

Redressing torture: a genealogy of remedies and enforcement

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Introduction

In national and international society the rights and interests of victims of torture and other serious violations of human rights are still largely overlooked and ignored. Numerous victims continue to suffer in silence. Yet, in recent times the victim's perspective appears to be gaining ground. Notably the United Nations General Assembly adopted in December 2005 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*" (the Basic Principles and Guidelines)".¹ This instrument confirms that, under international law, there is a clear right to a remedy and reparations for victims of gross violations of international human rights law and serious violations of international humanitarian law. The victims' right to redress includes access to an effective procedural remedy and adequate forms of reparations.

Still, access to justice for victims of torture and other gross abuses is difficult in practice. In the majority of cases there are no

effective remedies in the state where the act was committed. These crimes are systematic and/or widespread precisely in the countries where there are no remedies and safeguards in place to prevent and deter violations. On the other hand, there may be no access to international remedial mechanisms, as the state where the act occurred might not have agreed to their jurisdiction. Similarly, procedural bars like state immunity may affect the success of obtaining reparations in foreign courts. But more importantly, even if the applicant successfully obtains a judgment or decision in his/her favour, enforcing it can be as difficult, or even more difficult, than obtaining the reparation award itself.

Interestingly, while the victims' access to justice has been addressed with some degree of success over the course of recent years there has been only limited analysis by the interested legal community relating to how judgments, awards or other decisions won by

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1) On 10 November 2005 the General Assembly adopted without a vote 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" (A/C.3/60/L.24) [Hereinafter "Basic Principles and Guidelines"].

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survivors of torture and other international crimes are then enforced. In practice and legal doctrine, little attention has so far been paid to the position of the applicant who has taken the long road to justice and finally won his/her case. Does he or she see any improvement in his/her position? While acknowledgment of the wrong done by an international court or body might bring some degree of redress and satisfaction, if the reparation measures foreseen are never implemented, can it be said that the applicant obtained reparation beyond the “paper” judgment?

This article looks at the intricate relationship between the right to reparation (the forms of reparation and the remedies available to victims) and the degree of enforcement of reparations decisions. It argues that the concept of reparation foresees enforceable remedies, and therefore, enforceable decisions, but that so far international treaties, courts, human rights bodies, and victim’s advocates have failed to integrate the enforcement aspect of reparation when establishing remedial mechanisms, when enacting reparation decisions, and when devising litigation strategies. While this is to some degree understandable – as progress in obtaining the initial judgments in favour of victims of gross abuses has been very slow and thus efforts have concentrated in overcoming the major barriers impeding access to justice – it

is now clear how necessary it is to also focus attention on the enforcement procedures.

While there are various remedies available to torture victims, such as national and foreign courts, truth and reconciliation commissions, as well as the International Criminal Court,² this article will only focus on the enforcement procedures of international human rights bodies (including regional courts and UN monitoring mechanisms). Despite the obvious import of all available remedies, the legal framework applicable to enforcement differs between domestic judgments and administrative awards – including foreign judgments – and international decisions. As well, states (as opposed to individuals in international criminal proceedings) are responsible to afford reparation and thus present a specific set of issues in regards to the enforcement and implementation of reparation decisions. The purpose of this article is to analyse the types of reparation measures that can be awarded in individual human rights decisions and how they are implemented in practice. The analysis will cover the enforcement framework for material and non-materials awards,³ exploring the enforcement of preliminary/provisional measures, the enforcement of restitution and compensation (monetary awards) and the enforcement of other non-monetary awards such as rehabilitation,⁴ satisfaction and guarantees of non-repetition.

2) On 17 July 1998 the Statute of the International Criminal Court (ICC) was adopted. Perhaps the most significant aspect of the Rome Statute is that it established a permanent body, without the temporal and contextual restrictions that characterized the ad hoc Tribunals. Another important difference, and key element of the Rome Statute, is that the ICC acknowledges the rights of victims to participate in the proceedings as interested parties (not only as witnesses of the crimes), and to seek reparations before the Court [Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9].

3) The different forms of reparation recognised under international law include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. See Annex 1.

4) Rehabilitation (medical/psychological) services may be provided “in kind” or the costs may form part of a monetary award. It is important to distinguish between indemnity paid as way of compensation and money provided for rehabilitation purposes. See supra note 1, Sourcebook on Reparation pg. 18.

The article is divided into three parts. The first part analyses the right to reparation for victims of torture and other international crimes. It examines the legal sources, scope, and content of this right, reviewing then the standards codified by the Basic Principles and Guidelines. In particular, it describes the different forms of reparation and the type and nature of effective procedural remedies. In the second part, the article looks at the implementation of intentional decisions, analysing briefly some common aspects of enforcement of human rights decisions, the different international remedial mechanisms available to torture survivors and their enforcement procedures. Finally the third part outlines some conclusions referring to areas where enforcement of reparation awards/decisions for survivors of torture and other international crimes could be improved.

I. The right to a remedy and reparation

The right to reparation for victims of torture and other human rights/international humanitarian law violations exists under

international law. Reparation is a fundamental principle of general international law. As established by the Permanent Court of International Justice and upheld by international jurisprudence, the breach of an international obligation entails the duty to make reparations.⁵ The International Law Commission reaffirmed this principle in its 53rd Session when it adopted its “Draft Articles on the Responsibility of States for International Wrongful Acts”.⁶ The responsibility of states to provide reparation also applies to international human rights law. This is supported by international human rights treaties and declarative instruments.⁷ Reparation for human rights violations has also been recognised by the International Court of Justice and by an array of international tribunals and human rights bodies.⁸ Similarly, a violation of the norms of international humanitarian law gives rise to a duty to make reparations.⁹

The victims’ right to reparation is largely based on established principles of state responsibility (and the consequent duty of

5) See *Factory at Chorzow*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, no. 17, p. 29 ; *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184 ; *Interpretation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif*, C.I.J., Recueil, 1950, p. 228.

6) See Report of International Law Commission - 53rd session (23 April - 1st June, 1 June and 2nd July - 10 August 2002) Official document of the General Assembly, 56th Session, Addendum No. 10 (A/56/10).

7) At the universal level it is possible to find among others: the Universal Declaration of Human Rights (Art. 8), the International Covenant on Civil and Political Rights (art.2.3 and art 9,5 14.6), the International Convention on the Elimination of All Forms of Racial Discrimination (art 6), the Convention of the Rights of the Child

(art. 39), the Convention against Torture and other Cruel Inhuman and Degrading Treatment, (art.14) and the Rome Statute for an International Criminal Court (art. 75); as well as in several regional instruments, e.g. the European Convention on Human Rights (art 5,5 13 41) the Inter-American Convention on Human Rights (arts 25, 68 and 63,1), the African Charter of Human and Peoples’ Rights (art. 21,2).

