

Statement of eminent jurists on legal obligations when supporting reconstruction in Syria

For the attention of: UN Secretary-General Guterres, EU High Representative Mogherini, World Bank President Yong Kim and Foreign Ministers of donor countries,

As respected experts of international law, we write to emphasize the need to ensure reconstruction efforts in Syria abide by existing international law obligations. Without adherence to these standards, the provision of reconstruction assistance can facilitate past, continuous, or new violations of international law, which would in turn give rise to complicity or shared international responsibility. Those engaged in such assistance may incur a legal obligation to provide remedies and reparations to those harmed.

Together with UN Security Council Resolution 1325, Resolution 2254 establishes a path for peace, and conditions for Syria and for the international community's engagement with reconstruction efforts. Amongst the criteria in Resolution 2254 are constitutional reforms, a political transition, free and fair elections, and other 'confidence building measures' that will contribute to lasting peace and a viable political process. Necessary confidence-building measures in Syria include legal, political, and institutional reforms, the documentation of past crimes, the establishment of safe and sustainable conditions for the voluntary return of refugees and internally displaced persons (IDPs), the restitution of confiscated property, and accountability for past violations of international human rights (IHRL), humanitarian (IHL) and criminal (ICL) law.

These confidence-building measures are not only necessary for peace. They are also international legal obligations. While always incumbent upon Syria, the obligations most pertinent to the reconstruction process – which we have distilled here into 10 principles – have implications for, and often extend obligations to, other actors involved in the reconstruction process. The obligations underlying these principles have been developed during and in response to periods of intense strife. They represent not constraints but lessons learned about the preconditions necessary for, and the legal standards that underpin, true long-term peace and security. They are minimum, and non-exhaustive, obligations.

Reconstruction assistance for Syria must abide by and be conditioned upon these 10 principles.

10 Principles for Reconstruction in Syria Reflecting International Human Rights, Humanitarian, and Criminal Law Obligations

1. Financial or practical assistance, and the conditions attached to or associated with such assistance, must not undermine human rights protection.
2. Donors, funders, and partners need to ensure that they do not facilitate or entrench sectarian, ethnic, or religious cleansing within Syria.
3. The whereabouts of missing and disappeared persons must be investigated, documented, and disclosed.
4. Relevant parties must engage in human rights due diligence before each new reconstruction project to ensure they are not complicit in past, continuous, or new violations of international law.
5. Preventative policies and practices must be adopted and implemented to combat corruption.
6. Security and justice sector reforms are required.

7. Voluntary repatriation and the return of refugees and IDPs can be facilitated provided it can be done safely and sustainably, with clear information, after consultation, and with the consent of those displaced.
8. Violations of international criminal law and criminal breaches of international human rights and humanitarian law must be credibly and effectively investigated, prosecuted, and adequately punished.
9. Victims must have access to prompt, adequate, effective, and independent remedies capable of awarding appropriate and integral reparations.
10. Throughout the reconstruction process, particular attention must be paid to gendered and intersectional harms.

Consequences of a breach

Many of these principles relate to continuous violations of IHRL, IHL, and ICL. Financial or practical assistance that facilitates past, continuous, or new violations of IHRL, IHL, and/or ICL breaches can meet legal definitions of complicity.

States and international organizations that support past, continuous, or new violations may incur an international obligation to provide remedies and reparations to those harmed.

Individuals and businesses that fail to abide by these standards may be held accountable either through civil claims or through criminal prosecution.

Further explanations and support

We elaborate the principles in the attached 'Commentary on the Principles,' and are ready and willing to support efforts in operationalizing these principles.

Sincerely yours,

1. **Nadia Bernaz**, Associate Professor of Law, Wageningen University, the Netherlands
2. **Michael Bothe**, Professor Emeritus of Public Law, J.W. Goethe University Frankfurt/Main
3. **Christine Chinkin**, Emerita Professor of International Law, London School of Economics and Political Science; Director, Centre on Women, Peace and Security at London School of Economics and Political Science
4. **John Dugard SC**, former UN Special Rapporteur on human rights in Occupied Palestine
5. **Jared Genser**, Adjunct Professor of Law, Georgetown University Law Center
6. **Pablo de Greiff**, Senior Fellow and Director, Transitional Justice Program, School of Law New York University; former UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence
7. **Geoff Gilbert**, Professor of Law, University of Essex School of Law and Human Rights Centre
8. **Nicola Jägers**, Professor of Law, Tilburg University
9. **Wayne Jordash QC**, Managing Partner, Global Rights Compliance
10. **Sabine Michalowski**, Professor of Law, University of Essex School of Law and Human Rights Centre
11. **Justice Charles Mkandawire**, President of the Commonwealth Magistrates and Judges Association
12. **Sir Geoffrey Nice QC**, Professor of Law, Gresham College
13. **Stanley Nyamanhindi**, Chief Executive Officer, SADC Lawyer's Association

