THE VAN BOVEN/BASSIOUNI PRINCIPLES: AN APPRAISAL

MARTEN ZWANENBURG*

Abstract

On 16 December 2005 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', also known as the Van Boven/Bassiouni Principles. This article discusses a number of conceptual issues raised by The Principles, including their legal status, the relationship between human rights and international humanitarian law, and the role of non-State actors. It concludes that The Principles are not perfect and in many respects the result of compromise. They should nevertheless be welcomed because they attempt to structure the multiplicity of standards, principles and interpretations that exist regarding the right to a remedy and reparation.

1. INTRODUCTION

On 19 April 2005, the United Nations (UN) Human Rights Commission (the Commission) adopted Resolution 2005/35 entitled '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' (The Principles). These Principles and Guidelines are also called the 'Van Boven/Bassiouni Principles' in reference to Theo van Boven and Cherif M. Bassiouni, who were the special rapporteurs appointed by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities respectively the Commission, to develop...
them. The adoption of the resolution was the culmination of a process that started in 1989.

This article provides an analysis of the Van Boven/Bassiouni Principles as they were adopted by the Commission and, subsequently, the General Assembly. In view of the large number of issues covered by the Van Boven/Bassiouni Principles and space constraints, it does not attempt to give a detailed analysis of every single principle. Rather, the article will focus on a number of conceptual issues that played an important role in drafting The Principles and that play a role in their implementation. To this end, it will first sketch the drafting history of The Principles. It will then briefly set out the content of The Principles. Subsequently, it will identify a number of conceptual issues that are raised by the Van Boven/Bassiouni Principles. These issues, which include the legal nature of The Principles, the notion of ‘victim’, and the relationship between human rights and International Humanitarian Law (IHL), will be illustrated with reference to specific principles as well as State practice. Finally, the article will present some conclusions.

2. DRAFTING HISTORY

The point of departure for The Principles was Resolution 1988/11 of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, later the Sub-Commission on the Promotion and Protection of Human Rights.\(^2\) In 1989, the Sub-Commission entrusted Theo van Boven with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, with a view to exploring the possibility of developing some basic principles and guidelines in this respect.\(^3\) Van Boven submitted a preliminary report and two progress reports to the Sub-Commission before presenting a final report in 1993.\(^4\) The final report contained a proposal for basic principles and guidelines.\(^5\) Between 1993 and 1997 two revised versions were prepared, which were discussed in the Sub-Commission.\(^6\) In 1997, he submitted a final revised


During its 1996 session the Sub-Commission decided to transmit the draft principles to the Commission on Human Rights for its consideration.\(^7\) In 1998, the Commission on Human Rights appointed Cherif Bassiouni as an expert to prepare a revised version of the basic principles and guidelines elaborated by Van Boven.\(^8\) In 1999, Bassiouni submitted a comprehensive report comparing the principles drafted by Van Boven with The Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, developed by Louis Joinet,\(^9\) with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,\(^10\) and with the provisions on reparations in the Rome Statute of the International Criminal Court (ICC).\(^11\) Taking into account comments by governments and non-governmental organisations and the conclusions in the 1999 report, he submitted a final report in 2000 which included a set of draft principles.\(^12\) The Commission on Human Rights in that year took note of the report and requested the United Nations Secretary-General to circulate the text of the draft principles to all member States for comments. It also requested the High Commissioner for Human Rights to hold a consultative meeting in Geneva for all interested governments, intergovernmental organisations and non-governmental organisations in consultative status with the Economic and Social Council (ECOSOC), with a view to finalising The Principles and Guidelines on the basis of the comments submitted.\(^13\) It made the same requests again in 2002.\(^14\) Pursuant to these requests, a consultative meeting was held in Geneva from 20 September to 1 October 2002.\(^15\) The meeting was chaired by Mr Alejandro Salinas of Chile. In its resolution on the matter in 2003, the Commission requested the Chairperson-Rapporteur of the consultative meeting, in consultation with the independent experts, Theo van Boven and Cherif Bassiouni, to prepare a revised version of The Principles, taking into account the opinions and commentaries of States and of intergovernmental and non-governmental organisations and the results

---

\(^11\) Annex to General Assembly, Resolution 40/34 of 29 November 1985, UN Doc. A/RES/40/34.
\(^12\) UN Doc. E/CN.4/1999/65 of 8 February 1999.

of the consultative meeting. It also requested the High Commissioner for Human Rights to hold a second consultative meeting. The Chairperson-Rapporteur circulated a revised version of The Principles on 15 August 2003. A second consultative meeting was held in Geneva on 20, 21 and 23 October 2003. The participants in the consultation considered the revised version of The Principles, dated 15 August 2003, and provided general and specific comments on the text. Based on the comments received, the Chairperson-Rapporteur circulated a further revised version of The Principles, dated 23 October 2003, as well as a proposal put forward by himself and the independent experts that arose out of informal consultations held on 22 October 2003. The proposal consisted in changing the title of the basic principles and guidelines from 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of Humanitarian Law' to 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Law'. This was an attempt to address concerns raised principally by the United States concerning references to IHL.

The report of the second consultative meeting included a revised set of draft principles (not incorporating the 22 October proposal). In 2004, the Chairperson-Rapporteur again circulated revised principles dated 5 August 2004. This document was used as one of the bases for its work by the third consultative meeting convened by the Office of the High Commissioner for Human Rights from 29 September to 1 October 2004 in Geneva, pursuant to Resolution 2004/34 of the Commission on Human Rights. In the report on the third consultative meeting, the Chairperson-Rapporteur stated that he considered the document now to be mature, as it reflected three rounds of consultative meetings and some 15 years of work on the text. He thus believed that the mandate provided by the Commission on Human Rights in Resolution 2004/34 had been fulfilled as the draft Principles and Guidelines had been finalised.

A final consultative meeting between the Chairperson-Rapporteur and interested delegations took place shortly before the 2005 session of the Commission on Human Rights. Its main purpose was to ensure that there would be sufficient political support for The Principles in the Commission.