8) See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 ICJ ___, 45 I.L.M. 271 (2006); See also ICJ Advisory Opinion on the Wall in Occupied Palestinian Territory, footnote 14 and accompanying text. For international human rights courts see, e.g. ruling of the Inter-American Court of Human Rights on the Velásquez Rodríguez Case. Serial C, No 4 (1989), par. 174 – and *Papamichalopoulos vs. Greece* /(Art. 50) E.C.H.R. Serial A, No 330-B (1995), pg. 36.

states to make reparation) because the right to reparation developed initially in an interstate context. The theory of international remedies originally advanced in this context; focusing on claims and arbitral proceedings mostly as lodged between belligerent states. A state had the right (but not the obligation) to take up the claims of its nationals before an international body. The claims were determined by negotiation, mediation, arbitration, adjudication, and the state maintained full control over them. Although direct injuries to states and injuries to its nationals were considered differently when estimating damages, the reparation was awarded solely to the state as the injured party.¹⁰

After World War II the same standards were applied in human rights proceedings and other reparation mechanisms (like

claims commissions awarding compensation or restitution of property).¹¹ In this context, the standards were further developed to include specific principles to afford adequate redress to individuals (like rehabilitation as a form of reparation and the right to procedural remedies).¹²

The standards on reparation are now being applied in the area of international criminal law,¹³ where victims are not only recognised as a subject of international law with the capacity to claim an injury caused by the breach of an international obligation, but individuals can also be held liable under international law. Similarly, the right to reparation has been recognised for victims of violations of international humanitarian law. The International Court of Justice recently established in its Advisory Opinion on the

9) See ICJ Advisory Opinion on the Wall in Occupied Palestinian Territory, footnote 14. Under international humanitarian law, the Hague Convention regarding the Laws and Customs of Land Warfare (article 3, 1907 Hague Convention IV) includes requirements to pay compensation. Likewise, the four Geneva Conventions of 12 August 1949 contain a provision of liability for grave breaches and the 1977 Additional Protocol I (Art.91) specifically provides for liability to pay compensation. Finally, the Rome Statute of the ICC used the Principles and Guidelines as a reference to the right of victims of crimes under its jurisdiction to obtain reparation (A/CONF.183/C.1/WGPM/L.2/Add.7, 13/07/1998, p. 5, note 5)

10) See *Chorzow Factory Case*, *ibid.*; see also *Lusitania Cases (US v. Germany)*; *Mixed Claims Commission 1923*. The violation that was redressed was not the injury to the individual victim(s), but the violation (and its consequences) of the international duty to respect certain rights of the nationals of that State. If the State was awarded monetary compensation, it would normally then turn the award over to the injured national. For example, the General Claims Commission (Mexico and the United States), constituted in 1923, was mandated to settle claims arising after 4 July 1868 against one government by nationals of the other for losses or damages suffered by

such nationals or their properties and for losses or damages originating from acts of officials or others acting for either government and resulting in injustice. The Treaty of Peace with Germany (Treaty of Versailles) established mixed arbitration tribunals for private claims against Germany [Treaty of Versailles, June 28, 1919, 1 Bevans 43]..

11) Several claims commissions have been established to afford compensation as well as restitution of property. The United Nations Compensation Commission has specifically developed principles relating to compensation (<http://www.unog.ch/uncc>.) Its Governing Council identified six categories of claims comprising four categories of claims of individuals, one for corporations and one for Governments and international organisations, which also includes claims for environmental damage. See also *Bosnia and Herzegovina's Commission for Real Property Claims of Displaced Persons and Refugees (CRPC)*.

12) For a discussion of the development of human rights law and the right to a remedy, see Dinah Shelton, *Remedies In International Human Rights Law* pp. 143-152 (Oxford University Press, 2nd ed. 2005).

13) See Rome Statue of the International Criminal Court, UN Doc A/CONF.183/9.

Wall in Occupied Palestinian Territory¹⁴ that natural and legal persons have a right to reparation for violations of human rights and international humanitarian law.¹⁵

Even so, while the right to reparation for victims of human rights and international humanitarian law violations rests on the well established principle that the breach of an international obligation entails the duty to make reparations,¹⁶ there is still a degree of uncertainty on the exact status, scope, and content of this right. In particular, the individuals' capacity to claim an injury based on a breach of international humanitarian law (as opposed to human rights law) has been questioned.¹⁷ It is not clear a) whether the right to reparation arises as a consequence of the nature of international humanitarian law violations (wrongful acts under international law); b) whether specific rules of international humanitarian law provide for some forms of reparation;¹⁸ c) whether this right is extended to international humanitarian law, as a consequence of the general applicability of human rights law in armed

conflicts while international humanitarian law operates as *lex specialis*;¹⁹ or d) if it is as a matter of international criminal law – as serious violations of human rights and international humanitarian law constitute crimes under international law irrespective of the context in which they are committed (armed conflicts, peace time, internal strife).²⁰

In addition to issues related to international humanitarian law, there are still other remaining questions in regards to nature and scope of the right to reparation. For example: is the right to reparation absolute or can exceptions like amnesties and immunities sometimes apply? Does the right to reparation enjoy the same status as the primary rule giving rise to the obligation to afford reparation? Should the substantive right be distinguished from the right to invoke a breach of that right? Is it 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? Is everyone within a targeted group a victim entitled

14) Legal Consequence of the Construction of a Wall in the Occupied Palestinian territory, Advisory Opinion of 9 July 2004, 43 ILM 1009 (2004). See E. Lambert-Abdelgawad, *L'Avis Consultative sur le Mur en Palestine: La CIJ et le Droit à Réparation des Victimes Individuelles de Graves Violations*, 60 *Revue de Science Criminelle et de Droit Pénal Comparé* 155 (2005).

15) *Id.*, para. 152.

16) *Factory at Chorzow idem.*

17) In its explanatory vote of resolution 2005/35 on the Principles and Guidelines, Germany 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."

18) For a discussion on this subject see Carnegie Endowment for International Peace. *The Hague Conventions and Declarations of 1899 and 1907*. New York, 1915, Oxford University Press; F.

Kalshoven, "Constraints on the waging of war", ICRC, Geneva, 1987; Frits Kalshoven, "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977", 9 *Netherlands Yearbook of International Law* 107, 111 (1978); Pierre d'Argent, "Les réparations de guerre en droit international public. La responsabilité internationale des États à l'épreuve de la guerre", *Prix Suzanne Bastid, Préface de Joe Verhoeven, Bruxelles/Paris, Bruylant/LGDJ*, 2002, pp. 902. (at pp. 441-449 and pp. 784-788).

19) The International Court of Justice decided in the Nuclear Weapons Advisory Opinion, that international humanitarian law acts as *lex specialis* to determine whether there has been an arbitrary deprivation of the right to life. *Legality of the Threat to Use of Nuclear Weapons, Advisory Opinion*, 1996 ICJ REP. 226 (July 8).

20) See article 75 of the ICC Statute

to reparations (for example in the case of genocide)? Should reparation be afforded collectively as affected groups or/and only to those who have suffered a personal, specific and identified harm?

