

The Legal Standing and Significance of the Basic Principles and Guidelines on the Right to a Remedy and Reparation

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I. Introduction

The Basic Principles were adopted by the General Assembly in 2005 without a vote,¹ after fourteen years of work by *Theo van Boven*, *Cherif Bassiouni*, various States, Intergovernmental Organizations (IGOs) and Non-Governmental Organizations (NGOs). When they were finally adopted, they evolved from being about three key forms of reparation (restitution, compensation and rehabilitation) to 13 Principles and Guidelines of a more general and comprehensive nature dealing with the right to a remedy and reparation for gross human rights violations and for serious violations of international humanitarian law.

I consider the Basic Principles to be a pivotal instrument that has changed, in various ways, the landscape of reparation for victims of gross human rights violations and serious violations of humanitarian law.

II. Are They Legally Binding?

The preamble of the Basic Principles clearly states that they

“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”.²

However, a closer look at the Basic Principles invites reflection on their status under international law.

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¹ UN General Assembly, 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, Resolution 60/147, 16.12.2005.

² Basic Principles ... (note 1).

I would argue that any discussion about whether the Basic Principles reflect current international law should not take place in general terms. Various principles are included in the document, some of them developed with great detail, which would need to be studied, one by one, to arrive at a conclusion about their legal status. Further, it will also be necessary to consider whether the scope of certain standards drawn by the Basic Principles really matches their scope under international law. Therefore, two distinctive pieces of work are needed: one looking at the legal status of each principle and the other considering their scope. Discussion on these issues is far from settled and they constitute areas where academic work can shed light.

The Basic Principles also reflect an important consensus between relevant stakeholders including States. They began as the work carried out by two experts (*van Boven* and *Bassiouni*) with the input from civil society organisations. However, particularly during the last five years of negotiations, States' views became increasingly influential under the Chilean leadership. Even Germany, which contested the legal standing of the right to reparation, participated during the drafting process and made explicit its views. Furthermore, the point of departure for the drafting process was "existing international human rights norms on compensation and judgements by courts, decisions and views of international human rights organs and bodies".³ The fact that States were involved in the drafting process could be indicative of the legal nature of some principles but also of emerging international law on reparation.

Equally, it can hardly be contested that some of the principles incorporated in the document are legally binding under international law. So is the case of the right to an effective remedy that is contained in all relevant international human rights treaties as well as the principle related to the recognition of different forms of reparation. Questions can be asked, for example, in relation to whether there is a right to reparation under humanitarian law, a field of law that has not evolved at the same pace as international human rights law despite all the pressing needs of those affected by or involved in armed conflict (including in non-international ones).

III. Why Are the Basic Principles Significant?

The Basic Principles have made a significant contribution to the right to a remedy and reparation of victims of gross human rights violations and seri-

³ Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res. 1989/13, E/CN.4/Sub.2/1989/58, 13.8.1989, 3.

ous violations of humanitarian law even if their binding nature can be disputed. Let me offer some reasons. First, they marked the culmination of an important stage in the evolution of the right to reparation as they served as the catalyst that brought together the views of victims, civil society, the United Nations (UN), regional organisations and States that were being expressed in different places: from countries undergoing transitions to international tribunals dealing with international crimes or with human rights violations. They brought that momentum together into one single document.

Second, they put together a comprehensive understanding of the right to a remedy and reparation by distinguishing the procedural (remedy part) and substantive (forms of reparation) dimensions they involve. This simple distinction has provided important tools for stakeholders to advocate more coherently for these rights in front of States and other relevant bodies.

Third, the Basic Principles have also helped to understand who can claim to be a victim, as well as to understand that while human rights law might be a branch of public international law, the nature of the harm suffered by victims requires the recognition of forms of reparation that are not adequate to redress States for breaches of international obligations as is the case of rehabilitation.

Fourth, the Basic Principles have triggered behaviour according to their standards – even if their binding nature can be disputed. They have generated new behaviour on remedy and reparation, including State behaviour that has triggered norm creation at the domestic or international level as well as greater awareness about these rights beyond those directly affected by the violations. Consider for example its impact in the incorporation of the right to reparation in Art. 26 of the UN Convention for the Protection of All Persons from Enforced Disappearances (2006), or during the discussions at the International Criminal Court of the principles on reparation in the *Lubanga* Case.⁴ Also, the Basic Principles have helped treaty-monitoring bodies to engage with reparation as part of their mandates as illustrated by the Committee against Torture and its General Comment on reparation and rehabilitation.⁵ The impact of the Basic Principles has also been felt in various countries and across State institutions – take a look for example at various countries around the world undergoing processes of transi-

⁴ See for example, ICC, Trial Chamber I, *Situation in the Democratic Republic of the Congo, in the case of The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 7.8.2012, paras. 21, 27, 85, 185.

⁵ The only footnote in General Comment 3 is the one to the Basic Principles. Committee against Torture, General Comment N. 3, Implementation of Article 14 by States parties, CAT/C/GC/3, 19.11.2012.

tion such as Sierra Leone (in particular the report of its truth commission)⁶ or the Colombian Domestic Reparation Programme (Victims and Land Restitution Law as well as the decisions of the Colombian Constitutional Court).⁷

IV. Conclusions

The Basic Principles mark a key moment in the evolution of the right to a remedy and reparation. Their attempt to reflect existing international law and incorporate a victim-friendly approach is welcome. They might not be the last word on the subject. Indeed, despite their comprehensive approach, they include gaps (as in relation to collective reparation or the role of non-state actors). Yet, they changed the language of engagement on these issues by providing clarity about the right to a remedy and reparation, and about how to best articulate them. They have certainly generated a new dynamic that has brought about new cases, international standards, emerging standards and important behaviour advocating for these rights in and outside courts, and more importantly, they have had a significant impact on the way victims experience their claims for redress and ultimately, reparation.

⁶ It is significant that the Basic Principles were used by the Truth and Reconciliation Commission (TRC) to support its views when they were still a draft. Sierra Leone, Truth and Reconciliation Commission, Final Report, Chap. 4, paras. 16-21 in particular, November 2004, available at: <<http://www.sierraleonetr.com>>.

⁷ Ley de Víctimas y Restitución de tierras, Ley 1448/2011, and Constitutional Court, C-330/16, Magistrado: María Victoria Calle Correa, 23.6.2016, paras. 54.2 and 58.