As stated above, on 19 April 2005 the Commission on Human Rights finally 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

18 Copy on file with the author.
22 Idem.
Violations of International Humanitarian Law' in Resolution 2005/35. There were 40 votes in favour, no votes against, and 13 abstentions.23

The Van Boven/Bassiouni Principles were adopted by the ECOSOC on 25 July 2005, by a vote of 43 in favour and five abstentions.24 On 16 December 2005, the General Assembly adopted the principles without a vote.25

3. CONTENT OF THE PRINCIPLES

The Van Boven/Bassiouni Principles consist of a preamble and 13 sections that contain 27 principles in total. The last preambular paragraph captures the essence of The Principles. It refers to the adoption of a ‘victim-oriented perspective’ by the international community affirming its solidarity with victims of violations of international law.

The preamble also affirms that The Principles are directed at gross violations of international human rights law and serious violations of IHL. The remainder of the document uses the term ‘gross violations of international human rights and serious violations of IHL’, with the exception of the sections that deal with the general obligation to respect, ensure respect for and implement human rights and IHL. It may be noted that no definition is given of ‘gross’ or ‘serious’ violations.

Section I sets out the sources of the obligation to respect, ensure respect for and implement international human rights law and IHL, and lists measures whereby States can ensure that their domestic law is consistent with their international legal obligations.

Section II describes in a non-exhaustive way the scope of the obligation to respect, ensure respect and implement. One of the aspects of the obligation listed is the duty to provide effective remedies, including reparation, to victims.

Section III is concerned with gross violations of human rights and serious violations of IHL that constitute international crimes. It refers to the duty to investigate and submit to prosecution persons allegedly responsible for international crimes, as well other criminal law aspects of suppression of international crimes such as universal jurisdiction. The next section dealing with statutes of limitations is also primarily concerned with criminal law, although it also refers to civil claims.

Section VI contains a definition of ‘victims’ for the purposes of the Van Boven/Bassiouni Principles that is discussed below.

23 The countries abstaining were: Australia, Egypt, Eritrea, Ethiopia, Germany, India, Mauritania, Nepal, Qatar, Saudi Arabia, Sudan, Togo and the United States.
25 General Assembly, Resolution 60/147 of 16 December 2005, UN Doc. A/RES/60/147.
Section VII is the crux of the document. It provides that remedies for gross violations of international human rights law and serious violations of IHL include the victim's right to the following as provided for under international law:

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.

These three aspects are elaborated on in the following sections. Section VIII is concerned with access to justice. Section IX deals with reparation for harm suffered. This section first states the basic principle that a State must 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 IHL. It then specifies the different forms that reparation may take: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Section X concerns measures relating to access to relevant information concerning violations and reparation mechanisms. Sections XI-XIII are essentially safeguard clauses that deal with non-discrimination in the application of The Principles non-derogation and the rights of others, in particular the rights of accused persons.

4. VICTIM'S PERSPECTIVE

Undoubtedly the most important aspect of the Van Boven/Bassiouni Principles is that they take the victim as their point of departure. They focus on the needs and rights of the victims rather than on the violation of human rights or IHL. Many delegations pointed to the importance of this 'victim-oriented perspective' in the course of consultations on the principles. This could suggest that the victim-oriented perspective is not new. Yet, as Van Boven noted in his final report in 1993, 'only scarce or marginal attention is given to the issue of redress and reparation to victims'.

In recent decades increasing attention has been devoted in national and transnational criminal law to redress for victims following the commission of crimes. A European Convention on the Compensation of Victims of Violent Crimes was adopted in the framework of the Council of Europe in 1983. The Convention essentially deals
with minimum standards for national schemes for the compensation of victims of crime. The European Union (EU) Council adopted a directive in 2004 relating to compensation of crime victims. The directive sets up a system of cooperation to facilitate access to compensation to victims of crimes in cross-border situations, which should operate on the basis of member States' schemes on compensation to victims of violent intentional crime committed in their territories. Article 12 of the directive requires all Member States to ensure that their national rules provide for the existence of a national compensation scheme for victims of crime.

Concerning the relationship between these developments and the role of victims of human rights and IHL violations, it may be noted that national compensation schemes are based on social solidarity instead of State responsibility. This is expressed inter alia in the preamble to the European Convention on the Compensation of Victims of Violent Crimes. It may also be noted that the instruments mentioned above are limited to offences that are violent and intentional. Human rights and IHL violations do not need to fulfill these criteria. In addition, not all violations of human rights and IHL are criminal, depending on the international obligations and the national criminal legislation of the State concerned.

In international law attention for the victim came later and less prominently. Since the 1990s the trend in human rights law and IHL has been criminalisation. In this process the attention has tended to focus on the perpetrator rather than on the victim. This is illustrated by the Statutes of the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR). With the adoption of the Rome Statute of the ICC, the victim's role has become more prominent, however. The Statute provides for the participation of victims in the proceedings in Article 68 as well as for reparations to victims in Article 75. The latter article provides inter alia that the ICC may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Article 79 of the Statute also provides for the establishment of a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

The Van Boven/Bassiouni Principles support the increasing focus on the position of victims in international law evidenced by the ICC Statute. A consequence of the victim-oriented perspective of The Principles is that they are not only based on principles of State responsibility, but also on principles of social solidarity. This was expressed in the explanatory comments annexed to the report of the second consultative meeting:

insofar as the principles and guidelines are victim oriented and are essentially predicated on the concept of social and human solidarity and not only on the concept of State responsibility, it would be difficult to link the rights of victims to the source of the conventional or customary law that is at the basis of victims' rights.\(^{35}\)

The concept of solidarity is also expressed in the preamble to the final version of The Principles, but not very clearly.\(^{36}\) Principle 18, which states that victims of gross violations of human rights and serious violations of IHL should be provided with reparation, does not contain a link with State responsibility. This appears to be intentional.\(^{37}\) Principle 16 provides expressly for national reparation schemes based on social solidarity.

5. ALL VIOLATIONS OR ONLY 'GROSS' AND 'SERIOUS'

The Van Boven/Bassiouni Principles are only concerned with 'gross' violations of human rights and 'serious' violations of IHL. The principal obligation on which The Principles are based, however, is the obligation to respect, ensure respect for and implement the two branches of law. This obligation extends to all human rights and IHL norms instead of a limited category.