14. **Navi Pillay**, President, International Commission Against the Death Penalty; former UN High Commissioner for Human Rights (2008-2014), Office of the United Nations High Commissioner for Human Rights
15. **Nelson Camilo Sánchez**, Assistant Professor of Law, University of Virginia School of Law
16. **Stephen Rapp**, Fellow, Center for Prevention of Genocide at the U.S. Holocaust Museum; former US Ambassador-at-Large, Global Criminal Justice (2009-2015)
17. **Naomi Roht-Arriaza**, Distinguished Professor of Law, University of California, Hastings College of the Law
18. **Clara Sandoval**, Deputy Director, Essex Transitional Justice Network (ETJN); Professor, School of Law and Human Rights Centre at the University of Essex
19. **Ben Saul**, Challis Chair of International Law, University of Sydney; Associate Fellow, Royal Institute of International Affairs, London
20. **Carsten Stahn**, Professor of International Criminal Law and Global Justice, Universiteit Leiden; Programme Director, Grotius Centre for International Studies
21. **David Tolbert**, Ford Foundation Fellow, Duke University; former President, International Center for Transitional Justice
22. **Arnold Tsunga**, Member, Africa Judges and Jurists Forum (AJJF) and Pan-Africa Lawyers Union (PALU)
23. **Rodrigo Uprimny**, Professor Emeritus, Department of Law at the National University Colombia
24. **Tara Van Ho**, Lecturer, University of Essex School of Law and Human Rights Centre
25. **Jens Vedsted-Hansen**, Professor of Law, Aarhus University

[Affiliations for identification purposes only].

Commentary on the Principles

These principles represent existing international obligations.

These principles represent the minimum, non-exhaustive, obligations that attach to reconstruction and reconstruction assistance. Engagement with reconstruction should be conditioned upon the realization of, at a minimum, all 10 principles.

Security Council resolutions must be respected.

The path to peace, set out in UN Security Council Resolution 2254, calls for a political process to co-exist with and act in parallel to a ceasefire. This process is intended to secure ‘credible, inclusive, and non-sectarian governance’ that will secure a lasting, peaceful solution to the conflict. This durable solution is a necessary precondition to securing all other rights and obligations. Without extensive institutional, political, social, cultural, and economic reforms and an inclusive governance structure, Syria is unlikely to be able to fulfil the other obligations outlined here. UNSCR 2254 identifies benchmarks upon which reconstruction assistance should be conditioned, including a political transition process (Operational Paragraph 2), constitutional reforms, free and fair elections (OP4), and other ‘confidence building measures to contribute to the viability of a political process and a lasting ceasefire’ (OP10). Additionally, states should remember that under Security Council Resolution 1325 women should be consulted and included in any reconstruction process, and specific attention should be paid to gendered harms.

The conditions in these Security Council resolutions are in addition to, and do not supplant or displace, the obligations outlined in the 10 Principles for Reconstruction in Syria.

While always incumbent upon Syria, the obligations most pertinent to the reconstruction process – which we have distilled here into 10 principles – have implications for, and often extend obligations to, other actors involved in the reconstruction process.

All the obligations we outline apply to Syria. Most also require donor states, international and multilateral organizations, and businesses to refrain from supporting reconstruction assistance that would breach these obligations. Where reconstruction assistance would constitute complicity in past, continuous, or new breaches of IHRL, IHL, and/or ICL, assistance must be avoided. Similarly, some of the obligations here are owed by all states at all times. Throughout this Commentary, we indicate when there are specific obligations owed by specific actors, but any reconstruction efforts or assistance that breaches these principles should be avoided.