There is also a certain degree of ambiguity in the manner that the right to reparation operates in practice. For instance, the relationship between the principle of access to justice for victims and the principle of state immunity is still unclear; the recently adopted “UN Convention on the Jurisdictional Immunities of States and their Properties” is silent on how state immunity and international human rights relate. In the small number of cases in which a foreign state has been sued for serious human rights violations, domestic courts have diverged in their analysis of the application of state immunity and on the end result. In some cases domestic courts have denied the applicability of immunity where cases concerned serious violations of human rights,²¹ but in others, domestic courts have interpreted their national laws granting immunity to states as barring the right of victims to access to civil remedies.²²

Additionally, despite the existence of a primary violation, the secondary right to reparation under international law has been questioned in cases where there is no international procedural remedy available to the victim (as there is no international court

with competence to entrain claims of individual breaches under general international law).²³ Similarly the non-binding nature of some international procedures and the general lack of enforcement mechanisms available to victims have hindered a comprehensive interpretation of the scope and nature of the right to a remedy and reparation.²⁴

1. *The Basic Principles and Guidelines on Reparation*

The Basic Principles and Guidelines were adopted by the UN General Assembly on 16 December 2005. Although the instrument does not cover nor solve all the different aspects of the right to reparation, it is the first international instrument codifying the rights of victims under international law and a step in the right direction. The Basic Principles and Guidelines outline a comprehensive regime for redress based on general principles of international law as well as other recent developments on the subject.

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

- *Definition of “victim” and “victims’ rights”:*
 - who is a “victim”;
 - the treatment of victims;
 - the right to an effective procedural remedy and access to justice;
 - the right to reparation and forms of adequate reparation;

21) The *Distomo* case in Germany, BGH, Decision of 26 June 2003, III ZR 245/98, published in NJW 2003, 3488; The *Ferrini* case in Germany, BUNDESVERFASSUNGSGERICHT 2 BVR 1379/01 vom 28.6.2004, Absatz-Nr. (1-45).

22) In *Ron Jones v Saudi Arabia*, an English case currently on appeal to the House of Lords, the Court of Appeal found that the Kingdom of Saudi Arabia enjoyed immunity for civil proceedings relating to torture but denied the protection of immunity to the individual State officials.

23) According to Tomuschat, as long as there is no procedural remedy, there can be no secondary right. See A. Randelzhofer, “The Legal Position of the Individual under Present International Law”, in: State responsibility and the individual: reparation in instances of grave violations of human rights, A. Randelzhofer/C. Tomuschat (eds.), 1999.

24) See for example Dinah Shelton “Commitment and Compliance, the Role of Non-Binding norms in the international legal system” (2000).

- the principle of non-discrimination amongst victims.
- *International responsibility and states' obligations:*
 - the obligation of states to afford reparation for breaches of international human rights law and international humanitarian law;
 - the obligation of non-state actors are responsible under international law to afford reparation;
 - the scope and limits of states' obligations in the areas of prevention, investigation, punishment, remedy and reparation; and
- *Procedural issues:*
 - the continuing obligation of states to afford effective procedural remedies and the nature of these remedies (judicial, administrative or other);
 - the incorporation of appropriate provisions providing universal jurisdiction over crimes under international law (extradition, judicial assistance and assistance and protection to victims and witnesses) within domestic law;
 - the applicability of statutes of limitations and the treatment of continuing violations (like disappearances).

While there are many similarities with the reparation provisions of the recent Draft Articles on the Responsibility of States for International Wrongful Acts adopted by the International Law Commission,²⁵ there are also important divergences. The ILC Articles were drawn up in the context of inter-state

relations and are not focused on the relationship between states and individuals, though there are still important parallels to draw. For example, cessation of a breach is included in Principle 22 (a) of the Basic Principles and Guidelines as a form of satisfaction, while the ILC Articles do not include cessation on the reparation section. According to the structure of the ILC Articles, cessation is part of the general obligation to conform with the norms of international law not a form of reparation. Then again the Basic Principles and Guidelines add rehabilitation as a form of reparation, which is not a form of reparation recognized at the inter-state level. But rehabilitation is an important component of an individual's reparation and it is a right specifically recognized in international instruments.²⁶ Similarly, other forms of non-monetary remedies such as satisfaction and guarantees of non-repetition, which are not perceived as essential forms or reparation at the inter-state level, are extremely important in human rights cases. This is reflected in the Basic Principles and Guidelines where satisfaction includes measures such as truth telling or recovery/reburial of victims' remains, and guarantees of non-repetition includes measures to strengthen national institutions under the rule of law.

The fact that the Basic Principles and Guidelines are restricted to the most serious violations does not mean that the right to reparation only arises in these limited cases. There is a right to an effective remedy and adequate forms of reparation for any breach of human rights or international humanitarian law. As Principle 26 states: “[...]In

25) Report of International Law Commission - 53rd session; see footnote 6.

26) See for example the UN Convention on the

Rights of the Child and its Optional Protocol; UN Convention against Torture; Declaration on Enforced Disappearances; Declaration on the Elimination of Violence against Women.

particular, it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. [...]”.

However, the legal consequences arising from gross violations of international human rights and serious violations of international humanitarian law (which constitute crimes under international law) are very specific: the right to a judicial remedy, universal jurisdiction, the non-applicability of statutes of limitations, and so on. These are the standards codified in the Basic Principles and Guidelines.²⁷ The aim of this instrument is to define the scope of the right to a remedy and reparation, and allow for the future development of procedural remedies and substantive reparations. Importantly, the instrument does not define what constitutes a violation of international human rights law or international humanitarian law, but only describes the legal consequences (the rights and duties) arising from these violations and establishes appropriate procedures and mechanisms to implement them.

The Basic Principles and Guidelines

27) Other types of violations give rise to different legal consequences. For example, a breach of the right to freedom of expression by the unjustified censoring of a newspaper or using the flags of neutral States in an armed conflict are violations of international human rights/humanitarian law but do not necessarily constitute crimes. In these cases, there is not necessarily an obligation to prosecute perpetrators - administrative remedies might be sufficient - and statutes of limitation might be applicable to control the timeframe to bring claims. However, if the use of such symbols is accompanied by an unlawful attack it might constitute a war crime. See “Law of Armed Conflict”, International Committee of the Red Cross, 2002.

28) As highlighted by Professor Theo van Boven: “the issue of State responsibility comes into play when a State is in breach of the obligation to

confirm that the responsibility to provide reparation arises when there is a breach of an international obligation, whatever its origin. As explained earlier, committing an international human rights or humanitarian law violation gives rise to a new international obligation to afford reparation.²⁸ And “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”²⁹ The Basic Principles and Guidelines set out the forms that reparation may take, which include restitution, compensation, rehabilitation, satisfaction and guarantees of non-description.³⁰

At the same time, international law requires states to provide effective procedural remedies under domestic law to guarantee adequate reparation to victims. In other words, the right to reparation for torture and other human rights/international humanitarian law violations includes both the right to substantive reparations (such as compensation) and the right to effective procedural remedies to enable victims to access substantive reparations (e.g., access to civil,

respect internationally recognized human rights. Such obligation has its legal basis in international agreements and/or in customary international law, in particular those norms of customary international law which have a peremptory character (jus cogens).” See Study concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur, Mr. Theo van Boven, U.N. Doc. E/CN.4/Sub.2/1993/8, July 2, 1993, para. 41. This Final Report provided the basis for the first draft of the Principles and Guidelines.

29) Case concerning the Factory at Chorzow (Ger. v. Pol.), 1928 P.C.I.J. (Ser. A) No.17, at p. 47.