The word 'gross' or similar wording has come and gone, and then come again in The Principles. Sub-Commission Resolution 1989/13 originally entrusted Van Boven with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of 'gross' violations of human rights and fundamental freedoms.\(^{38}\) The 1996 revised principles referred to 'gross' violations. In the course of debate in the Sub-Commission on this version, several members expressed the opinion that the word 'gross' should be deleted because they did not


\(^{36}\) Preambular paragraph 11 states: '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.'


\(^{38}\) Supra (note 3).
see why the document should be limited to gross violations alone. These comments were reflected in the 1997 version of The Principles that placed the word ‘gross’ in square brackets. At the first consultative meeting in 2003 the issue of whether the scope of The Principles should be limited to ‘gross’ violations was discussed. This led to the limitation to ‘gross’ violations of human rights and ‘serious’ violations of IHL in the 2004 draft Principles. At the 2004 consultative meeting the issue was again the subject of discussion. A number of delegations considered that the appropriate focus should be on gross violations of human rights, whilst others believed The Principles and Guidelines should relate to all violations of human rights. There is some justification for limiting the scope of The Principles. As stated above, the principal obligation on which The Principles are based extends to all human rights and IHL norms. The international community however has shown particular interest in a limited category of norms the breach of which is considered especially grave. This particular concern is reflected in mechanisms for prevention and punishment that apply only to those norms. The Principles refer to these mechanisms. For example, Principle 6 refers to the non-application of statutes of limitations. The principal international instrument relating to statutes of limitations is the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. States parties to this convention are obliged not to apply statutory limitations – irrespective of the date of their commission – to war crimes and most crimes against humanity, not to all violations of human rights and IHL.

The Principles do not make clear which violations of human rights are ‘gross’ or which violations of IHL ‘serious’. The definition of ‘serious’ violations of IHL is addressed below. In respect of the term ‘gross’, it may be noted that The Principles do not contain a definition or list of ‘gross’ violations. The Principles proposed by Van Boven in 1993 included the following non-exhaustive list of violations considered to be ‘gross’: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender. The report itself also discussed the issue of ‘gross’ violations. It noted that the term is widely used by human rights organs and bodies. No agreed definition exists of the

---

44 An example is the so-called “1503” procedure of the UN Commission on Human Rights, established by ECOSOC Resolution 1503 (XLVIII) of 27 May 1970. Under this procedure, the Commission has the mandate to examine in closed sessions a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms occurring in any country of the world. For a discussion of the meaning of ‘gross violation of human rights’, see also the Working Paper.
term ‘gross violations of human rights’, and it appears that 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.\textsuperscript{45} Useful guidance could be found in the International Law Commission’s draft Code of Crimes against the Peace and Security of Mankind, common Article 3 to the 1949 Geneva Conventions as well as the Third Restatement of the Foreign Relations Law of the United States (Section 702).

Since 1993 a number of other sources of guidance have been created. These include the Statutes of the ICTY and ICTR and the Rome Statute of the ICC. It may also be noted that the act creating the South African Truth and Reconciliation Commission included a definition of ‘gross violations of human rights’.\textsuperscript{46}

The omission of a definition of ‘gross’ violations has the important advantage of flexibility. As Van Boven pointed out during the first consultative meeting, the concept is fluid and evolving. A definition could have the effect of inhibiting this evolution.\textsuperscript{47}

It may be noted that it can be argued that an important consequence of the decision to restrict the scope of The Principles was to facilitate maintaining IHL in the text. Particularly in IHL, the consequences arising under international law depend on the seriousness of the crime. The regime that applies to violations of serious violations of IHL and gross violations of human rights is more similar than for less serious and gross violations. This, some argue, defeats the argument principally made by the US that it is not possible to mix the two bodies of law because they are governed by different legal regimes.\textsuperscript{48}

6. NON-STATE ACTORS

How to deal with non-State actors was an important question for the drafters of the Van Boven/Bassiouni Principles. As was discussed above, The Principles take the perspective of the victim. For a victim it does not make a difference whether his or her rights are violated by the State or by a non-State actor such as an armed opposition group.

It is undisputed that non-State armed groups may be bound by IHL. Common Article 3 to the Geneva Conventions refers to ‘each party to the conflict’, i.e., the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{45} UN Doc. E/CN.4/Sub.2/1993/10 of 8 June 1999.
\item \textsuperscript{46} Promotion of National Unity and Reconciliation Act No. 34 of 1995, Article I (ix): ‘gross violation of human rights’ means the violation of human rights through—(a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a).
\item \textsuperscript{47} UN Doc. E/CN.4/2003/63 (report on first consultative meeting), para. 21.
\item \textsuperscript{48} I am indebted to Gabriela Echeverria for this argument. But see section 8.
\end{itemize}
\end{footnotesize}
government side as well as the armed opposition group. Article 1 of Additional Protocol II to the Geneva Conventions provides that the Protocol applies to 'dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.' These instruments do not refer to responsibility for violations by non-State entities, but it must be accepted that if a non-State entity has international obligations it can be responsible for breach thereof. The International Law Committee (ILC) appears to accept this consequence. In its commentary to the draft articles on State responsibility it states that:

[a] further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces.

The possibility that non-State actors can violate human rights is contested. Human rights are traditionally seen as a relationship between the State as duty-bearer and the individual as rights-holder. Certain authors call for a reconceptualisation of human rights, to include non-State actors as duty-bearers. There is also some State practice that refers to human rights violations by non-State actors. For example, the UN Security Council has declared that Sudanese rebel groups are responsible for human rights violations. It seems that this practice is not yet sufficient to challenge the notion that human rights law binds only States, however.

