



# **IMPLEMENTING VICTIMS' RIGHTS**

**A Handbook on the  
*Basic Principles and Guidelines on the  
Right to a Remedy and Reparation***

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# FOREWORD

*When the United Nations General Assembly adopted on 16 December 2005 the Basic Principles and Guidelines on the Right to a Remedy and Reparation it stressed the need for their widest possible dissemination. Equally it recommended that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of Government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general.*

*This Handbook prepared and published by The Redress Trust (REDRESS) is a most welcome and timely response to the wish of the General Assembly to see the Basic Principles and Guidelines widely disseminated and applied. REDRESS is particularly qualified to render this important service as it was deeply involved, together with a good number of governmental and other non-governmental actors, in the long process contributing to the adoption of the Basic Principles and Guidelines.*

*In national and international society the rights and interests of victims of gross violations of human rights and serious violations of international humanitarian law are still largely overlooked and ignored. Numerous victims continue to suffer in silence. Yet, in recent times the victim's perspective appears to be gaining ground and the Basic Principles and Guidelines are intended to be used nationally and internationally as a source of inspiration, as a guide, as a tool for victim-oriented policies and practices. The Basic Principles and Guidelines are also intended to impress upon all organs of society, notably State authorities, that the victim's perspective is a requirement of human solidarity and a prescription of justice. I am confident that this Handbook will prove to be an important means to effectively promote these essential purposes.*

Theo van Boven

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## **BACKGROUND TO THE PRINCIPLES**

The *Basic principles and guidelines on the right to a remedy and reparations for victims of gross violations of international human rights law and serious violations of international humanitarian law* (the Principles and Guidelines) are the result of over 16 years of work by independent experts and a long-standing and participatory process of consultation that allowed the inclusion of the views of all States, international organizations and NGOs.

The process began in 1989 when the Sub Commission on prevention of discrimination and protection of minorities of the United Nations requested Professor Theo van Boven to prepare a study with the view “to explore the possibility” of establishing some principles and guidelines on the right to restitution, compensation and rehabilitation, and it ended in December 2005 with the adoption of the Principles - without a vote - by the United Nations’ General Assembly.

From 1989 to 2000, the work on the Principles and Guidelines was clearly in the hands of experts with the help of active human rights NGOs. Initially, it was the Special Rapporteur of the Sub Commission on prevention of discrimination and protection of minorities, Professor Theo van Boven, who presented a first text in 1993 and, upon request of the UN Commission on Human Rights (CHR), a revised one in 1996. Afterwards, it was the Special Rapporteur of the Commission on Human Rights, Professor M. Cherif Bassiouni who, based on van Boven’s text and after considering the opinions of States, presented to the 56<sup>th</sup> CHR in 2000, a new revised version attached to his final report (E/CN.4/2000/62).<sup>1</sup>

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<sup>1</sup> Professor Cherif Bassiouni conducted two consultative meeting with States, intergovernmental and non-governmental organizations in Geneva in 1998 and 1999.

Based on resolutions and decisions adopted by CHR in 2000, 2001 and 2002,<sup>2</sup> the Office of the United Nations' High Commissioner for Human Rights, in cooperation with the Government of Chile, organized in September 2002 the first of a series of three consultative meetings with the specific purpose of finalizing the Principles.<sup>3</sup> The interest and political support of the Government of Chile was going to be one of the salient features throughout the development of the Principles.

Under the chairmanship of Mr. Alejandro Salinas (Chile), the participation of the independent experts, Professors van Boven and Bassiouni and delegates from States, intergovernmental and NGOs, the consultative meetings gave further opportunities to clarify and refine the text, which thus was enriched through the various comments and suggestions made. Five new revisions of the text were produced during the meetings and inter-sessional periods.<sup>4</sup>

Crucially important during the entire process were the expert contributions made by a coalition of NGOs, whose participation also ensured keeping contact with the reality of victims. Given that the main thrust of the process was to compile and systematize the extensive corpus of law regulating the right to a remedy and reparations, the consultative meetings had to keep a delicate balance between giving a sense of intergovernmental ownership by taking into account the comments and suggestions of States, and the need that the text accurately reflect a coherent universal understanding of the principles on the right to a remedy and reparations for victims around the world.

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<sup>2</sup> See CHR Resolution 2000/41, CHR Decision 2001/105 and CHR Resolution 2002/44.

<sup>3</sup> The reports of the consultative meetings can be found in documents: E/CN.4/2003/63; E/CN.4/2004/57 and E/CN.4/2005/59 (final).

<sup>4</sup> See versions dated 15 August 2003; 23 y 24 October 2004 (E/CN.4/2004/57); 5 August 2004; and, 1<sup>st</sup> October 2004 (E/CN.4/2005/59).

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Without compromising the victim-oriented approach present in the Principles and Guidelines since the first draft, the consultative meetings produced a document that strikes a right balance between the interests and responsibilities of States and the rights and interests of the victims. It will serve as a guide and useful tool for victims and their representatives, as well as for States in the design and implementation of their own public policies on reparations by giving the latter a wide margin of appreciation in the implementation.

The text presented for adoption to the 61<sup>st</sup> CHR garnered a wide acceptance, expressed through the 40 CHR members States that voted in favour<sup>5</sup> of resolution 2005/35 while a large number of CHR members States articulated their support by cosponsoring it.<sup>6</sup> It is worthwhile to mention in this regard the endorsement given to it by the Group of Latin-American and Caribbean countries, the almost unanimous support of European countries and the fact that no CHR member voted against it.

Based on CHR's decision to finalize the Principles and Guidelines with a view to their adoption by the General Assembly (CHR

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<sup>5</sup> Votes in favour: Argentina, Armenia, Bhutan, Brazil, Burkina Faso, Canada, China, Congo, Costa Rica, Cuba, Dominican Republic, Ecuador, Finland, France, Gabon, Guatemala, Guinea, Honduras, Hungary, Indonesia, Ireland, Italy, Japan, Kenya, Malaysia, Mexico, Netherlands, Nigeria, Pakistan, Paraguay, Peru, Republic of Korea, Romania, Russian Federation, South Africa, Sri Lanka, Swaziland, Ukraine, United Kingdom, Zimbabwe.