States create international law, but in doing so they also create obligations for other international subjects. International organizations have a distinct legal personality from their Member States, but the organizations are bound by IHRL and IHL standards. States cannot do collectively what they are prohibited from doing separately. The purpose of an international organization is to develop, advance, and accomplish particular collective goals; states create these organizations to accomplish together what an individual state cannot accomplish alone. Consequently, international organizations must abide by the same obligations owed by their Member States.

Under international law, businesses are also expected to respect human rights and therefore to meet the principles outlined here. The role of businesses in reconstruction efforts raises particular obligations and responsibilities for home states. Home states should ensure their nationals, including businesses, do not breach IHRL, IHL, or ICL obligations when operating in Syria. The commission of criminal breaches of international law by nationals – including business leaders and, where domestic law allows, businesses – must be prosecuted. All breaches should be remedied. Given the conflict-affected nature of Syria, the UN Guiding Principles on Business and Human Rights recognize that home states should also provide assistance to their business nationals to ensure the latter understand their responsibilities and the risks of doing business in Syria. This should include training and other outreach efforts

aimed at ensuring businesses undertake appropriate due diligence and establish or engage with independent operational grievance mechanisms that operate in line with the UN Guiding Principles on Business and Human Rights. States should also consider new legislation mandating due diligence in Syria and other conflict-affected areas, requiring businesses to report on their processes and procedures, and establishing accessible remedial mechanisms for those impacted by business operations in Syria. In this regard, we wish to draw attention to and praise France's efforts to hold their business nationals accountable for participation in international crimes in Syria. This demonstrates the type of leadership and commitment expected of all states.

PRINCIPLES

1. Financial or practical assistance, and the conditions attached to or associated with such assistance, must not undermine human rights protection.

The basic tenet of IHRL is that states must respect, protect, and fulfil human rights. While the obligations to protect and fulfil human rights are often (although not always) obligations of effort, the obligation to respect human rights is one of outcome. The failure to respect a human right by a state entails international responsibility.

The obligation to respect human rights is also owed by international and multilateral organizations and businesses. International and multilateral organizations may incur international responsibility for their support of activities that fail to respect human rights. Businesses that fail to respect human rights should be held accountable through civil or criminal processes in Syria and/or their home states.

Those entities that provide financial and practical assistance should condition their support upon specific commitments to implement relevant IHRL standards, and must withdraw their support if during the course of their operations they know or have reason to believe their efforts are negatively impacting or undermining the realization of human rights. New economic agreements and legislation upon which loans are conditioned – which often include trade or investment reforms and new bilateral trade and investment agreements – must include clauses that protect and require respect for human rights by all economic actors.

2. Donors, funders, and partners need to ensure that they do not facilitate or entrench sectarian, ethnic, or religious cleansing within Syria.

Those engaged in reconstruction assistance should be aware of the impact reconstruction can have on the rights to housing and an adequate standard of living, amongst other rights. Syria has an international obligation to ensure access to adequate and appropriate housing and property on a non-discriminatory basis. The realization of the right to housing is intimately related to the realization of other adequate conditions of living that Syria is bound to respect, protect, and fulfil on a non-discriminatory basis, including access to clean, affordable, and adequate water, health care, and education. These obligations exist regardless of the cause of displacement and Syria has a responsibility to ensure that all individuals who have been displaced are able to access adequate and affordable housing on a non-discriminatory basis regardless of any previous legal tenure. It is only through the satisfaction of these IHRL obligations that Syria can hope to re-establish anything resembling the pluralistic, tolerant, and safe society it once enjoyed.

Continued forced displacement is often the result of on-going IHRL, IHL, and/or ICL breaches. Where forced displacement has resulted in discriminatory or arbitrary property transfers or confiscation, the transfer or confiscation must be voided as a first and most basic means of reparation. Any reconstruction effort that takes advantage of such discriminatory or arbitrary property transfers or confiscations, or that leaves such transfers or confiscations in place, has the potential to entrench, institutionalize, and embed continuous criminal breaches of IHRL and/or IHL. Additionally, where mass displacement has been accompanied by discriminatory or arbitrary property transfers or confiscation, new reconstruction efforts risk exacerbating sectarian, ethnic, and/or religious divisions, and may constitute the commission of a new crime against humanity.