In keeping with this notion, certain delegations involved in drafting The Principles objected to suggestions, implicit in The Principles, that non-State actors can violate human rights law. At the first consultative meeting, Van Boven responded to these objections by stating that

---


53 Zegveld, op. cit. (note 50), pp. 47–49.


56 UN Doc. E/CN/2003/63, at p. 20, para. 33 (United Kingdom).
the question of non-State responsibility was also evolving. Such new developments must be taken into account in the Draft Guidelines. It may be that human rights law had not yet developed far enough on non-State responsibility, but, as the draft was not a treaty, it could reflect those emerging concepts as well.\(^{57}\)

The final version of the Van Boven/Bassiouni Principles appears not to exclude non-State actor’s responsibility. The core principles, i.e. Principle 3 setting out the scope of the obligation to respect, ensure respect for and implement the law and Principle 18 concerning full and effective reparation, are not by their wording limited to States only. In 2000, the draft principles still referred to ‘a State’s duty to’ in connection with the obligation to respect, ensure respect for and enforce international human rights and humanitarian law.\(^{58}\)

7. THE NATURE OF THE PRINCIPLES

Preambular paragraph 7 of the Van Boven/Bassiouni Principles emphasises that The Principles ‘do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations’. This clarification was not always included in earlier drafts of The Principles. It appears to have been inserted for the first time in the draft principles submitted to the 2003 consultative meeting. It may be noted that the 2003 version included the word ‘substantive’ before ‘international or domestic legal obligations’, implying that The Principles do include new procedural obligations. This word was retained in a draft of 5 August 2004, but deleted in the draft of 1 October 2004.

The Principles have been adopted in resolutions of the Commission, ECOSOC and the General Assembly. Resolutions of these UN bodies are recommendations and do not bind States. This does not preclude the possibility that the resolutions, which as such are merely recommendations, reiterate principles which are binding on the basis of other sources of law. This appears to have been the intention of the sponsors of the resolution before the Commission. It also explains the use of the terms ‘shall’ and ‘should’ in The Principles. It may be noted that a number of principles use the term ‘shall’, while a number of others use the term ‘should’. As the Chairperson-Rapporteur’s report on the 2002 consultative meeting states:

‘the Draft Guidelines use the term “shall” only in cases where a binding international norm is currently in effect. Where an international norm is less mandatory, the non-mandatory word “should” is used.’\(^{59}\)

\(^{57}\) Ibidem, p. 21, para. 38.

\(^{58}\) Supra (note 12).

\(^{59}\) 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
A first remark is that it is unclear what a 'less mandatory norm' is. If the intention was to make a clear distinction between binding and non-binding norms, the use of this term is less than helpful. Quite apart from this, the claim that those provisions which employ the term 'shall' are binding on States is highly questionable. According to The Principles themselves, such obligations would derive from one or more of three sources:

1) Treaties to which a State is a party;
2) Customary international law;
3) The domestic law of each State.

The first Principle provides that the obligation to respect, ensure respect for and implement human rights and IHL emanates from these sources. The obligation to respect, ensure respect for and implement, includes, inter alia, the duty to provide victims with access to justice and with effective reparation. The substance of the corresponding right to access to justice and to effective reparation are spelled out in sections VIII and IX of The Principles. In other words, the content of the right to access to justice and to effective reparation (to the extent they employ 'shall') derives from one or more of the sources mentioned in Principle 1.

It is interesting to analyse whether such a claim can be substantiated. A first attempt to do so was undertaken by Van Boven in his final report submitted to the (then) Sub-Commission on the Prevention of Discrimination and Protection of Minorities. In this report he correctly pointed out that global and regional human rights instruments include provisions on a right to a remedy. It is useful to maintain the distinction between a procedural and a substantive remedy as used in The Principles. With respect to the first element, Article 2(3)(a) of the UN Covenant on Civil and Political Rights (ICCPR) for example provides that States parties to the Covenant undertake 'to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy'.

With respect to the second element, Article 2(3)(a) of the ICCPR provides that States parties should 'ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State'. Article 13 of the European Convention on Human Rights provides that

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The American Convention on Human Rights and the African Charter on Human and Peoples' Rights (Banjul Charter) also contain provisions on a remedy for violations of the rights provided therein.

Van Boven also pointed out that the provisions on remedies in different human rights instruments have been interpreted by the monitoring bodies of the treaties. This body of jurisprudence has developed the conventional right to a remedy considerably. There have been important findings on the legal basis for such a right as well as on the specific content of this right. It may be noted that there are certain differences between the case-law of the different monitoring bodies. This is partly due to the fact that the basis for such case-law is the provisions of specific instruments which are not identical. Another factor is that the monitoring bodies apply the law to specific cases. As a consequence, pronouncements on remedies reflect the types of human rights violations committed in the region with which a specific body is concerned. For example, enforced disappearance is a kind of human rights violation that is often associated with dictatorships in Latin America in the 1970s and 1980s. As a consequence, some of the most important pronouncements on remedies by the Inter-American Court of Human Rights have been made in cases concerning enforced disappearances. Principle 22(c) of the Van Boven/Bassiouni Principles, for example, appears to have been inspired by this case-law.

With respect to customary international law, it is well known that the existence of a rule of customary international law requires a general practice which is accepted as law. As the International Court of Justice stated in the North Sea Continental Shelf Cases 'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.'

It is useful to make a distinction between the duty of States toward other States to provide reparation for violations of human rights, the duty toward an individual to provide reparation for violation of human rights, and the right of an individual to claim such reparation from a State. The duty toward other States to provide reparation for a violation of human rights which is attributable to the State appears to be a customary rule of international law. Such a rule is supported by the articles on State responsibility adopted by the ILC in 2001. The Van Boven/Bassiouni Principles, however, are not concerned with this kind of – inter-State – responsibility. They are concerned with an obligation on the State toward an individual to remedy a gross violation of human rights or a serious violation of IHL, and the right of an individual to invoke that obligation. As IHL is dealt with below, the discussion will for the moment be limited to human rights law. There is some evidence to support a duty under international customary law for a State to which a violation of human rights can be attributed to make reparation to an individual. In principle, if a State has

---

61 See the state practice discussed by Van Boven in UN Doc. E/CN.4/Sub.2/1993/8, supra note 5.
an international obligation toward an individual it must be assumed that the State is responsible if it violates that obligation.\textsuperscript{62}

State practice, however, does not support the proposition that there is an individual right under international customary law to claim a remedy for violations of human rights.\textsuperscript{63} It must be pointed out that the judgements of human rights monitoring bodies concerning remedies are based on specific rules in specific human rights treaties. As such, they are not necessarily proof of a customary rule. Practice outside of the context of conventional regimes appears to indicate that there is no individual procedural right to claim a remedy for human rights violations.\textsuperscript{64} This was underlined by Germany in its explanation of vote on Resolution 2005/35. Germany stated that there is no general rule within customary international law that any grave violation of human rights creates the right for an individual claim for reparation under international law.\textsuperscript{65}

8. HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW

The Van Boven/Bassiouni Principles apply to gross violations of human rights as well as to serious violations of IHL. This suggests that the two categories are identical, or at least that there is a close resemblance. It is clear that the two bodies of law share the same philosophical underpinning. It is also clear that human rights have had an important influence on the development of IHL.\textsuperscript{66} The precise relationship between human rights and IHL has been the subject of much debate. Whatever the precise nature of this relationship, there are important differences between human rights and IHL. This was a point that the United States made during the drafting of The Principles to argue that the Van Boven/Bassiouni Principles should only address human rights. It referred in particular to various remedies for transgressions which are already recognised in IHL, such as binding legal obligations on States with respect to criminal sanctions, the duty to search for offenders of certain violations, and compensation. The United States was concerned that The Principles would be confusing when placed


\textsuperscript{64} See, e.g., Daniković \textit{et al.} v. the Netherlands, Supreme Court of the Netherlands, 29 November 2002, reported in NJ 2003, 35; Landgericht Bonn, decision of 10 December 2003, No. 1 O 361/02 (Varvarin bridge) and Oberlandesgericht Cologne, decision of 28 July 2005, No. 7 U 8/04 (Varvarin bridge, appeal).

\textsuperscript{65} UN press release, 19 April 2005.

\textsuperscript{66} Meron, T., 'The Humanization of Humanitarian Law', \textit{American Journal of International Law}, Vol. 94, No. 2, 2000, pp. 239-278.
alongside binding international obligations under IHL treaties. This argument does not appear very convincing. There are many non-binding principles and guidelines in the field of human rights that exist next to binding treaty obligations. These do not appear to lead to much confusion in practice. Another point that the United States made however has more merit. This is the point that under IHL, remedies vary with respect to different categories of violations. The Geneva Conventions and Additional Protocol I define violations of a limited number of rules as 'grave breaches'. Another category is 'serious violations' of IHL, mentioned in Articles 89 and 90 of Additional Protocol I. These articles do not define the expression. Article 90, which refers to 'grave breach as defined in the Conventions and this Protocol or other serious breaches of the Conventions or of this Protocol', does make clear that the term is not synonymous with 'grave breach'. The ICTY interpreted the term 'serious violation' in the context of its own Statute. In that context, it held that for a violation to be 'serious' it 'must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.' It appears that IHL contains three categories of norms, from the narrowest to the widest: grave breaches, serious violations and other violations. Additional Protocol II to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict contains a number of obligations concerning the suppression of 'serious violations' of that Protocol. The violations that are 'serious' are listed in Article 15.

The Geneva Conventions and Additional Protocol I contain a robust regime for reacting to 'grave breaches'. States parties undertake, inter alia, to enact any legislation necessary to provide effective penal sanctions for persons committing grave breaches. They also have an obligation to prosecute or extradite persons alleged to have committed grave breaches. States parties are not allowed to absolve themselves or other States parties of any liability incurred in respect of grave breaches. The Geneva Conventions and Additional Protocol I have much less to say about violations of IHL norms that are not 'grave breaches'. The relevant provisions are limited to the obligation to take measures necessary for the suppression of all acts contrary to the provisions of the Geneva Conventions and the Additional Protocol, and the statement in Article 91 of Additional Protocol I that a party to the conflict that violates the provisions of the Conventions or the Protocol is liable to pay compensation if the case demands.

The Van Boven/Bassiouni Principles do not take the distinction in the Geneva Conventions and Additional Protocol I between grave breaches and other violations into account. As was discussed, they refer to a category of 'serious' violations which does not play a role as far as remedies are concerned in other IHL instruments than

---

67 Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, A. Ch., 2 October 1995, para. 94.

The Van Boven/Bassiouni Principles: An Appraisal

the Second Protocol to the 1954 Hague Convention. It may be noted, at the same time, that limiting the scope of The Principles to ‘grave breaches’ of IHL would have had the effect of excluding IHL violations committed in non-international armed conflicts. The legal regime which applies to non-international armed conflicts, common Article 3 of the Geneva Conventions and Additional Protocol II, does not contain the notion of ‘grave breaches’. Although it has been argued by some that the grave breaches concept now also extends to non-international armed conflicts, this is not widely accepted yet.69

Article 91 of Additional Protocol I, together with Article 3 of Hague Convention IV of 1907, appears to have been an important basis for including the right to a remedy for serious violations of IHL in The Principles. Preambular paragraph 1 of The Principles recalls:

the provisions providing a right to a remedy for victims of violations (...) of international humanitarian law as found in article 3 of the Hague Convention of 18 October 1907 concerning the Laws and Customs of War on Land (Convention No. IV) of 1907) [and] article 91 of Protocol Additional to the Geneva Conventions of 12 August 1949.

This implies that the articles concerned confer a substantive right to reparation and a procedural right to a remedy on individual victims of violations of IHL.

IHL was traditionally considered as governing relations between States. It appears to be increasingly accepted that certain rules of IHL confer rights on individuals under international law.70 Such a view is supported by the wording of modern IHL treaties. Article 7 of Geneva Convention (IV) for example provides that protected persons may in no circumstances renounce in part or in entirety the rights secured to them by that Convention. If these rights are breached by a State party, that State party is responsible. This conclusion is supported by the Advisory Opinion of the International Court of Justice on the Wall in Occupied Palestinian Territory.71 After the Court concluded that the construction of the Wall violated a number of human rights and IHL obligations of Israel, it dealt with the legal consequences of that

---

69 Interestingly, the United States has argued that the concept of grave breaches also extends to non-international armed conflicts. See Submission by the Government of the United States of America Concerning Certain Arguments Made by Counsel in the Case Concerning the Prosecutor v. Dusan Tadić, 17 July 1995, cited in Tadić Appeals Decision on Jurisdiction, supra (note 66), para. 83.


conclusion. It held that, given that the construction of the Wall has, inter alia, entailed the requisition and destruction of homes, businesses and agricultural holdings, “the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned.”

A substantive right must be distinguished from the right to invoke a breach of that right, however. The ILC has recognised this distinction. Article 33(2) of the ILC Articles on State Responsibility provides that Part Two of The Articles (concerning the content of State responsibility) is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State. In the system of The Articles, this provision merely makes clear that The Articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, but it has much wider implications, as the ILC commentary makes clear:

In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State (...) It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility of their own account.