30) See Basic Principles and Guidelines.

administrative and criminal remedies). This right is recognised in the Basic Principles and Guidelines and is firmly embodied in all major international human rights treaties and declarative instruments.³¹

The right to a remedy for a violation of a human right protected under any of the international instruments is itself a right expressly guaranteed by the same instruments and, in the case of fundamental human rights, it has been recognised as non-derog-

able.³² Accordingly, there is an independent and continuing obligation to provide effective domestic remedies to protect human rights - during peace or war, and irrespective of states of emergency. Human rights instruments guarantee both the procedural right to an effective access to a fair hearing (through judicial and/or non-judicial remedies)³³ and the substantive right to reparations (such as restitution, compensation and rehabilitation).³⁴ The European Court of Human

31) For example, art. 8 Universal Declaration of Human Rights, GA Res. 217 A (III) of 10 December 1948; art.2 (3), art 9(5) and 14(6) International Covenant on Civil and Political Rights, (entry into force 23 March, 1976); art 6 International Convention on the Elimination of All Forms of Racial Discrimination (entry into force 4 January 1969); art. 39 Convention of the Rights of the Child, (entry into force 2 September 1990) ; art. 14 Convention against Torture and other Cruel Inhuman and Degrading Treatment, (entry into force 26 June 1987) and art. 75 of the Rome Statute for an International Criminal Court (entry into force 1 July 2002, UN Doc A/CONF.183/9). It has also figured in regional instruments, e.g. the European Convention on Human Rights (entry into force 3 September 1953, art 5(5), 13 and 41); the Inter-American Convention on Human Rights (entry into force 18 July 1978) (arts 25, 68 and 63(1)); the African Charter on Human and Peoples' Rights (entry into force 21 October 1986) (art. 21(2)). See also, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 of 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (art 19), GA Res. 47/133 of 18 December 1992; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 20), recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; and Declaration on the Elimination of Violence against Women. GA Res. 48/104 of 20 December 1993.

32) See, for example, General Comment 29 on States of Emergency (Art. 4) of the UN Human Rights Committee, CCPR/C/21/Rev.1/Add.11, 31 August 2001, at para. 14: "Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is

not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective." The Committee considered further that "It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees ... The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights (...)" Similarly the Inter-American Court of Human Rights explained that the judicial remedies to protect non-derogable rights are themselves non-derogable. (Advisory Opinion OC-9/87 of 6 October 1987. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 25(8) American Convention on Human Rights. Series A No. 9).

33) Some instruments explicitly call for the establishment of judicial remedies for the rights they guarantee; the African Charter on Human and Peoples' Rights for example, provides that all remedies should be judicial. See Art. 7 of the African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

34) See Jeremy McBride, "Access to Justice and Human Rights Treaties" (1998) 17 Civil Justice Q.235.

Rights established that: “A remedy must be effective in practice as well as in law, particularly in the sense that its exercise must not be unjustifiably hindered by acts or omissions by national authorities”.³⁵

The nature of the procedural remedies (judicial, administrative or other) should be in accordance with the substantive rights violated and the effectiveness of the remedy in granting appropriate relief for such violations.³⁶ As explained by the UN Human Rights Committee, “administrative remedies cannot be deemed to constitute adequate and effective remedies [...], in the event of particular serious violations of human rights”.³⁷ Therefore, in cases of serious abuses, non-judicial remedies, such as administrative or other remedies, are not considered sufficient to fulfil states’ obligations under international law. This is

reflected in the Basic Principles and Guidelines which establish that: “12. *A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law.[...]*”.³⁸ Accordingly, even if a torture victim wishes to apply for compensation through an administrative procedure, he/she should also have the right in law and the ability in practice to bring a civil claim against the individual and state in a court of law.³⁹ Of course the relevant procedures may take into account compensation already awarded to the victim in order to determine whether the claimant has received full and adequate reparation.⁴⁰

In sum, remedies available at the national level should comply with international standards. Although there are different

35) See *Aksoy v. Turkey*, 21987/93 [1996] ECHR 68 (18 December 1996).

36) According to the ECtHR. Article 13 requires: “the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief” although States have some discretion as to how to comply (para 69) *D v. United Kingdom* App. No. 30240/96 Judgment of 2 May 1997 (referring to *Soering v. United Kingdom* App. No. 14038/88 Judgment of 7 July 1989 and *Vilvarajah v. United Kingdom* App. No. 13163/87 Judgment of 30 October 1991). The UN Human Rights Committee commented on Finland’s report (CCPR/C/95/Add.6) regarding the obligation under Art 2(b) of the ICCPR that “while noting that a recent reform of the Penal Code makes punishable the violation of several rights and freedoms, including those protected by articles 21 and 22 of the Covenant, the Committee is concerned that criminal law may not alone be appropriate to determine appropriate remedies for violations of certain rights and freedoms (Concluding Observations of the Human Rights Committee, Finland: 08/04/98 CCPR/C/79/Add. 91).

37) *Nydia Bautista v Colombia* No. 563/1993

U.N. Doc. CCPR/C/55/D/563/1993 (1995); José Vicente and Amado Villafane Chaparro, Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v Colombia No. 612/1995 UN Doc. CCPR/C/60/D/612/1995 (14 June 1994).

38) Basic Principles and Guidelines, footnote 1.

39) See *Albert Wilson v. Philippines*, Communication No. 868/1999, U.N. Doc. CCPR/C/79/D/868/1999 (2003).

40) For example, the benefit to those persons who were detained in Argentina before 10 December 1983 by virtue of the state of siege and who were in the custody of the Executive (under Decree No. 10/90 and Law 24.043), was extended to cover persons who had initiated legal action and won their cases, but who had received compensation lower than that awarded by the reparations laws. Decree Num. 131/94 of 1 August 1994. For a general overview of the reparation process in Argentina, see Guembre, “Economic Reparations for Grave Human Rights Violations: the Argentine Experience” in *The Handbook of Reparations*, Pablo de Greiff, ed. (Oxford: Uxford University Press, 2006).

domestic legal systems, the Basic Principles and Guidelines establish that states are obliged to afford within their national procedures effective access to justice and adequate reparation proportional to the harm suffered (including rehabilitation and compensation). For example, a national human rights commission might serve as a supervisory body to guarantee the impartiality of police investigations, but it cannot be a substitute for criminal proceedings when allegations reveal the perpetration of crimes. The same applies to administrative boards or commissions which may provide compensation to victims of crime; as explained, such boards cannot override the right of victims to bring civil proceedings before a court.

2. *International remedies/mechanisms*

If states fail to diligently prevent and/or respond to human rights violations they become legally responsible under international law.⁴¹ In other words, a state is responsible at the international level to afford reparation if: a) it breaches a human rights or international humanitarian law obligation; b) there is material and/ or moral damage; and c) it fails to provide complete or adequate reparation domestically (particular weight should be given to the procedural requirements of expeditiousness and effectiveness).

In other words, international law recognises that states should have an opportunity to redress human rights and international humanitarian law violations for which they

are responsible before an international body can exercise jurisdiction.⁴² Consequently, international procedures for individual complaints require effective domestic remedies to be exhausted.⁴³ But there is currently no general international human rights court where individuals can bring claims against states, so the forum to bring these claims varies depending on the international remedies/mechanisms made available by each country.