<sup>6</sup> Co-sponsors of CHR Resolution 2005/35: Argentina, Armenia, Austria, Azerbaijan, Belgium, Bolivia, Brazil, Burkina Faso, Congo – Brazzaville, Chile, Check Republic, Costa Rica, Cyprus, Denmark, Dominican Republic, Ecuador, Estonia, Finland, France, Guatemala, Greece, Haiti, Hungary, Honduras, Ireland, Italia, Japan, Latvia, México, Nigeria, Netherlands, Norway, Paraguay, Peru, Poland, United Kingdom, Romania, Portugal, Slovenia, South Africa, Spain, Sweden, Uruguay, Venezuela.

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Resolution 1998/43) and having in mind other recent precedents, like the adoption of the Optional Protocol to the Convention Against Torture or the Optional Protocols to the Convention on the Rights of the Child, 61° CHR Resolution 2005/35 designed an adoption process that included also the adoption by ECOSOC (Res. 2005/30) and the General Assembly.

The Principles and Guidelines were finally adopted on 16 December 2005 by the United Nation's General Assembly at its 60<sup>th</sup> session, through Resolution 147 (A/Res/60/147).

*Patricio Utreras*  
*Counsellor*  
*Permanent Mission of Chile in Geneva*  
*March 13, 2006*

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## **INTRODUCTION**

This Handbook is published by REDRESS as part of its mission to obtain justice and other forms of reparation for torture survivors and, where appropriate, their families. Its purpose is to explain some of the key issues which arise from the recently adopted United Nations document 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***. These *Principles and Guidelines* reflect more than fifteen years of careful work by international human rights experts, States and non-governmental organisations, and their importance is directly related to the extent to which their contents can be made a reality in countries throughout the world.

REDRESS' aim is to make the main concepts contained in the *Principles and Guidelines* as widely accessible and understandable as possible, especially amongst non-governmental organisations, civil society groups and others working with and representing victims. The central thrust is that the rights of victims are paramount, and that their interests and concerns ought always to be at the forefront of laws and practices in all States. This victim-oriented perspective is fundamental if the physical and psychological wounds of those who have suffered are to be healed, and if further violations are truly to be prevented.

REDRESS hopes that the Handbook will play a useful role in bringing nearer the time when torture and other international crimes will cease to be widespread as they are today, when those who have suffered such violations will be treated with the dignity and respect that they deserve and for which they so loudly cry out, and when perpetrators will be held to account.

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## **I. THE CONTENT OF THE PRINCIPLES AND GUIDELINES**

The United Nations General Assembly adopted 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* in December 2005. In this Handbook they will be referred to as the *Principles and Guidelines*. The full text can be found in the Annex.

Terms such as "remedy", "reparation", "redress" and other similar words in the context of breaches of international human rights and humanitarian law appear in a large number of international, regional and domestic instruments and in United Nations resolutions and reports. Sometimes the different terms are used to express identical or similar concepts, and at other times they are used without clear distinction. In the *Principles and Guidelines* the term "reparation" refers to the wide range of measures that may be taken in response to an actual or threatened violation, embracing both the substance of the relief as well as the procedure through which it may be obtained. Essentially, the significance of these different terms and usages here and elsewhere does not lie in abstract considerations and definitions, but in the clear recognition that States have a dual obligation towards victims: to make it possible for them to seek relief for the harm suffered *and* to provide a final result that actually addresses the harm. To put it differently, justice for victims demands genuine procedural mechanisms (procedural remedies) resulting in final positive relief (substantive reparations).

The *Principles and Guidelines* outline a comprehensive regime for redress based on general principles of international law as well as other recent developments on the subject. By codifying the law of

reparation from the perspective of the victim, the provisions contained in the *Principles and Guidelines* respond to the many questions that arise when implementing this right:

- Who is entitled to a remedy?
- What violations will carry an obligation to afford reparation?
- Does remedial justice demand the prosecution and punishment of those responsible for the violations?
- What part should the gravity of the offence play in the reparation awarded?
- What criteria should be applied to determine the type of reparation afforded (monetary compensation or other)?

The key elements that the *Principles and Guidelines* cover are:

(i) **Definition of “victim” and “victims’ rights”:**

- who is a “victim”;
- the treatment of victims;
- the right to an effective procedural remedy and access to justice;
- the right to reparation and forms of adequate reparation;
- the principle of non-discrimination amongst victims.

(ii) **International responsibility and States’ obligations:**

- the obligation of States to afford reparation for breaches of international human rights law and international humanitarian law;
- the obligation of non-State actors responsible under international law to afford reparation;
- the scope and limits of States’ obligations in the areas of prevention, investigation, punishment, remedy and reparation; and

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### (iii) **Procedural issues:**

- the continuing obligation of States to afford effective procedural remedies and the nature of these remedies (judicial, administrative or other)
  - the incorporation of appropriate provisions providing universal jurisdiction over crimes under international law (extradition, judicial assistance and assistance and protection to victims and witnesses) within domestic law;
  - the applicability of statutes of limitations and the treatment of continuing violations (like disappearances).

The aim of the *Principles and Guidelines* is to define the scope of the right to a remedy and reparation, and allow for the future development of procedural remedies and substantive reparations. Importantly, the instrument does not define or determine what constitutes a violation of international human rights law or international humanitarian law, but only describes the legal consequences (the rights and duties) arising from such violations and establishes appropriate procedures and mechanisms to implement these rights and duties.

The *Principles and Guidelines* adopted by the UN General Assembly stipulate that the provisions in the text reflect existing norms on reparations (as opposed to new standards). This is declared in the seventh paragraph of the Preamble of the *Principles and Guidelines*:

*“Emphasizing that the 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.”*

In this context the *Principles and Guidelines* do not create new law. Instead, they highlight existing law and standards so that States can take them into account and promote them in national contexts, regionally and internationally. There is no doubt that the sooner all countries begin to make use of the standards reflected in the *Principles and Guidelines* to isolate and remedy the weaknesses and causes of violations, the sooner the plight of victims will improve.

## 2. THE SCOPE

The *Principles and Guidelines* are victim-oriented, and are applied equally to breaches of international human rights law and international humanitarian law that result in harm to individuals or groups of individuals. In other words, they apply at all times – in peacetime and during conflict.

However, the scope of the *Principles and Guidelines* is restricted by the *gravity* of the violations: they relate to gross violations of international human rights law and serious violations of international humanitarian law. In other words, the *Principles and Guidelines* focus on the standards that apply to some of the worst violations.

### A. The violations

The fact that the *Principles and Guidelines* are restricted to the most serious or systematic violations does not mean that the right to reparation only arises in these limited cases. There is a

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right to an effective remedy and adequate forms of reparation for any breach of human rights or international humanitarian law.