Certain authors maintain that Hague Convention (IV) of 1907 and Additional Protocol I provide a private right to a remedy. The travaux préparatoires of Hague Convention (IV) however do not support such an interpretation. A statement by Belgium at the Hague Peace Conference suggests that this delegation considered Article 3 as relating to inter-State responsibility by referring to the settlement of cases by the States concerned. There is no evidence that other delegations disagreed with this statement or interpreted the article differently.

72 Ibidem, para. 152.
75 "Le règlement des indemnités dues à des neutres pourra, le plus souvent, avoir lieu sans retard, par la simple raison que l'Etat belligérant responsable est en paix avec leur pays et continue avec ce dernier des relations pacifiques qui permettront aux deux Etats de liquider aisément et sans délai tous les cas venant à se présenter. La même facilité ou possibilité n'existe pas entre les belligérants, par le fait même de la guerre, et, bien que le droit à une indemnité naisse en faveur de leurs ressortissants respectifs aussi bien qu'en faveur de neutres, le règlement des indemnités, entre belligérants, ne pourra guère être arrêté et effectué qu'à la conclusion de la Paix." Deuxième Conférence internationale de la Paix, La Haye 15 juin – 18 octobre 1907, Actes et Documents (Actes), Vol. III, at 147 (emphasis added).
76 See also Zwanenburg, M., Accountability of Peace Support Operations, Martinus Nijhoff, Leiden, 2005, pp. 87–88. But see expert opinions by F. Kalshoven, E. David and C. Greenwood in Fujita,
The function of Article 91 of Additional Protocol I is to restate the principle in Article 3 of Hague Convention (IV). This is demonstrated by statements in the committee that adopted the article during the Conference that adopted the Additional Protocol.77

The question whether Article 3 of Hague Convention (IV) provides standing to individuals has been at issue in a number of national cases. The courts of Japan, the United States and Germany in particular have addressed this issue. Japanese courts have held on a number of occasions that there is no private right of action for violations of IHL and that compensation may be claimed only by another State.78 In February 2005, the Japanese Supreme Court once again confirmed this interpretation in a judgement rejecting a compensation claim by seven Taiwanese ‘comfort women’.79

The German Supreme Court (Bundesgerichtshof) held in a decision, dated 26 June 2003, that on the basis of Article 3 of Hague Convention (IV) a ‘Party to the conflict’ has an obligation to compensate another ‘Party to the conflict’, and not individuals. The case concerned a claim for damages by Greek nationals for a massacre committed by the German armed forces during World War II. A German Court of Appeals rejected the claim on the grounds that Germany was immune from prosecution, and that individuals do not have legal standing to make claims regarding violations of International Humanitarian Law. The Supreme Court upheld both arguments. With respect to the latter argument, however, it limited its analysis to the state of law at the time of the events concerned. The Court stated that Article 3 of Hague Convention (IV) does ‘not apply except between Contracting Powers’. The Court did not specify whether the situation had changed since 1945, although it did state that only recent developments in international law conferred rights on individuals and created treaty-based systems of protection, on the basis of which an individual could make a claim. This statement implies that a right to make a claim does not (yet) exist outside the framework of treaty-based systems. In a judgement by the Landgericht Bonn of 10 December 2003, the court did state explicitly that States have created treaty-based individual claims procedures in the field of human rights. Where such a procedure has not been created, an individual cannot invoke the breach of an individual right under international law against a State. Article 3 of the 1907 Hague Convention (IV) and Article 91 of Additional Protocol I do not create a remedy for individuals.

---

78 Supra note 76, p. 86.
United States courts have consistently denied that Article 3 of Hague Convention (IV) creates a procedural right to a remedy for individuals. In Princz, for example, an Appeals Court held that nothing in Convention (IV) even impliedly grants individuals the right to seek damages for violation of its provisions.  

The case-law mentioned above suggests that there is no right under IHL to an individual claim for a remedy. This was also stated by Germany in its explanation of vote on Resolution 2005/35. It stated that 'under certain regimes, violations of human rights could lead to individual claims for reparations, but the same was not true for violations of international humanitarian law'. The International Committee of the Red Cross (ICRC), in its study on customary IHL suggests that this is changing. It states that '[there] is an increasing trend in favour of enabling individual victims of violations of international humanitarian law to seek reparation directly from the responsible State.' The practice which the ICRC adduces to support this statement, however, largely consists of cases in which States have provided reparation on the basis of specific inter-State and other agreements which do not necessarily reflect a right for individuals. An example is an agreement between the Government of Canada and the National Association of Japanese Canadians adopted in 1988. According to the ICRC the agreement provides for apology for and acknowledgement of violations of IHL. This conclusion is not necessarily justified by the text of the agreement, in which the Government of Canada, inter alia, acknowledged 'that the treatment of Japanese Canadians during and after World War II was unjust and violated principles of human rights as they are understood today.' The agreement does not mention IHL. The wording of the agreement carefully avoids any admission by Canada of responsibility for internationally wrongful acts.

9. THE NOTION OF "VICTIM"

Principle 8 defines 'victims' as follows:

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

---

83 Ibidem, p. 542.
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.

The definition in Principle 8 is based on the definition of victim in the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. It is interesting to note that the debate on ‘victims’ appears to have resembled the debate on the definition of ‘victim’ in the Rules of Procedure and Evidence (RPE) of the ICC. In both cases the 1985 UN Declaration was taken as the starting point. In the case of the ICC RPE, it did not prove possible to arrive at a definition on that basis because almost every word in the 1985 UN Declaration definition proved controversial. The Van Boven/Bassiouni Principles reproduce the definition of ‘victim’ in the UN Declaration almost verbatim. This does not mean that this definition was easily arrived at. On the contrary, the definition of ‘victim’ was one of the most debated Principles.

It is generally recognised that ‘victims’ can be ‘direct’ or ‘indirect’. ‘Direct victims’ are persons who have been directly affected by a violation. ‘Indirect victims’ are persons who have not been directly affected but who have suffered harm. The debate focused in particular on who should be included in the category of ‘indirect victims’. At various stages in the drafting of The Principles categories of persons were included in the definition of ‘indirect victims’ additional to those in the UN Declaration. In the 2000 version a member of the household of the direct victim was also considered a victim, for example. It appears that the exclusion of such categories in the final version is related to the concern that ‘indirect victims’ should have a close connection with the ‘direct victim’.