States have to specifically agree to the jurisdiction of an international court or body to allow individuals injured under their jurisdiction to bring challenges against them. While claims before the regional human rights bodies may be brought on behalf of individuals as a matter of adherence to the Conventions that underpin the bodies (e.g. the European or Inter-American Courts of Human Rights), states that have already ratified a UN Convention have to specifically agree to the monitoring bodies' jurisdiction to review claims from individuals (e.g. the Human Rights Committee and the Committee Against Torture).

When exercising their jurisdiction, the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (ICtHR), as well as the newly established African Court on Human and Peoples Rights (ACtHPR), have the power to order the state to afford reparation directly to victims. This differs from the African Commission on Human and Peoples Rights, the

41) E/CN.4/Sub.2/1993/8 page 61.

42) Local remedies will be considered to have been "exhausted" once all appropriate internal remedies have been sought or, when it is considered that local remedies are ineffective or cannot provide fair and adequate reparation. This principle does not apply for systematic and/or massive violations of human rights. For more

information see G. Echeverria, *Reparation – A Sourcebook For Victims of Torture and other Violations of Human Rights and International Humanitarian Law*, REDRESS, March 2003, available at <http://www.redress.org/publications/SourceBook.pdf> (REDRESS' Sourcebook on Reparation).

43) *Ibid.*

Inter-American Commission on Human Rights, the UN Human Rights Committee, or the UN Committee against Torture. These bodies can only make recommendations to the state concerned to provide reparation to victims and/or enact views on the violations committed and the obligation of states to redress them adequately. As will be discussed in the next part, the enforceability of these decisions rests on the assumption that they reflect states' treaty obligations, since the bodies enacting such decisions are officially charged with interpreting such treaties.

II. Enforcement of reparation decisions

The effective enforcement of reparations judgments or decisions is an essential part of the right to a remedy and reparation. In order to be effective, remedies need to be enforceable. The execution of judgments, as explained by the Inter-American Court of Human Rights in *Baena-Ricardo* "should be considered an integral part of the right to access to justice, understood in its broader sense, as also encompassing full compliance with the...decision".⁴⁴ Without the possibility of implementation, the remedy is simply ineffective. For this reason, it is important to analyse the effectiveness of such remedies in terms of their enforceability.

While considering the willingness of the state to implement the decision as a crucial aspect of enforcement, there are other important aspects that must be analysed as underlying basis for problems with enforcement. These include the nature of the decisions or judgments and whether they are themselves legally binding, the forms of

reparation contemplated in the decisions and the extent to which these pose any particular challenges for implementation, and the effectiveness of the remedial mechanisms and its capacity to follow-up with states on enforcement issues. Each of these issues will play a part in the degree to which views, decisions or judgments are enforced in practice.

1. *The nature of the obligation of states to implement reparation measures ordered by Human Rights Bodies*

The nature of the obligation of states to implement reparation measures plays an important part in enforceability. The fact that a particular decision is legally "binding" will not necessarily mean that enforcement will be easy or obvious. Similarly, the fact that a particular mechanism is by its nature "non-binding" will not preclude enforcement.

In cases where the decisions are legally binding (such as the European or Inter-American Court of Human Rights), there is often a tension between the binding force of the decisions and the finality of domestic decisions. There is no established collateral procedure for cases in which international courts and tribunals find a violation by a domestic decision (particularly when it has been reviewed by the highest judicial body of the state). In practice, a respondent state's political and judicial divisions are mobilised to varying degrees depending on the nature of the judgments, views or decisions: Do they require purely executive remedial action or legislative and/or judicial action? It appears that compliance depends on the extent to which each governmental division rallies to respond to a specific judgment and on the pressure that each international enforcement procedure is able to exercise over the state.

Still, the clearer the obligation to enforce (i.e. the legal basis) the easier it becomes to implement the decision. Whilst decisions of

44) *Baena-Ricardo Case*, para 72, cited in Shelton, *Remedies in International Law*, Oxford, Second Edition (2005), pg. 383.

quasi-judicial bodies like the Inter-American Commission of Human Rights, the African Commission on Human and Peoples Rights and the UN treaty-body mechanisms (such as the Human Rights Committee and the Committee Against Torture) are not themselves binding *stricto sensu*, they provide an authoritative interpretation of conventional obligations which are arguably, in themselves, legally binding. A state is effectively bound by treaty to make the requisite changes and provide the necessary redress to give effect to its obligations under the treaty. States have accepted the role of these bodies as the interpreters of the conventions.

Some of the mechanisms, themselves, have read in an obligation to comply. In this regard, the Inter-American Commission has interpreted the obligations contained in Articles 1 and 2 of the American Convention as imposing a duty on states to comply with the recommendations made by the Commission. The Commission has explicitly urged states to “*comply with the recommendations made in its reports on individual cases and to abide by the request of provisional measures*” and “*to adopt legal mechanisms for the execution of the recommendations of the Commission in the domestic sphere*”.⁴⁵ Some domestic tribunals have also begun to acknowledge the importance of both the Court’s judgments and Commission’s resolutions.⁴⁶

45) Inter-Am. Comm. H.R., Annual Report of the IACHR 1997, at Ch. VII, para. 12 and 13, OEA/Ser.L/V/II.98 doc.6 rev. (1998) Cited in Shelton 2003.

46) E.g. Colombian Constitutional Court (inter alia, T 558-03 regarding precautionary measures or T 327-04, in relation to San José de Apartadó); Argentinean Supreme Court (Ekmekdjian, Miguel Angel c/ Sofovich, Gerardo y Otros).

47) Resolution.240 AHG/(XXXI).

Correspondingly, the Organisation of African Unity/African Union has made general calls for states to cooperate with the African Commission.⁴⁷

Importantly, both the African and Inter-American Human Rights Systems have a court with the power to issue legally binding decisions. This means that there is always the possibility to recourse to the regional court if the recommendations by the Commissions are not implemented by the incumbent state (which is not the case with UN treaty-bodies decisions).⁴⁸

1.1. The legal nature of decisions by UN treaty bodies

Constitutional or other legal barriers may stand in the way of giving effect to UN treaty body decisions in individual cases. States may sometimes be able to provide remedies by means of executive or administrative action, while in other cases it may be necessary to reopen court proceedings, to overturn verdicts, or to enact legislation in order to provide an appropriate remedy, or the remedy recommended by the treaty body. Although this applies generally to other international courts, tribunals, and human rights bodies, the status of the treaty bodies themselves (i.e. as bodies which are not courts and adopt “Views” which are not binding judgments in formal terms) may

48) The African Court on Human and Peoples Rights is yet to be fully established. It will eventually operate as the second of the dual protective mechanisms for human rights in Africa alongside the Commission. It is mandated to undertake effective adjudication, render enforceable judgments and remedies to victims and make states more accountable for violations of human rights. According to the Preamble to the Protocol on the African Court, by doing this the Court is meant to “enhance the efficiency of the African Commission” and “to complement and re-enforce its functions” specifically in terms of its protective mandate.

also be a factor which impedes the implementation of a “View” in the domestic legal system.