As Principle 26 states:

*“Nothing in these Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it 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 law and international humanitarian law** [emphasis added]. It is further understood that these Principles and Guidelines are without prejudice to special rules of international law.”*

However, as will be described, the legal consequences arising from gross and serious violations of international human rights and humanitarian law (which constitute crimes under international law) are very specific: the right to a judicial remedy, universal jurisdiction, the non-applicability of statutes of limitations, and so on. These are the standards codified in the *Principles and Guidelines*. But other types of violations give rise to different legal consequences. For example, a breach of the right to freedom of expression by the unjustified censoring of a newspaper or using the flags of neutral States in an armed conflict are violations of international human rights/humanitarian law but do not necessarily constitute crimes.<sup>7</sup> In these cases, there is not necessarily an obligation to prosecute perpetrators - administrative remedies might be sufficient - and statutes of limitation might be applicable to control the timeframe to bring claims.

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<sup>7</sup> However, if the use of such symbols is accompanied by an unlawful attack it might constitute a war crime. See “Law of Armed Conflict”, International Committee of the Red Cross, 2002.

In other words, the *Principles and Guidelines* cover the legal consequences arising from violations that constitute crimes under international law. The Rome Statute of the International Criminal Court (ICC) sets out in some detail the elements and acts which constitute war crimes, genocide and crimes against humanity and is a useful reference point for those seeking a crisp picture of some of the violations that constitute crimes under international law.<sup>8</sup> Another useful reference is the International Law Commission (ILC) Draft Code of Crimes Against the Peace and Security of Mankind.<sup>9</sup>

It is also important to note that the terms “gross” and “serious” refer to the nature of the violations and not only to violations committed in a massive scale and/or with a policy or a systematic pattern. An individual case of torture (regardless of the context in which it is committed) gives rise to the rights and obligations described in the *Principles and Guidelines*. As explained by Professor Theo van Boven in his first report on the right to reparation:

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<sup>8</sup> It is important to note that the crimes enlisted in the Rome Statute are the acts that State Parties considered the ICC should exercise jurisdiction. For example, the decision to include torture or disappearances as an ICC crime only when such acts are committed as part of a systematic or massive attack (therefore constituting a crime against humanity) responds to the nature of the ICC proceedings and its capacity. For obvious reasons, it was agreed that the ICC should not deal with single or isolated cases of torture, disappearances or extrajudicial killings (Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9). But this does not mean that a single case of torture or a disappearance is not a crime under international law. It is well established that these acts give rise to universal jurisdiction (see for example article 5 of Convention against Torture).

<sup>9</sup> Text adopted by the Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report (A/48/10), which also contains commentaries on the draft articles is published in *Yearbook of the International Law Commission, 1996*, vol. II(2).

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"... the word "gross" qualifies the term "violations" and indicates the serious character of the violations but that the word "gross" is also related to the type of human right that is being violated."<sup>10</sup>

Importantly, the term “serious violations of international humanitarian law” qualifies the nature of the violation, not the context in which it takes place. This term was first used in the ICC Statue to avoid confusion with the term “grave breaches” which refers to atrocious violations (like genocide, torture, slavery) that are committed in *international* armed conflicts only. Obviously grave breaches are serious violations of international humanitarian law but this term includes more. Since the law regulating armed conflicts has developed and it is now recognised that war crimes can also be committed during internal armed conflicts (and crimes against humanity can be committed in times of peace or war), the term ‘serious’ has been used to describe violations of international humanitarian law that are so severe that they constitute crimes under international law regardless of the context in which such violations are committed.

In other words, the internationalisation of the crimes no longer depends on whether the armed conflict is international; it is the gross nature of the crimes that makes them international wherever and whenever they are committed. What is important to remember is that these acts (or omissions) are *never* justifiable under international law, whether in times of peace or war. States and non-State actors (like insurgents or rebels) cannot use the

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<sup>10</sup> Para.8 under the heading "gross violations", doc.E/CN.4/Sub.2/1993/8,paras.8-13. The expression "gross violations of human rights" has a long history in the United Nations. The ECOSOC resolutions 1235 and 1503 which were at the basis of defining the competence of the Commission on Human Rights to deal with violations of human rights refer to "gross" violations and "a consistent pattern of gross and reliably attested violations of human rights". Obviously, the consistent pattern related to the scale of the violations and the word gross to the nature of the violations.



excuse that they are involved in an internal rebellion, or in a war with a powerful and oppressive State, or that they are combating terrorism, or any other excuse to commit these crimes.

### **B. The victims**

Based on the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>11</sup> Section V of the *Principles and Guidelines* defines “victims” as:

*“8. ... persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.*

*9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.”*

Included in this concept of “victim”, therefore, are the following elements:

- A person is a victim if they suffered harm or loss, regardless of whether a perpetrator is identified or whether he/she has a particular relationship with the victim;

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<sup>11</sup> General Assembly Resolution 40/34 of 29 November 1985.

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- There are different types of harm or loss which can be inflicted, and these can relate to both positive acts or omissions;
- There can be both direct as well as indirect victims of violations, and indirect victims too may be entitled to reparations;
- persons can suffer harm individually or collectively

It is therefore essential that reparations laws at the international and national levels recognise victims' right to redress, even in those cases when there has been a failure of authorities to link the harm or loss to a specific perpetrator. This is particularly relevant in cases of serious human rights and humanitarian law violations, as it is often difficult if not impossible to identify a perpetrator. Torturers do not typically give their names nor do they allow their victims to see their faces. In most cases, victims can only provide evidence of the harm that they endured (physical and psychological).

Equally, when the crimes are executed on a massive scale, it is virtually impossible for authorities to match victims with perpetrators. This should not, however, deprive the victims from their right to justice and other forms of reparation. On the contrary, an effective remedy means that all victims should have access to some form of justice and that awards of reparations are not limited to cases where the authorities have identified a perpetrator. For example, the Regulations of the Trust Fund of the International Criminal Court allow the Board of Directors to use the voluntary contributions to benefit victims from the initial announcement of the opening of a formal investigation.<sup>12</sup>

As well, it must always be kept in mind that it is an obligation of the State to provide reparation to victims for the acts or

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<sup>12</sup> See Regulations of the ICC Victims Trust Fund ([http://www.icc-cpi.int/linary/asp/PartIII\\_-\\_Resolutions.pdf](http://www.icc-cpi.int/linary/asp/PartIII_-_Resolutions.pdf)).

omissions which can be attributed to it, irrespective of whether any individual or legal entity has been found liable. This is made clear in the *Principles and Guidelines* in the following terms:

*“15... 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.”*

This is important for a number of reasons. Because the State's obligations are clear, it means that the individual State officials which actually committed the gross/serious violations cannot hide behind the State, nor can the State hide behind the individual officials. If the individuals have been ordered to make reparation this is relevant but not decisive; again, if individuals are never found liable or only emerge after the State has fulfilled its obligations this too will be relevant but not decisive. There can be situations where individual perpetrators are identified and made to make reparation themselves and other situations where this does not happen, but whichever is the case the victims are always entitled to look to and receive “adequate, effective and prompt reparation”, irrespective of the dealings between the State and any individual perpetrators.