Another category proposed for inclusion in the definition of ‘victim’ was legal persons. Legal persons include organisations and institutions with a legal personality. For example, a museum could be considered to have been harmed by theft of cultural property protected by the Second Protocol to the 1954 Hague Convention, which is a serious violation of that Protocol under its Article 15. The 5 August 2004 draft of The Principles included a reference to a legal person as a victim, and at the third

---

86 Compare Art. 85(b) of the ICC RPE, which states that victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.
consultative meeting there was debate about the appropriateness of including a reference to legal persons.87 This reference is not reproduced in the final version of The Principles because the best course of action was considered to be to reflect as closely as possible the 1985 UN Declaration.88

A related point was whether a ‘collective’ element should be included in the definition of ‘victim’. Certain human rights are the rights of groups. Article 1 ICCPR for example provides that ‘all peoples have the right to self-determination’. Rights are also accorded to ethnic, religious and linguistic minorities. There is much debate concerning the exact nature of these rights and who is entitled to claim reparation for a violation. Jones has described this debate as opposing a ‘collective’ conception and a ‘corporate’ conception of rights.89 Under the first conception, a group right is a right held jointly by those who make up the group. The group has no existence or interest that cannot be explicated as that of its members. Under the second conception, the holder of the right is the group conceived as a single, integral entity. The debate is carried on in particular in the Working Group on Indigenous Populations of the Sub-Commission on the Promotion and Protection of Human Rights, and the open-ended intersessional Working Group of the Commission on Human Rights to Draft a Declaration on the Rights of Indigenous Peoples. In these working groups some States strongly support the concept of corporate rights, others strongly oppose them.90

Human rights monitoring bodies have recognised a collective element of human rights, but not necessarily in a ‘corporate’ sense as referred to above. The Inter-American Commission on Human Rights, for example, held in a case brought by an indigenous community in Nicaragua that ‘there is an international customary law norm which affirms the rights of indigenous peoples to their traditional lands’91 In the case at hand, the Commission argued that Nicaragua had violated the right to property of the indigenous community by granting a logging concession on lands traditionally occupied by the community. The Inter-American Court considered that the logging concession constituted a violation of the right to property to the detriment of ‘the members of’ the Mayagna (Sumo) Awas Tingni Community.92 It appears unlikely that the use of the words ‘the members of’ by the Court was accidental.93

---

88 Letter from Prof. Th. Van Boven to the author, 26 August 2005.
92 Ibidem, para. 155.
93 See also the Court’s judgement in the case of Moiwana Village v. Suriname, Judgement, 15 June 2005, Inter-Am. Ct. H.R. (ser. C), No. 124 (2005), in which the Court consistently referred to the
A collective element was included in draft versions of The Principles. The 1996 revised basic principles, for example, stated that:

Reparation may be claimed individually and where appropriate collectively, by the direct victims, the immediate family, dependants or other persons or groups of persons connected with the direct victims.

It appears that this represents a ‘collective’ approach as described above, in contrast to a ‘corporate’ approach. The possibility of groups as such having rights and being able to claim reparation was discussed during the 2002 and 2003 consultations. Some delegations expressed the view that the definition of ‘victim’ should embrace groups, other delegations objected to the inclusion of groups.\(^94\) The final version of the Van Boven/Bassiouni Principles is less than clear on the issue. Principle 8 refers to ‘persons’, who may have individually or collectively suffered harm. This suggests that collective harm does not make a group a victim rather than a collection of individuals. Preambular paragraph 9 notes that contemporary forms of victimisation may be directed against ‘groups of persons who are targeted collectively’.

The ambiguity in The Principles on collective rights is not surprising given the fact that States have not been able to agree on this point for many years in other fora.

10. FORMS OF REPARATION

The ILC’s 2001 Articles on State Responsibility authoritatively set out the legal consequences of inter-State responsibility.\(^95\) They provide that a responsible State is under the obligation to cease an internationally wrongful act if it is continuing; to offer appropriate assurances and guarantees of non-repetition if circumstances so require; and to make full reparation for the injury caused. Reparation takes the form of restitution, compensation and/or satisfaction. Human rights treaties contain provisions on legal consequences of responsibility for human rights violations. Article 41 of the European Convention on Human Rights provides for the possibility for the European Court of Human Rights to afford ‘just satisfaction’ to the injured party if the internal law of the State party allows only partial reparation to be made. Article 63 of the American Convention on Human Rights provides that if the Inter-American Court finds that there has been a violation of a right or freedom protected by the Convention, the Court shall rule, if appropriate, that the consequences of violation be remedied and that fair compensation shall be paid to the injured party. In applying these provisions human rights monitoring bodies state that the provisions and the manner


in which they are applied reflect general principles of State responsibility. They appear to assume that the principles and rules of inter-State responsibility may be applied mutatis mutandis in the legal relationship between a State and an individual.\(^96\) The Inter-American Court of Human Rights stated in its judgement in the Suárez Rosero Case that the obligation to make reparations established by international courts 'is governed, as has been universally accepted, by international law in all its aspects: scope, nature, forms, and the determination of beneficiaries.'\(^97\) The ILC considers that the rules and principles on reparation developed by human rights bodies can be seen as manifestations of the general principle of reparation.\(^98\) These bodies have developed extensive case-law on legal consequences of conventional human rights obligations.\(^99\) The richest case-law in this respect is that of the Inter-American Court of Human Rights.\(^100\)

The ILC's articles and human rights monitoring bodies' case-law were important sources of guidance in the formulation of Section XI (Reparation for harm suffered) of the Van Boven/Bassiouni Principles.\(^101\) The Principles distinguish between restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as forms of reparation. This system is different from that in the ILC Articles. First, the ILC does not consider guarantees of non-repetition as a form of reparation, but as a separate legal consequence of responsibility. In contrast to reparation, guarantees of non-repetition are future-oriented and have a preventive rather than a remedial function. The same applies to cessation, which is presented as a form of satisfaction in the Van Boven/Bassiouni Principles. Secondly, the Van Boven/Bassiouni Principles present rehabilitation as a species of reparation. The ILC articles do not mention rehabilitation. Rehabilitation has been defined as 'the process of restoring the individual's full

---


\(^{98}\) Supra (note 69), at 247, para. 6.


health and reputation after the trauma of a serious attack on one's physical or mental integrity'. The concept appears to be covered by the legal consequence of restitution as included in the ILC articles.

