The Normative Value of the Basic Principles and Guidelines on the Right to a Remedy and Reparation

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The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter: Principles) have become a cornerstone in legal practice and in the academic discussion of the right to reparation. Yet, what is their normative value in affirming the existence of a right to reparation in international humanitarian law?

The Human Rights Commission, Economic and Social Council (ECOSOC) and General Assembly adopted the Principles in resolutions. Resolutions have normative value to the degree with which they evidence states' *opinio iuris* as a necessary element of customary international law. This evidentiary weight depends on various factors, including the resolution's wording, drafting process and the circumstances of its adoption.[1] Each of these factors will be evaluated in turn.

I. Wording

According to their preamble, the Principles "do not entail new international […] obligations but identify mechanisms […] for the implementation of existing legal obligations". Often, this is understood as affirming that the Principles restate only existing international law. Yet, it can also be read as emphasising that the Principles do not entail legal obligations at all, but merely contain policy recommendations. Numerous statements by states at the occasion of the adoption of the Principles, which emphasised their non-binding nature, support the latter reading.[2] However, the Principles employ

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[1] Third report on identification of customary international law, by *Michael Wood*, Special Rapporteur, 27.3.2015, A/CN.4/682, paras. 47 et seq.

[2] Commission on Human Rights, Sixty-first Session, Summary Record of the 56th Meeting, 20.2.2012, E/CN.4/2005/SR.56, 15 et seq.; Economic and Social Council, Substantive

legal language, which would be inadequate for mere policy recommendations. Also, the drafters intended to include in the Principles restatements of existing law (marked by the word "shall") as well as recommendations (marked by the word "should").[3] This also corresponds to their original assignment to "develop *existing international standards and fill remaining gaps* in order to ensure that victims […] have an enforceable right (to reparation)".[4] Thus, the first reading of the preamble should prevail.

But do the Principles even acknowledge unequivocally the existence of a right to reparation? Apart from their title they contain only one clear reference to such a right, curiously placed in the penultimate Principle XII concerning non-derogation. All other references contain limiting language: The preamble recognises the "right of victims *to benefit* from […] reparation", suggesting that victims are only entitled to benefit from reparation once it is made without having a right to demand it in the first place. Other passages refer to a right to reparation "as provided for in international law" or "in accordance with […] international legal obligations". These phrases were inserted to emphasise the Principles' non-binding character.[5] They indicate that the Principles do not take a stance on the existence of a right to reparation. Instead they guide states in the implementation of reparation policies, if they must provide reparations under the international law applicable to them in a particular case.

Thus, while better arguments speak for reading the preamble as acknowledging that the Principles partly restate existing legal obligations, a right to reparation is not acknowledged unequivocally.

Session of 2005, Provisional Summary Record of the 38th Meeting, 5.12.2005, E/2005/SR.38, 2; Third Committee of the General Assembly, Sixtieth Session, Summary Record of the 29th meeting, 17.1.2006, A/C.3/60/SR.29, 3; Third Committee of the General Assembly, Sixtieth Session, Summary Record of the 39th Meeting, 8.12. 2005, A/C.3/60/SR.39, 2 et seq.

[3] The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final Report of the Special Rapporteur, *M. Cherif Bassiouni*, submitted in accordance with Commission Resolution 1999/33, 18.1.2000, E/CN.4/2000/62, para. 8.

[4] Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 40th Session, 25.10.1988, E/CN.4/1989/3, 36.

[5] Report of the Third Consultative Meeting on the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law", 21.12.2004, E/CN.4/2005/59, para. 19.

II. Drafting Process

The drafting process shows that this ambiguity was intended. The original assignment did not include international humanitarian law. The first rapporteur inserted it into the project only after eight years upon a suggestion by the International Committee of the Red Cross (ICRC).[6] At the time, little legal reasoning for its inclusion was provided. With the inclusion of international humanitarian law, the language of the draft changed notably. While the 1994-draft still contained unequivocal acknowledgments of a right to reparation, these were deleted and replaced with language of state obligations.