However, in cases where States are not responsible for the violations (for example, in internal armed conflicts insurgents who are parties to the conflict might be liable for breaches of international humanitarian law) the *Principles and Guidelines* establish:

*“16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligations.”*

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Importantly, the same concept of “victims” should apply to these reparation programmes to make sure they include all persons who have suffered harm or loss as a consequence of a violation regardless of the identification of perpetrators.<sup>13</sup>

Another important element of the definition of victims is the recognition of the different types of harm or loss which can be inflicted through acts or omissions. Torture, for example, may cause serious and often long-term physical injury, or can leave no physical signs whatsoever. Usually torture will result in psychological scars such as an inability to trust, depression and anxiety that the torture will happen again, even in a safe environment, resulting in long-term, often permanent suffering. These symptoms are common to victims of serious abuses and it is essential that the forms of reparation adequately address the variety of damages and loss suffered by victims.

The *Principles and Guidelines* also recognise that the term "victim" includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation. The direct victim is the person that is unlawfully killed, disappeared or tortured. However, the inclusion of immediate family members and/or dependants in the definition of “victim” recognises that they are also affected by the violation. For example, a mother can suffer moral damage for the loss of a son, but can also suffer material damage if she was economically dependent on him. Furthermore, an indirect victim (such as the mother) whom the authorities have failed to provide information in regard to the disappearance

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<sup>13</sup> In these cases, as it will be discussed below, States will have the obligation to investigate and prosecute alleged non-State perpetrators. If the violations were committed by non-State actors that become the new government of a State (for example in a revolution or a war of independence) or form a new State (after a war of secession), then the new government will have the responsibility to afford full reparation.

of her son may herself be conceived of and claim reparation as a direct victim precisely because of her own, separate mistreatment by the authorities. In such a case the failure of the authorities to deal properly with the initial breach (that is, their failure to investigate and/or to reveal what they know or should know about the disappearance) causes additional harm to the mother, over and above what she has already suffered by her son's disappearance.

Finally the definition of "victim" also includes persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation. It is very common for human rights lawyers or doctors assisting victims of human rights abuses to be targeted. When considering the harm suffered, the context in which the violations took place needs to be taken into account to define the victimisation and right to reparation. For example, a lawyer defending victims of gross abuses might be ill-treated or physically abused, or intimidated through phone calls; written threats; random questionings; short detentions; 'mistaken' arrests. In these cases, the distress, harm and loss suffered needs to be considered in the context of the overall pattern of serious violations of international human rights or humanitarian law.

### 3. THE STRUCTURE OF THE PRINCIPLES AND GUIDELINES

The *Principles and Guidelines* have a preamble explaining their purpose and object and they are subsequently divided into eight sections containing a total of twenty seven provisions. After recalling in Section I the general obligation to respect and implement international law, Section II describes the scope of the obligation to afford reparation:

*"3. The obligation to respect, ensure respect for and implement international human rights law and*

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*international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:*

*(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;*

*(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;*

*(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and*

*(d) Provide effective remedies to victims, including reparation, as described below.”*

The next sections of the *Principles and Guidelines* attempt to describe in detail the scope of this obligation, explaining how reparation, prevention and prosecution are interlinked.

Broadly speaking, States have two obligations under international law: firstly, the duty to refrain from violating human rights and, secondly, the duty to guarantee respect for such rights. The first is made up of a set of obligations that are directly related to the duty of the State to refrain - whether by acts or omissions - from violating fundamental rights and norms. This also implies that States must take all necessary measures to guarantee the enjoyment of such rights. Similar obligations are also extended to non-State actors during armed conflicts through the norms of international humanitarian law. The second refers to the obligations of States to prevent violations, investigate them, bring

to justice and punish perpetrators and provide reparation for the damage they caused.

Section II of the *Principles and Guidelines* sets out these obligations:

- obligation to prevent violations;
- obligation to investigate, prosecute and punish perpetrators;
- obligation to provide effective access to justice to all individuals alleging a violation (through impartial procedural remedies/avenues); and
- obligation to afford full reparation to victims.

This Handbook will describe the relevant provisions of the *Principles and Guidelines* following the same structure.

### **A. Prevention**

States have the responsibility under international law not only to abstain but also to protect individuals from human rights violations. The nature of a State's obligation is therefore twofold: a duty to abstain and a duty to protect. The former is a negative obligation to refrain from a certain action, and the latter a positive obligation to take steps, such as training of officials, establishing checks and balances within and outside of institutions that make certain that the working environment is such that the opportunities for officials to perpetrate human rights violations is minimised. This would include effective oversight, strong accountability mechanisms, and providing (potential) victims with access to complaint mechanisms.

The central role of prevention is enshrined in Article 2 (1) of the Convention Against Torture, which States that: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its

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jurisdiction.” In other words, it is not sufficient for States simply to pass laws prohibiting torture or other ill-treatment; they must also take all reasonable measures to ensure that such acts do not occur in practice, such as ensuring prompt access of detainees to lawyers and to courts. States are also obliged to train law enforcement and other personnel coming into contact with those in custody, and are required to review interrogation rules regularly.

An effective system of procedural safeguards can deter violations and prevent the occurrence of future crimes. For example, if a detainee has a clear right to challenge the legality of his/her detention before an independent judicial body (through a *habeas corpus* or an *amparo* remedy), it is less likely that the police will arbitrarily detain a person and less likely that the police will mistreat him/her while in detention, as it will be clear to officials that any offensive treatment will be promptly reported to an impartial judge.

International law has also established other safeguards to protect persons who are taken into custody. These measures are commonly referred to as “custodial safeguards” and include the right of access to lawyers, physicians and family members and, in the case of foreign nationals, diplomatic and consular representatives. International humanitarian law has also detailed rules on the treatment of persons in custody.