The descriptions in the Bassiouni/Van Boven Principles of different forms of reparation appear to reflect the extensive body of case law of human rights monitoring bodies. It is outside the scope of this article to discuss all the forms of reparation mentioned in The Principles, but a few may be noted. The Principles recognise 'verification of the facts and full and public disclosure of the truth' as a form of satisfaction. This obligation has been especially prominent in the case-law of the Inter-American Court of Human Rights. The obligation was first set out by the Court in the Velásquez-Rodríguez Case, and has been a constant part of case-law since. In both human rights law and IHL the right of the relatives of the victim to know what happened is part of the primary obligation to respect, but this does not preclude it from also being a secondary obligation that arises when the primary obligation has been breached.

The Principles refer to 'moral damages as a form of economically assessable damage for which compensation must be provided[']. 'Moral damages' have been defined as 'compensation for dignitary violations, including fear, humiliation, mental distress'. The award of compensation for moral damages is well-known in the European human rights system. In this system, moral damages have been awarded for anxiety, distress, isolation, confusion and neglect, abandonment, feelings of injustice, impaired way of life, harassment and humiliation and other suffering. The Inter-American Court has also awarded 'non-pecuniary' or moral damages. In its judgement on reparations in the Bámaca Velásquez Case the Court stated that:

Non pecuniary damages can include the suffering and affliction caused to the direct victims and their relatives, detriment to values that are very significant for individuals, as well as non-monetary alterations in the conditions of existence of the victim or the victim's family. As it is not possible to assign a precise monetary equivalent to non-pecuniary

106 Shelton, op. cit. (note 102) p. 292.
damages, for purposes of integral reparation to the victims all that can be done is for them to receive compensation\textsuperscript{108}

Until the last stages of the drafting of The Principles they included 'harm to reputation or dignity' as compensable damage, but not moral damages as such. During the consultative meetings the suggestion was made to refer to moral damage.\textsuperscript{109} The representative of the European Court of Human Rights placed this concept in the context of European jurisprudence,\textsuperscript{110} although as was discussed above it is also familiar to other human rights systems. It appears that in the 5 August 2004 version of The Principles the words 'moral damage, including' were inserted before 'harm to reputation or dignity'. Later the reference to 'harm to reputation or dignity' was deleted.

It is important that The Principles with respect to reparation are not worded exhaustively. They leave room for forms of reparation that are not mentioned but that might be appropriate in a concrete case. It is also noteworthy that The Principles do not establish a hierarchy of forms of reparation, unlike the ILC Articles on State Responsibility. This reflects the victim-oriented perspective of The Principles.

It is unfortunate that Principle 18 provides that victims of gross violations of human rights law and serious violations of IHL should be provided with full and effective reparation 'in accordance with domestic law'. The reference to domestic law is correct in so far as reparation will normally be accomplished through the application of domestic law. The reference however implies that the obligation to provide reparation is subject to internal law. This could generate the impression that reparation is more a matter of charity towards victims and survivors than a legal imperative.\textsuperscript{111} This implication is not in accordance with the principle of international law that a State may not invoke its internal law to justify the non-performance of an international obligation. The ILC draft Articles on State Responsibility include a provision that applies this principle specifically to the obligations of cessation, guarantees of non-repetition and reparation as a consequence of an internationally wrongful act.\textsuperscript{112}

\textsuperscript{110} UN Doc. E/CN/2003/63, supra (note 15), at 35, para. 145.
\textsuperscript{111} Shelton, op. cit. (note 102) p. 148.
\textsuperscript{112} Article 32.
11. CONCLUSION

The Van Boven/Bassiouni Principles are undoubtedly one of the longest projects of the Commission on Human Rights. Their adoption by the Commission, and the General Assembly, after more than 15 years of drafting and negotiations should be welcomed. Not because The Principles are above criticism, because they are not. Although it is emphasised in the preamble to The Principles that they do not entail new international or domestic legal obligations, in some respects they appear to go beyond existing law. In other respects The Principles appear conservative. For example, Principle 18 that provides that victims of gross violations of international human rights law and serious violations of IHL should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, appears to restate existing law and could have used ‘shall’.113

On a number of questions The Principles are ambiguous and clearly the result of compromises made in negotiations. For example, The Principles refer to a collective dimension of a remedy in the definition of victim and in Principle 13, which provides that States should endeavor to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate. This collective dimension is not elaborated, however, even though it raised many questions during negotiations.

The principal merit of the Van Boven/Bassiouni Principles is not that they perfectly reflect existing law, but that they structure the material. A broad corpus of law on the subject of reparations exists. However, the abundant jurisprudence and international norms are very dispersed. International instruments approach reparations and the right to an effective remedy from the specific position of the rights they are designed to protect. International human rights monitoring bodies have created a body of case-law on remedies that is often to some extent specific to one particular region. National laws, judgements and reparation schemes also have their specificities. The result is a multiplicity of standards, principles and interpretations that may lead to confusion on norms and principles concerning remedies. The Van Boven/Bassiouni Principles attempt to bring together the standards and principles that have been developed in various quarters and structure them. They seek to rationalise through a consistent approach the means and methods by which victims’ rights can be addressed, so as to maximise positive outcomes and minimise the diversity of approaches that may cause uneven implementation.114

In this way the document can provide guidance to States when they are considering remedies, be it in a new international instrument or in a national reparation scheme. It also provides guidance to human rights monitoring bodies. This is illustrated by the

113 Shelton, op.cit., p. 147.
fact that the Inter-American Court has referred several times to the draft Principles in its judgements on reparations.¹¹⁵

The Van Boven/Bassiouni Principles also have programmatic merit because they take the victim as their point of departure. For a long time the perspective of the victim has not received the attention it deserves in human rights law and IHL. The adoption of the Van Boven/Bassiouni Principles, following the provisions in the Statute and RPE of the ICC on victims, marks an important step forward in this respect.