We feel it is necessary to draw attention to Syrian Law No. 10 of 2018, which has the potential to turn the process of reconstruction into a form of ethnic cleansing. This law appears to entrench breaches of IHRL and IHL, and to disproportionately harm those already rendered vulnerable by the conflict. Of particular concern are:

- (1) the requirement in the law that property owners submit documentation to local authorities within 30 days of an area being designated for redevelopment;
- (2) the lack of compensation for those owners affected; and
- (3) the lack of due process for those harmed by the law.

Given the large number of displaced and disappeared persons, the sectarian nature of the violence, and the known destruction of property registries, the requirements in the law are unrealistic and are likely to violate the right to housing for those individuals, and their families, who have been displaced or disappeared or who are residing in conflict-affected areas. This can have the additional effect of undermining the right of return as a means of reparation for refugees, IDPs, and other asylum seekers. The lack of due process and the procedures associated with the law give rise to the potential for false and discriminatory transfers of property without a means by which to challenge the transfers.

The broad nature of the law, and the historic use of similar decrees, raises grave concerns about the compatibility of Law No. 10 with IHRL and IHL guarantees. Given the gravity of concerns, states, international and multilateral organizations, and businesses have an obligation to ensure that they do not fund or facilitate reconstruction projects that rely on property registrations resulting from Law No. 10, or that use Law No. 10 in a way that furthers ethnic, religious, political, or gender-based discrimination or ethnic cleansing.

3. The whereabouts of missing and disappeared persons must be investigated, documented, and disclosed.

Enforced disappearance represents a continuous criminal breach of human rights and has been recognized as a form of torture for the family of those disappeared. In order to stop these continuous violations, a process of investigating, documenting, and disclosing the whereabouts of missing and disappeared persons is needed. The current political and social conditions indicate that this process would best be carried out by an international commission rather than by the Syrian government. Families should be informed on the whereabouts of their loved ones, or, in an on-going manner, on the process of locating their family members. Where an investigation indicates that the missing person has, in fact, been killed, this must be appropriately communicated to the family and the remains should be returned to the family in accordance with their wishes.

The widespread nature of enforced disappearances in Syria represents a particular problem for post-conflict reconstruction. As noted above, the demands of Law No. 10 of 2018 place an unreasonable burden on those who have been disappeared and their families. It appears that enforced disappearances have been used to dispossess individuals of property and potentially to ensure ethnic, religious, or sectarian cleansing. The failure to identify, document, and disclose those who have been disappeared and their current whereabouts throws into question the validity of subsequent uses of property. The use of property for reconstruction in a manner that utilizes, institutionalizes, or embeds the harm caused by an enforced disappearance will create new breaches of international law and complicate necessary reparations efforts.

Given the widespread nature of the disappearances, and the potential harm caused to family members by the absence of an official finding of death in legal areas such as property restitution and inheritance, Syria should adopt a law addressing the status of disappeared persons and conferring rights on their surviving relatives.

4. Relevant parties must engage in human rights due diligence before each new reconstruction project to ensure they are not complicit in past, continuous, or new violations of international law.

As noted above, in the Commentary to Principles 2 and 3, there is a significant risk that the conflict facilitated property confiscation and transfers in breach of IHRL, IHL, and ICL. New reconstruction projects that would embed and institutionalize these continuous violations can constitute complicity. To ensure their respect for human rights – in line with Principle 1 – all relevant parties must engage in human rights due diligence. This standard applies to

any party, public or private, that is providing financing, personnel, or practical assistance, including through their supply chains or subsidiary businesses, to reconstruction efforts in Syria.

Human rights due diligence must include an effective consultation with those affected, adequate reparations to those whose rights are harmed by the project, and a process for those affected to challenge the decision. This should be a robust and on-going process aimed at identifying and mitigating human rights impacts. Human rights due diligence must include, at a minimum:

- the development and disclosure of standards by which the project will be assessed for its compliance with human rights;
- the establishment of an independent, transparent, and trusted process by which individuals can raise claims and concerns, and seek reparations when harmed;
- the documentation and examination of property rights and claims;
- the collection of data about human rights harms associated with the property to date and those that would arise as a result of the proposed use for the property; and
- consultation and collaboration with affected individuals, communities, and other stakeholders on both the harms expected and the appropriate means of mitigating those harms.