When the second rapporteur took over the project in 2000, he relied mainly on moral reasons to justify the inclusion of international humanitarian law in the project:

> "Extraneous considerations concerning sources of law […] should not obscure the fundamental imperative of ensuring that victims of violations receive reparations. […] If the moral and conceptual point of departure […] is the victim, then it follows that the guidelines should not exclude violations committed in the context of armed conflict."[7]

The rapporteur also reinserted unequivocal acknowledgments of a right to reparation. In the 2000-draft, Principle VII read: "Remedies for violations of [...] international humanitarian law include the victim's rights to [...] reparation for harm suffered". Principle IX was named "Victims' right to reparation". These passages again were diluted. In the final 2005-draft, Principle IX was named "Reparation for Harm Suffered" and the abovementioned phrase "as provided for under international law" was added to Principle VII.

In sum, it was due to the ICRC that the Principles' original scope as foreseen by states was broadened to include international humanitarian law. This inclusion was justified more by moral than legal reasons, and in the aftermath the drafts were repeatedly stripped of clear acknowledgments of a right to reparation. Curiously, these changes were almost never officially

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[6] Report of the Sessional Working Group on the Administration of Justice and the Question of Compensation, 13.8.1996, E/CN.4/Sub.2/1996/16, 5; Report of the Secretary-General prepared pursuant to Sub-Commission Resolution 1994/33, Addendum, 13.6.1995, E/CN.4/Sub.2/1995/17/Add.1, 14.

[7] Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, *M. Cherif Bassiouni*, submitted pursuant to Commission on Human Rights Resolution 1998/43, 8.2.1999, E/CN.4/1999/65, paras. 83 et seq.

discussed. Few states expressed support for a right to reparation in international humanitarian law in passing, without being challenged.[8] But all in all, the large number of fundamental changes is not reflected in official protocols. It seems as if no state wanted to openly oppose a right to reparation in international humanitarian law. Yet, it was ensured that the Principles would not acknowledge its existence too clearly.

III. Adoption

No state voted against the resolutions, but 13 members of the Human Rights Commission and five members of the ECOSOC abstained.[9] The General Assembly adopted the Principles without a vote. This, however, must not be mistaken as unanimous approval. A closer look at the adoption processes reveals a lesser degree of support. Germany expressly denied the existence of a customary right to reparation in international humanitarian law.[10] In all three bodies, Chile, speaking on behalf of the sponsors, made clear that the Principles are not binding and do not establish new obligations. Several other States echoed this statement.[11] This severely diminishes the Principles' normative value: How can a resolution carry normative weight, if states themselves do not attach such weight to it?

In conclusion, the Principles should not be taken unwarily as clear-cut evidence for the existence of a right to reparation in international humanitarian law. While not without evidentiary weight to that regard, the abovementioned factors diminish the Principles' evidentiary value. Of course, this article did not look at an important factor: The Principles had and continue

[8] Report of the Consultative Meeting on the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, 27.12.2002, E/CN.4/2003/63, para. 47, Annex I para. 105.

[9] Commission on Human Rights, Sixty-first Session, Summary Record of the 56th Meeting, 20.2.2012, E/CN.4/2005/SR.56, paras. 113 et seq.; Economic and Social Council, Substantive Session of 2005, Provisional Summary Record (note 2), 2.

[10] Commission on Human Rights, Sixty-first Session, Summary Record of the 57th Meeting, 29.4.2005, E/CN.4/2005/SR.57, paras. 38 et seq.; Economic and Social Council, Substantive Session of 2005, Provisional Summary Record (note 2), 2; Third Committee of the United Nations General Assembly, Sixtieth Session, Summary Record of the 39th Meeting (note 2), 3 et seq.

[11] Commission on Human Rights, Sixty-first Session, Summary Record of the 56th Meeting, 20.2.2012, E/CN.4/2005/SR.56, 18 et seq.; Economic and Social Council, Substantive Session of 2005, Provisional Summary (note 2), 2; Third Committee of the United Nations General Assembly, Sixtieth Session, Summary Record of the 29th meeting, 17.1.2006, A/C.3/60/SR.29, 3; Third Committee of the United Nations General Assembly, Sixtieth Session, Summary Record of the 39th Meeting (note 2), 2 et seq.

to have a great impact worldwide. States engage with and rely on them when designing reparation policies. Thus, state practice might have enhanced the Principles' normative value since 2005 to a large degree. This assessment however, is outside the scope of this contribution.