### ***B. Investigations, Prosecutions and Punishment***

The concept of impunity, that those that perpetrate human rights abuses are not held to account or are somehow held to be ‘above the law’ is incompatible with victims’ right to a remedy and reparation. Furthermore, an effectively functioning domestic system for providing redress is “one of the best safeguards



against impunity.”<sup>3</sup> The more that the obligation to investigate and prosecute serious crimes under international law is acknowledged and carried out in practice, the more the international legal principles of accountability, justice and the rule of law will be strengthened. Prosecutions are an essential means of restoring the dignity of those who have suffered. Not only may they contribute to a sense of ‘justice’ or closure, but prosecutions may also result in the social impact of reducing the risk of resort to personal revenge.

It is important to consider the *Principles and Guidelines* alongside other efforts at the UN that also analyse reparation in the context of impunity, like the **Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (Impunity Principles)**.<sup>14</sup> The *Impunity Principles* also deal with this duty to prosecute under the rubric of "the right to justice" for victims, stressing that it is a general principle that States must take "*appropriate measures...particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.*"<sup>15</sup>

The *Impunity Principles* also contain the following reference to the obligation to investigate and prosecute:

*“States should undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for*

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<sup>3</sup> Para 48, comments of Françoise Hampson, The Administration of Justice and Human Rights, Report of the sessional working group on the administration of Justice; E/CN.4/Sub.2/2000/44, 15 August 2000.

<sup>14</sup> E/CN.4/2005/102/Add.1.

<sup>15</sup> III.A. Principle 19.

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*serious crimes under international law are prosecuted, tried and duly punished.”*<sup>16</sup>

International law requires that perpetrators of international crimes be brought to justice. Conceptually, this requirement exists independently of the rights or even the wishes of victims: it is a well-established obligation of States. However, holding perpetrators legally accountable for their actions is also of great relevance for reparation and is a fundamental way of providing some measure of redress for victims and their families; it is from such a perspective that the importance of prosecutions and punishment are highlighted in both the *Principles and Guidelines* and the *Impunity Principles*. The *Principles and Guidelines* provide as follows:

*“...States have the duty 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 him or her. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations. ”*<sup>17</sup>

Again, the *Principles and Guidelines* stress that States are obliged to investigate, prosecute, and punish perpetrators but they also refer to the obligation of States to cooperate with other States and with international tribunals in the investigation and prosecution of international crimes. This is a well recognised standard in international law. 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 cooperate with each other on a bilateral and multilateral basis with a*

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<sup>16</sup> III.A. Principal 19.

<sup>17</sup> III.4.

view to halting and preventing war crimes against humanity, and shall take the domestic and international measures necessary for that purpose.”<sup>18</sup>

Importantly, the *Principles and Guidelines* note that:

“5. ...States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice.”

Although "it remains the rule that States have primary responsibility to exercise jurisdiction over serious crimes under international law,"<sup>19</sup> as recognised in the *Impunity Principles*, international crimes can be tried in international tribunals (or in third States exercising universal jurisdiction), and States are obligated to cooperate fully with such procedures. The newly established International Criminal Court, for example, has complementary jurisdiction and therefore can exercise jurisdiction over the crimes set out in the Rome Statute when national courts fail to do so. In all cases, States should facilitate the extradition or surrender of accused persons as well as provide judicial assistance and other forms of cooperation to international tribunals.

What is important is that States need to facilitate the investigation and prosecution of international crimes. Thus there should be a constructive inter-play between and amongst States to facilitate such justice through and within their respective domestic legal systems, and in this process special attention must be paid to the protection of victims and witnesses.

- Universal jurisdiction

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<sup>18</sup> UN GA Res. 3074 (XXVIII) of 3 December 1973.

<sup>19</sup> III.B. Principle 20.

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As a general rule jurisdiction over crime is primarily territorial: it is the State within whose borders a crime has been committed which has the legal authority and duty to deal with it in accordance with that State's domestic law (and the general principles of international law). However, there are a number of instances in which foreign States are entitled to exercise jurisdiction, for example if their nationals were impacted by the crimes or the crime was directed at the foreign State, or where the accused is a national of the foreign State. Another basis on which foreign States may exercise jurisdiction is when the acts in question are recognised to infringe the most basic values of humanity - intrinsic values that are protected directly under international law, as is the case with serious crimes under international law. These acts are considered an affront against humanity. Since the international community has an interest in punishing the perpetrators (who are considered enemies of all mankind) such crimes allow, and at times require, foreign States to intervene – no one has an interest in providing a safe haven to the worst criminals or to see them escape justice.

Additionally, for a variety of additional pragmatic reasons, it can be difficult for serious/gross violations to be effectively addressed in and by the State in which they occurred. Particularly for systematic crimes, there is usually some involvement or acquiescence of the State in the perpetration of the crimes and in such cases perpetrators are seldom pursued through the local criminal justice system of the State concerned. Again, when it comes to genocide and war crimes it can be virtually impossible to bring people accused of such crimes to trial in the State where they carried out the atrocities, because the entire State structure may have been so disrupted or even destroyed in the course of the conflict (either inter-State armed conflict, civil war or internal strife), or there may be such deep ethnic or political divisions that to hold a fair trial is simply not feasible.

Thus, unlike most other 'ordinary' criminal conduct committed within a State which is left to each State to prosecute, a person who is alleged to have committed a serious crime under international law can be prosecuted *anywhere in the world where he or she is found*.<sup>20</sup> There have been a number of investigations, prosecutions and convictions of individuals on the basis of universal jurisdiction. A famous example is that of former Chilean dictator General Pinochet, who was arrested in Britain for torture; British courts recognised that he was not immune from prosecution and were prepared to extradite him to Spain to face charges there for crimes he was said to have committed in Chile. Other examples include the case of Nikolai Jorgic who was convicted in Germany for genocide committed in Bosnia,<sup>21</sup> the conviction of a number of Rwandans in Belgium and other countries for crimes committed in the context of the 1994 genocide, and recently in the UK an Afghan warlord was convicted for carrying out torture and hostage-taking in his homeland.<sup>22</sup>

The *Principles and Guidelines* call on States to take the necessary steps to ensure that they are capable of exercising universal jurisdiction or extraditing or surrendering suspects of international crimes to other States or international tribunals:

*"5... States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction...."*

Again, the *Impunity Principles* are equally clear in regard to the importance of this:

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<sup>20</sup> Article 5 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UN GA Res. 39/46 10, December 1984).