In general, domestic courts have noted that while treaty bodies are not courts, their findings are relevant and useful in some contexts. However, they have usually stopped short of concluding that they are obliged to follow treaty body interpretations, even in cases in which the treaty body has expressed a View on a specific case or law from the jurisdiction in question. An example of the approach taken by courts is *The Queen v. William Hung* in which it was held:⁴⁹ “*Further, we can bear in mind the comments and decisions of the United Nations Human Rights Committee – ‘The Committee’. I would hold none of these to be binding upon us though in so far as they affect the interpretation of Articles in the Covenant, and are directly related to Hong Kong legislation, I would consider them as of the greatest assistance and give to them considerable weight.*”

Whilst the decisions by treaty bodies or Views are not themselves binding strictu sensu they provide an authoritative interpretation of treaty obligations which are, in themselves, binding. A state is effectively bound under a treaty to make the necessary changes and provide the necessary redress to give effect to its obligations under the same. Article 26 of the Vienna Convention on the Law of Treaties stipulates: “26. *Every treaty in force is binding upon the parties to it and must be performed by them in good faith (pacta sunt servanda).*” This has been recognised by domestic courts when examining the compliance of treaty provisions, for example, in *R (European Roma Rights Centre) v Im-*

*migration Officer at Prague Airport*⁵⁰ it was observed that: “19. [...] article 26 of the Vienna Convention, entitled *pacta sunt servanda*, [which] requires that a treaty in force should be performed by the parties to it in good faith and also on the requirement in article 31(1) that a treaty should be interpreted in good faith. Taken together, these rules call for good faith in the interpretation and performance of a treaty, and neither rule is open to question.”

It is clear, however, that the decisions of the treaty monitoring bodies in individual communication procedures are different to those of human rights courts like the ECtHR or the IACtHR. Treaty Bodies only interpret the binding instruments (conventions, treaties, covenants) and have the authority to decide when a state has breached an obligation contained therein. After that the Treaty Bodies can only refer back to the obligations under the instruments to afford adequate remedies domestically. In contrast, the human rights courts have the power to order specific reparation when a member state has breached their conventional obligations, and such awards are binding.

Still, the Views adopted by the UN treaty bodies cannot be seen as mere recommendations, and some domestic courts have implemented them accordingly.⁵¹ Additionally, as will be described, some countries have adopted specific legislative procedures to give effect to the Views in individual cases. It is clear that states are bound to comply with their international obligations (conventional and customary) and if an interpretative body, recognised by the state, establishes that there has been a breach, in principle the state should comply with its obligations

49) [1992] HKCFI 95; HCCC000032/1991, 14 April 1992, per Duffy J.

50) [[2003] EWCA Civ 666 [2004] QB 811.

51) See e.g. Finland KHO (Supreme Administrative Court) 1993 A 25 and KHO 15 April 1996 No. 1069, both based on Committee views in individual cases.

under the specific convention by redressing the breach within the means established by the same. States have accepted the role of treaty bodies as the interpreters of the conventions, and international courts and tribunals as well as domestic courts have referred to their jurisprudence when interpreting the obligations under the respective treaties.⁵²

There are positive and negative examples of enforcement of findings made by the UN treaty bodies in torture cases. For example, in *Dzemajl et al. v. Serbia and Montenegro*,⁵³ Montenegro, in compliance with a decision by the Committee Against Torture (CAT), awarded compensation in the order of one million euros to a group of Roma whose rights under the Convention against Torture were found to have been violated. Similarly, in *Villacres Ortega v. Ecuador*⁵⁴ the HRC concluded that the complainant had been tortured and ill-treated in detention and the state of Ecuador later advised that it agreed to pay the complainant US\$25,000 compensation or in *Pinto v. Trinidad and Tobago*,⁵⁵ where the HRC found that the complainant, a former death row inmate, had been ill-treated in detention and the petitioner later informed the HRC that he had been released as a direct result of the finding. However, in the case of *Ltaief et. al. v. Tunisia*,⁵⁶ the Tunisian Government has consistently challenged the *ratio decidendi* of the CAT's Views adopted in November 2003

In addition, in the case of *Ahani v. Canada*⁵⁷ concerning the deportation of an Iranian national from Canada to Iran on national security grounds, Canada has challenged the findings and denied that there had been any violation of Canada's obligations under the treaty, despite the fact that the HRC found violations of articles 7 and 13 of the ICCPR.

In common-law countries it has been argued that ratifying international treaties creates a legitimate expectation that states will comply with them, and therefore, will enforce the findings of treaty bodies. In the High Court of Australia case of *Minister of State for Immigration and Ethnic Affairs v Teoh*,⁵⁸ it was held that an immigrant had a legitimate expectation that the state would broadly comply with the Convention on the Rights of the Child (the CRC) on the grounds that Australia's ratification of the CRC was "an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision makers would act conformably with the convention." There have been attempts in other human rights cases to use the legitimate expectation argument established in *Teoh* to enforce substantive rights, but these have been unsuccessful (although subject to an important qualification as outlined below).

The most relevant perhaps is *Kavanagh v. Governor of Mountjoy Prison*,⁵⁹ in which the Supreme Court of Ireland rejected an

52) See e.g. the recent decision of the House of Lords in *A* and the US Supreme Court in *Rasul*.

53) *Dzemajl et al. v. Yugoslavia*, Communication No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000 (2002).

54) *Ortega v. Ecuador*, Communication No. 481/1991, U.N. Doc. CCPR/C/59/D/481/1991 (8 April 1997).

55) *Pinto v. Trinidad and Tobago*, Communication

No. 512/1992, UN Doc. CCPR/C/57/D/512/1992 (1996).

56) *LTAIEF v. Tunisia*, Communication No. 189/2001, U.N. Doc. CAT/C/31/D/189/2001 (2003).

57) *Ahani v. Canada*, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002 (2004).

58) (1994-1995) 183 CLR 273.

argument based on legitimate expectation which attempted to enforce a view of the Human Rights Committee (HRC) that the applicant's right to equal protection under the law had been breached. The applicant sought on this basis to have his conviction quashed but the Court held that to do so would greatly exceed the reach of legitimate expectation, although it did state that: *"Depending on circumstances, it is conceivable that application of the doctrine [of legitimate expectation] will have the effect of conferring substantive rights, but that will necessarily be an indirect consequence. The decision-maker, confronted with the duty to take created expectations into account may find it difficult or even impossible credibly to reject an application for a particular result."*⁶⁰

However, this case turned on the fact that the particular provisions had not been incorporated into domestic law. The Court decided against the applicant ultimately on the basis that it would *"incorporate an unincorporated treaty by the back door"* thereby contravening Ireland's constitutional arrangements and the separation of powers. At the same time the Court accepted that *"the State may, by entering into an international agreement, create a legitimate expectation that its agencies will respect its terms."*⁶¹ Therefore it can be concluded that the case accepts the principle of legitimate expectation, but only provides good authority for the application of the legitimate expectation doctrine where

state has incorporated the treaty in question.