Throughout the process, particular attention should be paid to impacts on women and groups in situations of vulnerability, including children, the elderly, ethnic and religious minorities, and persons with disabilities.

Where a project would cause, exacerbate, or entrench the results of international crimes or discrimination, it cannot be undertaken. In other instances, efforts to mitigate the harm may be used where necessary because the project furthers a legitimate public interest and those harmed by the project are afforded due process with adequate and effective reparations.

5. Preventative policies and practices must be adopted and implemented to combat corruption.

Corruption undermines human rights and development. States parties to the UN Convention against Corruption have specific obligations to combat corruption. States, international, and multilateral institutions should adopt preventative policies and practices. Donor states, international and multilateral institutions, and businesses should adopt policies of transparency for all funds to Syria. States should regulate their corporate nationals operating in Syria, and investigate and where appropriate prosecute and punish, instances of corruption, including by their businesses or business leaders.

6. Security and justice sector reforms are required.

The realization of peace and security, and the protection, enforcement, and fulfilment of IHRL, is dependent on a security and justice sector that is respected and trusted by the population it is intended to serve. Reforms within the security and justice sectors are important for ensuring peace and stability within neighbourhoods affected by violence and to secure the conditions necessary for the repatriation and return of refugees and IDPs. Without trust in the security and justice apparatuses, individuals and groups will seek their own understandings of justice and reparations. This has the potential to undermine short- and long-term reconstruction efforts. To establish trust, reforms are needed, including new policies and trainings for the police, military, and other relevant institutions in an effort to ensure the cessation of on-going violations of IHRL, IHL, and ICL, and to prevent the reoccurrence of documented abuses.

Finally, individuals who are accused of orchestrating or enforcing widespread or systematic breaches of IHRL, IHL, and/or ICL must be removed from the military, the police, and other security and justice institutions, at least until a thorough investigation (and where appropriate prosecution and punishment) is undertaken by individuals, a commission, or a tribunal whose independence and trustworthiness is unimpeached by their role in the conflict. This should not, however, lead to mass vetting based on ethnic, religious, or political affiliation.

7. Voluntary repatriation and the return of refugees and IDPs can be facilitated provided it can be done safely and sustainably, with clear information, after consultation, and with the consent of those displaced.

Given the difficulties faced by refugees, IDPs, and by some host countries, voluntary repatriation options that offer full guarantees and that comply fully with international standards should be sought and supported. This cannot be done, however, without adequate protections to ensure refugees and IDPs are not placed in a position of new or renewed persecution or on-going IHRL violations. Given the current status in Syria, forced repatriation is likely to give rise to complicity in torture, triggering both the state's responsibility to provide remedies and reparations, as well as individual criminal responsibility for complicity in torture. Repatriation should therefore only be facilitated after the preconditions for a sustainable and safe return have been undertaken, including clear respect for human rights and the rule of law. Additionally, those who have been displaced must be consulted, given clear and accurate information, and consent to being returned.

Cessation of refugee status can only be authorised with UNHCR's approval if there is a fundamental change in circumstances in Syria, which we have not yet seen, and should only be done when the conditions allow for sustainable and safe return in dignity.

The law must ensure that no one is rendered stateless as a consequence of displacement or birth abroad during displacement. This must be guaranteed on a non-discriminatory basis. In regard to those born abroad during displacement, this guarantee must be afforded regardless of the gender of the displaced parent and guaranteed on a non-discriminatory basis.

8. Violations of international criminal law and criminal breaches of international human rights and humanitarian law must be credibly and effectively investigated, prosecuted, and adequately punished.

The obligation to investigate, prosecute, and punish international crimes and criminal breaches of IHRL and IHL is simultaneously owed by all states. This obligation attaches to, at least, instances of war crimes, crimes against humanity, torture, enforced disappearance, and genocide. The exceptional recognition of universal jurisdiction for these crimes underscores the gravity of the crimes committed and the importance of fulfilling this obligation.

We would be remiss if we did not draw attention to two particular crimes that were prevalent during the Syrian conflict and that we are concerned may go unprosecuted or under-prosecuted: attacks on humanitarian aid workers and journalists as war crimes; and sexual and gender-based violence as a war crime and, in some instances, crimes against humanity and/or genocide.