<sup>21</sup> *Jorgic Case*, 2 BvR 1290/99.

<sup>22</sup> *R v Zardad* (Judgment of 18 July 2005, unpublished).

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*"States should undertake effective measures, including the adoption or amendment of internal legislation, that are necessary to enable their courts to exercise universal jurisdiction over serious crimes under international law..."*

*"States must ensure that they fully implement any legal obligations they have assumed to institute criminal proceedings against persons with respect to whom there is credible evidence of individual responsibility for serious crimes under international law if they do not extradite the suspects or transfer them for prosecution before an international or internationalised tribunal."<sup>23</sup>*

- Statutes of limitation

In practice victims face formidable hurdles when trying to bring forward criminal complaints or civil claims relating to grave abuses. In a typical situation, there are practical barriers impeding victims' access to justice: victims may well be traumatised and need quite a lot of time to process the events before they are ready to come forward to officials and explain what happened. Often there are immediate financial or security issues that they will need to address first, and/or they may still suffer from ongoing persecution and fear reprisals.

Part of the difficulty is caused by time restrictions in terms of which claims are blocked after a few years or less from the time when the breach occurred. It can be virtually impossible to bring a claim within the proscribed time limits. This is the case in both 'day to day' situations and in the aftermath of massive and systematic violations. For example, in some countries, there are very short statutes of limitation for crimes such as torture; they can sometimes expire even before the victim is released from

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<sup>23</sup> III.B. Principle 21.

detention. In such cases, it is usually not possible for the victim to bring an allegation of the torture he/she suffered while in detention (logically many victims are afraid of bringing an allegation while they are still under detention because of the fear of repercussions including further torture). Where violations are systematic and perceived to be State-sanctioned, it may be impossible in practice to bring a claim until there is a change of regime, and this may be many years or sometimes decades later.

The *Principles and Guidelines* explicitly State:

*“6.... statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.*

*7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.”*

The International Criminal Tribunal for the Former Yugoslavia has said that because of the internationally recognised status of the prohibition of torture, “torture may not be covered by a statute of limitations.”<sup>24</sup> Even more recently the United Nations Committee against Torture has rejected such statutes in respect of torture, as has the United Nations Special Rapporteur on Torture.<sup>25</sup> In the case of disappearances, which constitute continuing offences so long as the person remains disappeared, international law has recognised that statutes of limitation could not begin to run while there is no effective remedy.

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<sup>24</sup> *Furundzija Case*, Judgement of 10 December 1998, IT-95-17/1, para 157.

<sup>25</sup> See the Committee’s 2003 and 2004 conclusions and recommendations in respect of Turkey and Chile respectively; also the Special Rapporteur’s 2004 report of his visit to Spain.

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The *Impunity Principles* also establish that:

*“Principle 24. Restriction 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 crimes under international law that are by their nature imprescriptable.*

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

Some might argue that as time passes so does the need for reparation, but the truth is that for many victims of gross/serious violations the passage of time alone does not in fact diminish the trauma and instead in many cases actually increases the post-traumatic stress. As a result there is very often continuing need for different types of support (financial, material, medical, psychological, legal) over a long period. Furthermore, as full reparation includes bringing perpetrators to account through criminal investigation, prosecution and punishment this principle applies as much to such sanctions against perpetrators as it does to reparations for the victims. Thus where States have statutes of limitations which conflict with international criminal law norms the *Principles and Guidelines* call on such States to effectively bring their national laws and practice into conformity with international law, and therefore not to trump victims' rights to justice through prescription of claims and time-barred prosecutions.



### **C. Equal access to justice through effective remedies**

The nature of the procedural remedies (judicial, administrative or other) should be in accordance with the substantive rights violated and the effectiveness of the remedy in granting appropriate relief for such violations. In the case of grave abuses, such as those covered by the *Principles and Guidelines*, remedies need to be *judicial*. As explained by the UN Human Rights Committee, “*administrative remedies cannot be deemed to constitute adequate and effective remedies [...], in the event of particular serious violations of human rights*”.<sup>26</sup>

This is reflected in the *Principles and Guidelines*:

*“12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law.”*

In other words, in cases of gross/serious violations, non-judicial remedies, such as administrative or other remedies, are not considered sufficient to fulfil States’ obligations under international law. This means that even if a victim can apply for compensation through an administrative procedure, he/she

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<sup>26</sup> *Nydia Bautista v Colombia* (No. 563/1993); *José Vicente and Amado Villafane Chaparro, Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v Colombia* (No. 612/1995). Furthermore, the individual right of access to court for the determination of civil rights and obligations regarding serious human rights violations is a fundamental part of international human right law (See e.g. Article 27.2 of the American Convention on Human Rights; Article 6 of the European Convention on Human Rights; Art 7 of the African Charter on Human and People’s Rights).

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should also have the right in law and practice to bring a civil claim against the individual and State in a judicial court. In the same way, a person who has been detained has a right to challenge his/her detention before a judicial body and if applicable to bring a civil claim for his/her arbitrary detention.

This means victims of serious/gross violations of human rights and international humanitarian law have the right of access to justice, which includes being able to trigger effective judicial remedies of a sufficiently high standard of fairness and impartiality. States can also provide other remedies to complement reparation procedures, such as access to administrative bodies and mechanisms, modalities and proceedings conducted in accordance with a State's domestic law. To this end States are exhorted to publicise information about available remedies<sup>27</sup> to protect victims, their representatives, witnesses and families from intimidation and retaliation,<sup>28</sup> to provide proper assistance to victims seeking access to justice,<sup>29</sup> to provide appropriate legal, diplomatic and consular means to ensure that all victims can exercise their rights to a remedy,<sup>30</sup> and so on.

Finally, the *Principles and Guidelines* specify that:

*“13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.”*

Group claims are particularly important when victims are targeted as a community since the appropriate form of reparation needs to reflect the collective suffering. Examples of international

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<sup>27</sup> *Principles and Guidelines*, VIII. 12 (a).

<sup>28</sup> *Principles and Guidelines* VIII.12 (b).

<sup>29</sup> *Principles and Guidelines* VIII.12 (c).

<sup>30</sup> *Principles and Guidelines* VIII.12 (d).

crimes always or generally directed against groups/communities include genocide and apartheid, yet it is often the case that individuals that are linked to particularly vulnerable or marginalized groups such as ethnic or religious minorities, or political groups or others, may be subjected to abuses because of these affiliations and in such instances there can be a collective dimension to the suffering.