By contrast, in *McVeagh v Attorney-General*⁶² the New Zealand Court of Appeal dismissed an appeal against the striking out of a proposed cause of action based directly on article 9 of the ICCPR by a person who had been detained in a psychiatric hospital, noting that not only was it contrary to principle but that McVeagh had already unsuccessfully brought a communication before the HRC in *A (name withheld) v New Zealand*.⁶³

A number of recent cases against Spain before the HRC have also highlighted potential difficulties in giving effect to decisions of treaty bodies in countries with monist systems, but have also shown that dialogue between the HRC and national courts can result in the adaptation of national laws to conform with the ICCPR.⁶⁴ As in any monist county, international treaties ratified by Spain form part of the internal legal order (without the need to enact implementing legislation). However, treaty body decisions are not directly enforceable by domestic courts, particularly when the remedy involves the revision of a domestic judgment or decision. In such cases, implementation of these decisions requires recourse to a special procedure (*amparo*) of the Constitutional Court.⁶⁵

The first case where enforcement of a treaty body decision was addressed by the Spanish courts arose from the communication submitted to the HRC by Michael and Brian Hill.⁶⁶ The authors challenged their

59) (2002) IESC 13.

60) Ibid. para. 38.

61) Ibid. para. 43.

62) [2002] 1 NZLR 808; 2001 NZLR LEXIS 88.

63) Communication No 754/997, views of 3 August 1999.

64) Natalia Alvarez Molinero, Turku Paper cited in the Final Report on the Impact of Finding of the United Nations Human Rights Treaty Bodies, Para 42, ILA (2004).

65) Idem.

66) Hill and Hill v Spain, Communication No 526/1993, views of 2 April 1997.

conviction in Spain and the HRC, after concluding that there had been violations of a number of provisions of the ICCPR,⁶⁷ established that the authors were “entitled to an effective remedy, entailing compensation”.⁶⁸ Following that decision Brian Hill brought his case back to the Spanish courts, seeking to quash his conviction and to be granted a new trial. The case eventually was reviewed by the Spanish Supreme Court⁶⁹ which held that a decision of the HRC or a judgment of the European Court of Human Rights does not constitute new evidence to reopen criminal proceedings.⁷⁰

A second case decided by the HRC against Spain, *Gómez Vázquez v Spain*,⁷¹ gave rise to a number of discussions in the Spanish Constitutional Court on how to approach HRC decisions. The HRC acknowledged the author’s claim that the Spanish Criminal Procedure Act⁷² breached Article 14(5) of the ICCPR and concluded: “[T]he lack of any possibility of fully reviewing the author’s conviction and sentence, [...] the review having been limited to the formal or legal aspects of the conviction, means that the guarantees provided for in article 14, paragraph 5, of the Covenant have not been met” and therefore, “The

author’s conviction must be set aside unless it is subjected to review in accordance with article 14, paragraph 5, of the Covenant.” On 14 December 2000, the Supreme Court held that the case should be re-evaluated in a revision procedure, but subsequently reversed its decision, deciding that a re-evaluation of the case would automatically be made by one of the judges of the Court. This procedure however did not require any re-assessment of the facts.

The HRC’s Views in *Gómez Vázquez* have been discussed in a number of other Constitutional Court decisions, where HRC’s interpretation of article 14(5) has been challenged by the Court, especially in light of divergent European case law. The HRC on the other hand, has subsequently adopted Views in a number of other cases against Spain asserting its position in *Gómez Vázquez*.⁷³ While the discrepancies between the Spanish courts and the HRC were not solved in the judicial fora, on 23 December 2003 Spain amended its law to conform to the HRC’s Views.⁷⁴ Interestingly, the publication of the law in the Official Bulletin expressly refers to the HRC’s jurisprudence.⁷⁵

67) Articles 9 (3), 10 and 14 (3)(c) and (5) of the ICCPR, in respect of both Michael and Brian Hill and of article 14(3)(d), in respect of Michael Hill only.

68) Hill and Hill v Spain, Communication No 526/1993, views of 2 April 1997, para. 16.

69) Supreme Court (Tribunal supremo), auto 69/2001, 25 July 2002.

70) The Supreme Court also stated that the Human Rights Committee had not explicitly recommended that Spain annul the earlier criminal sentence, but rather left the matter open to the assessment of domestic courts as to the most appropriate way provide an effective remedy.

71) 45Communication 701/1996, 11 August 2000.

72) Ley de Enjuiciamiento Criminal.

73) Sineiro Fernández v Spain, Communication No. 1007/2001, views of 7 August 2003, UN Doc CCPR/C/78/D/1007/2001, para 7; Semey v Spain, Communication No. 986/2001, views of 30 July 2003, UN Doc CCPR/C/78/D/986/2001, para. 9.5.

74) Ley Orgánica 19/2003, de 23 de diciembre, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial [Organic Law 9/2003, modifying Organic Law 6/1985 on the Judicial Power] Boletín del Estado, No 309, 26 December 2003, p. 46025.

2. *Enabling legislation to enforce international decisions*

Enabling legislation at the domestic level facilitates implementation of reparation measures in compliance with international decisions. However, there are very few states that have enacted specific legislation, and the existing examples of enabling legislation generally fail to take into account all of the existing international human rights bodies, and/or do not necessarily take into account the varied forms of reparation measures. For example, Colombia passed enabling legislation in 1996 for the domestic enforcement of awards of “compensation” made by international bodies, such as the Human Rights Committee and the Inter-American Court and Commission of Human Rights.⁷⁶ Peru had legislation for the implementation of Views of the Human Rights Committee before taking it off the books in the late 1990’s, although law no. 23506 on *amparo* and *habeas corpus* recognises the binding nature of the Inter-American Court.

There is also a special team in Colombia in charge of the security of persons in favour of whom the Inter-American Commission or the Court has ordered interim/precautionary measures. In Costa Rica, the headquarters agreement of the Inter American Court provides that decisions of the Court or the President have the same effect as judgments

handed down by the domestic judiciary upon their transmission to the domestic administrative and judicial authorities.

In Hungary, while there is no specific provision allowing international decisions to be given direct effect, the Code on Criminal Procedure provides that the decisions of international human rights organs are to be considered as “new evidence” for the purpose of reopening criminal cases.⁷⁷

In the Czech Republic under Act No. 517/2002 Coll. of Laws on Some Measures in the System of Central State Organs, the Ministry of Justice has been charged with the co-ordination of the implementation of the Views of the UN Human Rights Committee.⁷⁸

More generally, the Honduran Constitution proclaims the validity and mandatory execution of international judicial decisions. Similarly, the Guatemalan, Nicaraguan and Argentinean constitutions specifically recognise human rights treaties as overriding domestic legislation, which facilitates the implementation of international judgments. But despite these legal provisions and initiatives, there is still a general sense among national authorities that international law is irrelevant to the domestic context, which normally impedes a swift enforcement of international reparation measures.

75) Id.

76) Law 288 of 5 July 1996, (http://www.minddefensa.gov.co/politica/legislacion/normas/1996_288_ley_con.rtf) enables the enforcement of awards of compensation made by international bodies such as the Human Rights Committee to be enforced in domestic law. In the Czech Republic under Act No. 517/2002 Coll. of Laws on Some Measures in the System of Central State Organs, the Ministry of Justice has been charged with the co-ordination of the implementation of the views of the UN Human Rights Committee.

77) A similar provision was expected to be included in a new Code on Civil Procedure. See Final Report on the Impact of Finding of the United Nations Human Rights Treaty Bodies, Para 42, ILA (2004).

78) Mahulena Hofmann, “impact of the views of the UN Human Rights Committee in the national legal order of some eastern and central European countries”, available at <http://www.abo.fi/institut/imr/research/seminars/ILA/Hofmann.doc>.