First, particular attention should be paid to attacks on humanitarian aid workers and journalists as war crimes. The work humanitarian aid workers undertake is necessary and facilitates the realization of other protections provided in IHL. Targeting humanitarian aid workers is prohibited. Similarly, journalists retain their status as civilians; their work does not make them legitimate military targets, and targeting them is prohibited. Targeting these protected persons is a war crime. There are serious and repeated allegations that both state and non-state actors have targeted humanitarian aid workers and journalists. These allegations must be investigated, and where appropriate, prosecuted and punished.

Second, instances of sexual and gender-based violence must be investigated as forms of torture or cruel, inhuman or degrading treatment or punishment. In armed conflicts, torture and inhuman treatment are war crimes regardless of whom they are perpetrated against. Rape and other forms of sexual and gender-based violence can also be means of perpetrating crimes against humanity and genocide. There are widespread allegations of the use of rape and other sexual or gender-based violence by state and non-state actors. Some of these allegations indicate the use of rape as a form of genocide. Any credible attempt to investigate, prosecute, and punish international crimes must include a focus on sexual and gender-based violence.

9. Victims must have access to prompt, adequate, effective, and independent remedies capable of awarding appropriate and integral reparations.

Victims of gross IHRL violations or serious violations of IHL are owed adequate reparations under international law. Reparations, according to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, include restitution, rehabilitation, compensation, satisfaction, and guarantees of non-recurrence. Given the large number of potential victims in a context such as Syria, provisions should be made through a systematic approach capable of providing complex and appropriate reparations expeditiously and without burdening or re-traumatizing victims.

Victims cannot be returned to a place of on-going violations or to the *status quo ante* if that would return them to a situation where they would continue to suffer IHRL, IHL, or ICL violations. Comprehensive guarantees of non-recurrence are necessary. Such guarantees form part of an integral reparations plan and should be aimed at responding to the underlying political, social, cultural, and economic causes of the conflict and the resulting breaches of IHRL, IHL, and ICL. Reparations can be designed in ways that further sustainable development – beyond their potential to assist in reconciliation and social reparation – and that can facilitate innovative approaches to reconstruction.

Other reconstruction needs cannot be used to displace obligations towards victims.

10. Throughout the reconstruction process, particular attention must be paid to gendered and intersectional harms.

Violations that appear to be indiscriminate will often have specifically gendered impacts that require responses aimed at these harms while addressing existing structural inequalities. Gendered harms can be exacerbated by issues of intersectionality when women and girls are members of other minority groups or groups in situations of vulnerability.

Gendered impacts may be most clearly evident in regard to violations related to torture or cruel, inhuman, and degrading treatment or punishment (see Commentary to Principle 8, above). However, there are often less evident gendered impacts that arise in post-conflict reconstruction and re-development. For example, the location of new reconstruction projects may impact women and girls' security or property rights in a way not experienced by their male counterparts. Additionally, the failure to locate missing and disappeared male relatives is likely to impact property rights and security for women and girls. This can undermine women's ability to participate in the peace process and ultimately lead to a failure to realise the standards in Security Council Resolution 1325.

Attention must be paid throughout the reconstruction process, and in each new project or initiative, to the potential for gendered-based and intersectional harms. Women from diverse backgrounds should be involved in the planning of new reconstruction processes and should be consulted throughout the process so that gendered and intersectional harms can be identified. Where such impacts are identified, there is an obligation to mitigate and remediate the harm.

Consequences of a breach

Financial or practical assistance that facilitates on-going IHRL, IHL, and ICL breaches can meet the legal definition of complicity. States that support past, continuous, or new violations may incur shared international responsibility for those violations, and incur an obligation to provide remedies and reparations to those harmed.

Individuals and businesses that fail to abide by these standards may be complicit in international crimes, and held accountable either through civil claims by those harmed or through criminal prosecution. As noted above, home states have an obligation to investigate, and where appropriate, prosecute and punish their nationals who are involved in, directly or through complicity, corruption or criminal violations of IHRL, IHL, and ICL. This obligation includes effectively investigating, and where appropriate prosecuting and adequately punishing, business leaders. Where domestic law allows, this should be extended to businesses and other juridical persons. Additionally, home states should make remedial processes and reparations available for victims through civil claims.