### ***D. Forms of Reparation for the Harm Suffered***

The *Principles and Guidelines* emphasise that victims are entitled to “adequate, effective and prompt reparation”<sup>31</sup> which should be “proportional to the gravity of the violations and the harm suffered.”<sup>32</sup>

The *Principles and Guidelines* refer to: **restitution; compensation; rehabilitation; satisfaction; and guarantees of non-repetition** for full and effective reparation to be made. It is made clear that account must always be taken of the individual circumstances of each case: not every gross/serious violation will necessarily and automatically require each of these aspects of reparation, but they should always be considered and, if appropriate, applied in proportion to the gravity of the violation suffered.<sup>33</sup>

- Restitution

“19. Restitution should, whenever possible, restore the victim to the original situation before the ...violations... occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship,

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<sup>31</sup> IX. 15.

<sup>32</sup> Ibid.

<sup>33</sup> IX.18.

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*return to one's place of residence, restoration of employment and return of property."*

It is clear that the list of areas for restitution is not intended to be exhaustive of all the various situations which can occur where restitution is appropriate. What are listed are examples of where it should be feasible to 'return' the victim to where he/she was prior to the occurrence of the wrongful act. However, it is often not possible to restore victims to their original situation before the violations occurred - for example, pain and suffering cannot be 'undone' - though certain specific aspects of restitution are possible, as listed. Restitution is especially important where the obligation breached is of a continuing character: thus in a case of unlawful detention or disappearance, for example, the authorities must end the situation by producing the victim. However other forms of reparation might be needed to redress the harm and suffering of the victim and his/her family.

- Compensation

*"20. 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..., such as:*

*(a) Physical or mental harm;*

*(b) Lost opportunities, including employment, education and social benefits;*

*(c) Material damages and loss of earnings, including loss of earning potential;*

*(d) Moral damage;*

(e) *Costs required for legal or expert assistance, medicine and medical services, psychological and social services.*”

The payment of compensation can be conceived of as covering all the damage which the victim has suffered that can be financially assessed so as to ensure full reparation. There is a distinction between payment of monies by way of compensation and payment of monies for other purposes (like a sum of money to pay for physical or psychological treatment which would be for rehabilitative purposes or to repay the cost and expenses of a legal challenge). As its title indicates, payment under this heading is purely compensatory, and corresponds to what can be calculated in monetary terms for the damage suffered by the injured party. It is not concerned with the punishment of the responsible State, nor does it include the concept of punitive or exemplary damages.

The Inter-American Court of Human Rights held in the *Velásquez Rodríguez* case that “*it is appropriate to fix the payment of ‘fair compensation’ in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered.*”<sup>34</sup> Monetary compensation is intended to remedy the damage suffered by the injured party as a result of the breach, to the extent that money can do this. The appropriate heads of compensation can vary according to the type of breach, the behaviour of the parties and other factors. Compensation awards include material losses (loss of earnings, pension, medical and legal expenses) and non-material or moral suffering (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter calculated on the basis of what is fair in all the circumstances.

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<sup>34</sup> *Velásquez Rodríguez Case*, Interpretation of The Compensatory Damages Judgment, Judgment of August 17, 1990, Para. 27.

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Importantly, the right to compensation for the damage suffered by the victims up until the time of their death should be transmitted by succession to their heirs, and the awards of compensation need to consider also the course that the victim's life would normally have taken and whether the violation caused a serious harm to his/her life plan.

- Rehabilitation

*“21. Rehabilitation should include medical and psychological care as well as legal and social services.”*

Rehabilitation is an important component of reparation, and it is clear that victims are entitled to and should receive the necessary material, medical, psychological and social assistance and support. States parties to the Convention against Torture, for example, have been specifically encouraged to support rehabilitation centres that may exist in their territory to ensure that torture victims get the means for as full rehabilitation as is possible.<sup>35</sup> These services should actually be provided in kind or the costs to have them provided may form part of a monetary award: in this latter situation it is important to distinguish between money paid by way of compensation and money provided for rehabilitation purposes. Rehabilitation incorporates diagnostic procedures, medicines, specialized aid, hospitalisation, surgeries, labouring, traumatic rehabilitation and mental health.

- Satisfaction

*“22. Satisfaction should include, where applicable, any or all of the following:*

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<sup>35</sup> Report on *Torture and other cruel, inhuman or degrading treatment or punishment*, submitted by Sir Nigel Rodley, Special Rapporteur of the Commission on Human Rights, in accordance with General Assembly resolution 53/139, Report A/54/426, 1 October 1999, Para 50.

- (a) Effective measures aimed at the cessation of continuing violations;*
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;*
- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;*
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;*
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;*
- (f) Judicial and administrative sanctions against persons liable for the violations;*
- (g) Commemorations and tributes to the victims;*
- (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels."*

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“Satisfaction” covers a wide and varied range of non-monetary measures that may contribute to the broader and longer-term restorative aims of reparation. Some will apply to all violations (e.g. verification of the facts) and in that sense are more general than specific measures for particular violations (e.g. searches in respect of disappearances). A central component is the role of public acknowledgment of the violation. One of the worst aspects for a victim is that he/she is not believed or that what really happened, be it torture or some other grave abuse, has been covered up or shrouded in secrecy. Bringing events officially into the open, provided this does not cause further harm to or danger for the victim and their families, can go quite a distance towards restoring the individual’s sense of identity and dignity, and can also act as a deterrent.

Equally significant is the victim’s right to know the truth, and for the perpetrators to be made accountable. Satisfaction may consist of an acknowledgement of the breach, an expression of regret, a formal apology, a declaratory judgment or another appropriate modality. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.

One of the most common forms of satisfaction is a declaration of the wrongfulness of the act by a competent State body, be it a court or a tribunal or some other official organ. Thus any court or tribunal which has jurisdiction over a dispute has the authority to make a declaration of its findings, as a necessary part of the judicial process, and a declaration may sometimes act as a precondition to other forms of reparation, or it may be the only remedy sought. In some instances, therefore, a finding of a violation could in itself be sufficient ‘just satisfaction’.

Under satisfaction, aspects relating to human rights training and education are also included. Training and education forms part of “satisfaction” because making the truth about past violations part



of a nation's official history, so to speak, is another important way of positively highlighting the violations for the actual victims and/or the families and descendants of those who suffered, as well as the wider society.

