

Overcoming legal challenges to access justice and to obtain reparation for human rights violations



Nieves Molina Clemente, Guest Editor

The volume that we are presenting compiles the opinions of several of the most renowned practitioners and academics in the field of human rights.

It is a matter of common knowledge that there exists treaties and international instruments which provide adequate reparation for individuals suffering injury from unlawful conduct of the state. The adoption by the United Nations General Assembly of the “Basic Principles and Guidelines on the right to a remedy and reparation for victims of the gross violations of international human rights law and serious violations of international humanitarian law” in 2005 without a vote, confirms the wide acknowledgement of the right to reparation. Unfortunately, however, the use of torture and other forms of ill-treatment is still prevalent and victims and survivors are still ignored and marginalised in many national jurisdictions.

The Basic Principles systematise already existing obligations and compile forms of substantive reparation such as compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. In cases involving human rights violations, the claimant is normally an individual or a group of individuals and the defendant is always the state. Although there are plenty of examples of states acknowledging wrongdoing and grant-

ing reparations to the claimant, more often victims and survivors only possibility would be to litigate their cases in criminal or civil actions. Furthermore, even in those cases where the state acknowledges the wrongdoing, there will be long negotiations to agree on the substance and form of the reparations. In addition, victims and survivors will face challenges in obtaining the enforcement of the resolution, and even in determining the form that this enforcement will take. The latter is especially relevant regarding the right to health rehabilitation. International courts have granted medical and psychological therapies as rehabilitation for survivors of torture and ill-treatment,¹ but there is passionate discussion on the obligation of states to guarantee such rehabilitation. While survivors would claim that the states have the obligation to pay for these therapies provided by experts of their choice, the states would maintain that their obligation is rather to establish the mechanisms to provide such therapies. Although states might be right in their claims, the mistrust that survivors feel for states and state mechanisms should not be disregarded.

1) See for example *Gutierrez Soler vs. Colombia* of the Interamerican Court for Human Rights (12 September 2005).

Realising that victims and survivors have a long process which involves legal challenges, litigation and extremely hard procedures in order to obtain acknowledgement, we conceived this special volume of torture. Here, the authors analyse different aspects which victims and survivors may encounter in their struggle to access justice, prove their cases against the perpetrators and obtain reparations:

Manfred Nowak has written on the difference between torture and inhuman and degrading treatment. This distinction has suddenly become relevant in the aftermath of September 11 and in the context of counter-terrorism measures in which a number of scholars have attempted to narrow the definition of torture, while at the same time maintaining that there is no absolute prohibition against inhuman and degrading treatment. Professor Novak successfully contributes to a clarification of the distinction.

Gabriela Echevarria looks into the right to reparation and the enforcement of reparation decisions. Although there might still be discussion on the context of the right to reparation, there is no doubt about its recognition in international legal instruments. Unfortunately, however, devising the enforcement mechanisms of the decisions has not received enough attention by human rights court mechanisms or even advocates. The political will to enforce decisions on reparation needs to exist. In addition, other factors should be taken into consideration, especially regarding the different forms of reparations that might be awarded, as enforcement might require the involvement of several organs of the state. Enforcement considerations should be taken into consideration by human rights mechanisms awarding reparations and by lawyers in their litigation strategies.

Carla Ferstman analyses the Convention on States Immunity that protects states or their agents against civil law suits for serious human rights abuses. The case of *House of Lords vs. Saudi Arabia* involves four British citizens who “were at the wrong place at the wrong time” in Saudi Arabia. They were detained and tortured by the Secret Service police. Although international instruments such as the UN Convention on Torture imposes obligations to investigate and provide reparation to survivors of torture, Saudi Arabia has failed to investigate the case and to provide any redress to the British citizens. The House of Lords rejected their claim that the United Kingdom, under the principle of universal jurisdiction, would have the obligation to seize Saudi Arabia properties in the U.K. to satisfy civil proceedings against this country.

Daniela Baro analyses the human rights perspective of children forced to witness the mistreatment of their parent or caregiver in different scenarios. Whether it happens recklessly or intentionally, the practice has proven to have long lasting psychological effects on the children. According to the author, this cruel practice constitutes inhuman and degrading treatment and under certain circumstances it would amount to torture.

Edouard Delaplace and Matt Pollard have contributed an article on the prevention of torture in places of detention. The Optional Protocol, entered into force this year, establishes mechanisms for visits to detention places. The authors analyse circumstances and elements that contribute to the prevention of torture, stressing the importance of “full implementation of international standards in processes of dialogue with NGOs and other international actors”. The authors defend the crucial role that the NGOs are to play in the guidance of such implementation.

Karen Sherlock describes the dilemma faced by NGOs and human right organisations between exposing individual cases to reinforce their advocacy campaigns and the right to privacy and dignity of the survivors. This is of special relevance for rehabilitation centres and programmes where the clause of confidentiality between the health professional and the client may apply, because health professional may also have an obligation to report human rights violations. Issues such as “informed consent” have not always been clear enough, as there may be clients that have difficulties realising the dimension of the publicity that their cases will achieve or the length of time that those records or reports might last. As such, a journal article might be kept on the Internet forever and the entire world will have access to the information provided on it. The author analyses this dilemma against the need to obtain funds and therefore justify projects.

Huyilia Ucpinar and Turkan Baycal analyse the use of the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, known as the Istanbul Protocol, as a tool to prevent torture and impunity. After describing the development process of the Istanbul Protocol, they analyse the impact that the protocol has had in international jurisprudence. Under the old principle, “no mater how delayed, justice should be reparative” the Istanbul Protocol has become a crucial tool for survivors of torture to obtain medical documentation on their physical or mental injuries. These medical reports are essential in any process intending to either bring perpetrators to justice or to claim the responsibility of the state in seeking reparations for state human rights violations.

Hatla Thelle describes the practice of torture and inhuman and degrading treatment

in China as “fairly widespread”. She analyses its roots, providing a very interesting description of a “weak system of justice” along with a tradition of uncontested and coercive bureaucratic power. According to the author, there exists a broad gap between the existing legislation which prohibits the practice of torture and the implementation of such legislation by the law enforcement officers.

I wish to express my gratitude to the contributors who have brought their experiences, their views, and their thoughts to this special issue of Torture. Our hope is that more professionals will join us in our work to prevent the use of torture. An important part of this, we believe, it is to prevent impunity and to provide victims and survivors with their inherent right to a full and adequate reparation. Ulpiano² said that “Justice was the constant and permanent will to give to everyone, that that belongs to them”. International law is on their side; we still need to work for enforcement and the political will to guarantee victims and survivors their rights and entitlements.

2) Iustitia est constans et perpetua voluntas ius suum cuique tribuendi.