- Guarantees of non-repetition

*“23. Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:*

*(a) Ensuring effective civilian control of military and security forces;*

*(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;*

*(c) Strengthening the independence of the judiciary;*

*(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;*

*(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces:*

*(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;*

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(g) *Promoting mechanisms for preventing and monitoring social conflicts and their resolution;*

(h) *Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.”*

Although assurances or guarantees of non-repetition may amount to a form of redress, they also serve a preventive function. In this context they may be described as a positive reinforcement of future performances, with cessation of violations being conceived of as the negative aspect of future performance, concerned with securing an end to the continuing wrongful conduct.

International human rights instruments generally include positive obligations to prevent violations. It can be seen that considerable emphasis is placed on institutional reforms and/or strengthening human rights norms within States, and especially amongst those who are often at the sharp end of committing violations: law enforcement, military, prison and security services. These organs and the personnel in them need to be properly and effectively controlled and trained (in law and in behaviour), and one important mechanism for this is the promotion and observance of codes of conduct and minimum standards which have been developed at the international level.<sup>36</sup> However, it is significant that it is not only the various State sectors which have a crucial part to play in preventing violations: the media, legal and health professionals, and other sectors of civil society all have a vital role too.

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<sup>36</sup> See for example the *Code of Conduct for Law-Enforcement Officials*, G.A.Res. 34/169 (17 December 1979), and the *Standard Minimum Rules for the Treatment of Prisoners Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Economic and Social Council Res. 663 C (XXIV) (31 July 1957) and 2076 (LXII) (13 May 1977).

What needs to be aimed for is the broad and deep growth of a culture of and respect for fundamental rights to such an extent that it becomes imbedded in the life of every nation. Crucial to this process is a strong and independent judiciary operating within a sound legal system reflecting the norms and values of international human rights and international humanitarian law. Equally important is the protection of those who specialize in the protection of human rights – human rights defenders.

Reparation may also necessitate changes to domestic laws within the responsible State, including changes to such laws as are in violation of a rule of international (human rights and/or humanitarian law) law. Sometimes legal reforms will be necessary to afford restitution: for example, for exiles to return to their country and for the restoration of their rights, including property rights, legislative amendments within the State's national system might be required. Legal modifications are also required to stop violations (for example an amnesty decree preventing victims from obtaining redress) or to prevent future violations (for example if a law allows for indefinite and/or arbitrary detention).

## 4. CONCLUSION

Remedies and reparation not only provide redress for the victims, but also serve the community interest by punishing the perpetrator and deterring future violations by the same or other wrongdoers. They serve the rule of law at all levels of society and are an essential element of justice. For this reason it is important to have an instrument codifying the right to a remedy and reparation in international law. The *Principles and Guidelines* serve this purpose.

In sum, the *Principles and Guidelines* :

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- remind that the victim is the point of departure for the application and development of the right to reparation;
- clarify the relevant terminology and allow for a consistent application of the right to “reparation”;
- reflect standards that are open to universal application by all States; and, finally,
- ensure that the measure of damages should always correlate to the gravity of harm suffered.

## **5. ANNEX**

### **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**

#### ***Preamble***

*Recalling* the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular the Universal Declaration of Human Rights at article 8, the International Covenant on Civil and Political Rights at article 2, the International Convention on the Elimination of All Forms of Racial Discrimination at article 6, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at article 14, the Convention on the Rights of the Child at article 39, and of international humanitarian law as found in article 3 of the Hague Convention of 18 October 1907 concerning the Laws and Customs of War and Land (Convention No. IV of 1907), article 91 of Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), and articles 68 and 75 of the Rome Statute of the International Criminal Court,

*Recalling* the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular the African Charter on Human and Peoples' Rights at article 7, the American Convention on Human Rights at article 25, and the European Convention for the Protection of Human Rights and Fundamental Freedoms at article 13,

*Recalling* the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and resolution 40/34 of 29 November 1985 by which the General Assembly adopted the text recommended by the Congress,

*Reaffirming* the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged,

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together with the expeditious development of appropriate rights and remedies for victims,

*Noting* that the Rome Statute of the International Criminal Court requires the establishment of "principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation" and requires the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, and mandates the Court "to protect the safety, physical and psychological well-being, dignity and privacy of victims" and to permit the participation of victims at all "stages of the proceedings determined to be appropriate by the Court",

*Affirming* that the Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity,

*Emphasizing* that the 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,

*Recalling* that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity,

*Noting further* that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively,

*Recognizing* that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law,

*Convinced* that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international

humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines.

## **I. OBLIGATION TO RESPECT, ENSURE RESPECT FOR AND IMPLEMENT INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW**

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:

- (a) Treaties to which a State is a party;
- (b) Customary international law;
- (c) The domestic law of each State.

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:

- (a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
- (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;
- (c) Making available adequate, effective, prompt, and appropriate remedies, including reparation, as defined below; and
- (d) Ensuring that their domestic law provides at least the same level of protection for victims as required by their international obligations.

## **II. SCOPE OF THE OBLIGATION**

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

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- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation, as described below.

### **III. GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW THAT CONSTITUTE CRIMES UNDER INTERNATIONAL LAW**

4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty 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 her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

### **IV. STATUTES OF LIMITATIONS**



6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

### **V. VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW**

8. For purposes of this document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

### **VI. TREATMENT OF VICTIMS**

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatisation in the course of legal and administrative procedures designed to provide justice and reparation.

### **VII. VICTIMS' RIGHT TO REMEDIES**

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

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- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered; and
- (c) Access to relevant information concerning violations and reparation mechanisms.

### **VIII. ACCESS TO JUSTICE**

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

- (a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
- (b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
- (c) Provide proper assistance to victims seeking access to justice;
- (d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may

have legal standing and should be without prejudice to any other domestic remedies.

### **IX. Reparation for harm suffered**

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. 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.

16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligations.

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

19. Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: 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.

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20. 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, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. Rehabilitation should include medical and psychological care as well as legal and social services.

22. Satisfaction should include, where applicable, any or all of the following:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;

- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

23. Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

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### **X. ACCESS TO RELEVANT INFORMATION CONCERNING VIOLATIONS AND REPARATION MECHANISMS**

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

### **XI. NON-DISCRIMINATION**

25. The application and interpretation of these Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or ground, without exception.

### **XII. NON-DEROGATION**

26. Nothing in these Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it 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 law and international humanitarian law. It is further understood that these Principles and Guidelines are without prejudice to special rules of international law.

### **XIII. RIGHTS OF OTHERS**

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.