3. Monitoring mechanisms

3.1. Specific follow-up procedures

The existence of a monitoring mechanism or follow-up procedure has in practice greatly improved prospects for enforcement. At times, monitoring mechanisms are established by the laws or treaties setting up the court, commission or treaty body. One example is the European Convention, which establishes a procedure for automatic and systematic supervision by the Committee of Ministers. Another example is the Inter-American Court, which in accordance with Article 65 of the Inter-American Convention, retains jurisdiction for follow-up.

There are advantages and disadvantages to either approach. The direct role of the Inter-American Court has some obvious advantages. It is not always easy for the Committee of Ministers of the Council of Europe, which is not a judicial body, to determine whether the legislative or other measures undertaken by a particular state do in fact fully comply with the European Court's decisions.⁷⁹ On this issue, it remains to be decided whether a case can come back to the Court for review of enforcement measures; the Evaluation Group appointed to study further reforms to the system opposed the idea on the ground that it could result in a blurring of the respective responsibilities of the Court and Committee of Ministers and draw the Court into an arena outside its purview.⁸⁰

But, the lack of oversight by a "political" body of the Organisation of American States to match the Committee of Ministers has made it more difficult to tackle political obstacles to implementation, including

the lack of political will. Under Article 65 of the American Convention, if a state does not comply with a judgment of the IACtHR, the Court shall note the specific instances of non-compliance and formulate pertinent recommendations in its annual report to the General Assembly of the Organisation of American States (OAS). However, this procedure falls rather short from the required enforcing powers that the Court needs to command executions of its judgments. An example of this is the account of the Court's attempted use of the procedure to force Honduras to comply with its judgment as interpreted in the *Vélásquez Rodríguez* and *Godínez Cruz* cases, which was unsuccessful. Although Honduras had paid the compensation originally ordered by the Court in these cases, albeit late, it refused to pay the Court-ordered interest and additional amount resulting from its failure to make the payment on time, before the devaluation of its currency. Consequently, the Court included a resolution detailing Honduras' non-compliance in its yearly report, which it expected to present to the General Assembly of the OAS. Due to the extensive lobbying campaign of Honduras, however, this statement was never officially presented to the General Assembly. Honduras reportedly threatened to withdraw its acceptance of the contentious jurisdiction of the Court if the General Assembly were to read the Court's condemnation. Although after an extended delay, the Honduran Government fully paid the compensation ordered by the Court,⁸¹ its successful campaign to block OAS efforts to oversee compliance with Court judgments may make that avenue untenable.

79) See Robertson and Merrills (1993), cited in Shelton (2005), supra note 1.

80) Shelton (2005), supra.

81) Shelton 2003.

3.2. Implied follow-up procedures

Certain laws/treaties have failed to mention or explicitly establish follow-up procedures, and here, the mechanisms have interpreted their mandates in order to establish such procedures and enhance enforcement of their decisions. In 1993, for example, the Human Rights Committee (HRC), recognising that the absence of a follow-up mechanism was a serious *lacuna* in the IC-CPR monitoring machinery, instituted a follow-up procedure to ensure implementation of its decisions, calling on states to provide information within ninety days about the measures taken in connection with its Views. According to the HRC “*the word ‘consider’ in Article 5, paragraph 1 of the Optional Protocol need not be taken as meaning consideration of a case only upon the adoption of a final decision, but consideration in the sense of engaging in those tasks deemed necessary to ensure implementation of the provisions of the Covenant*”.⁸² As part of this mechanism it also created a Special Rapporteur for Follow-Up on Views, whose mandate is for a two-year (renewable) term.

The HRC based its authority to establish such a procedure on the doctrine of implied powers, pursuant to which any international organ must enjoy certain implied powers to be able to carry out its functions. According to the HRC, States Parties ratify the Optional Protocol in good faith, intending to respect the Views of the HRC, and therefore the Committee would not act *ultra vires* by monitoring their implementation. Indeed, the HRC has emphasised the close link between the good faith fulfilment of the treaty obligations contained in Article 2 (3) of the ICCPR and compliance with the Views concerning remedies when a violation has been

found in an individual case. Importantly, no State Party has challenged this legal authority to engage in follow-up activities.

Similarly, since mid-2002, the following paragraph is added to all decisions in which the CAT has found a violation/s of the Convention: “*The Committee urges the State party to ... provide an appropriate remedy and, in accordance with rule 112, paragraph 5, of its rules of procedure, to inform it within 90 days from the date of transmittal of the decision, of steps taken in response to the Views*”. The CAT revised its Rules of Procedures and adopted the mandate of a Follow-up Rapporteur pursuant to Article 22 of the Convention (which establishes the individual complaints procedure), establishing that the follow-up Rapporteur should engage in the following activities: 1) monitor compliance by dispatching *notes verbales* to States Parties inquiring about measures taken pursuant to the CAT’s decisions; 2) recommend to the CAT appropriate action on responses received from governments on situations of non-response, and upon the receipt of letters from complainants about the non-implementation of the CAT’s decisions; 3) meet with State Party representatives to encourage compliance with the CAT’s decisions and to ascertain whether technical assistance from the Office of the High Commissioner for Human Rights (OHCHR) would be appropriate or desirable; and 4) prepare periodic progress reports to the Committee on her/his activities.

Though the African Commission has no official or formal policy on follow-up or other powers with which to coerce compliance with its decisions, it has used mechanisms within its procedures to this end. For example, the Commission has used its promotional visits to countries, as well as missions prompted by protective reasons or on site investigations, to monitor imple-

⁸² A/CONF. 157/TBB/3 (1993)

mentation of the Commission's findings and recommendations resulting from prior communications. Although primarily fact-finding missions are to gather information about pending communications,⁸³ they also serve as opportunities to secure amicable settlement of pending communications⁸⁴ and as an opportunity for follow-up. This procedure has been used in relation to Togo, Senegal, Sudan, Mauritania and Nigeria.⁸⁵ This mechanism has been developed under the authority given to the Commission by Article 46 of the Charter to "resort to any appropriate method of investigation" and these missions are similarly opportunities for pressure to be exerted on states to implement the Commission's decisions.⁸⁶

Clear follow up policies generally assist in identifying the areas of concern and lack of enforcement. For example the Committee of Ministers of the Council of Europe has a clear record of the number of member states that have adopted constitutional, legislative, regulatory reforms, or other general measures to comply with the Court's judgments, and how many of such reforms or measures it is currently supervising. Likewise a designated follow-up authority/body has proven useful not only within the European System but also with the UN treaty body mechanisms. A position of Follow-Up Officer was established in 2003 within the Office of the High Commissioner for Human Rights, and consequently the follow-up procedure under the Optional Protocol to the ICCPR

and under the procedure governed by article 22 of the Convention against Torture has improved. There is at present no Special Rapporteur tasked with follow-up of African Commission decisions, though this has been strongly recommended.

3.3 Victims participation in the follow-up procedures and avenues to challenge non-compliance Although victims have in fact participated in certain cases, their role before the European Committee of Ministers is still not formally established. Victims do have a role in the Inter-American Court's procedure to ensure compliance with its judgments or provisional measures (although this procedure is not formally established but has been developed by the Court itself). The procedure consists of the responsible state presenting reports on compliance as requested by the Court and the Inter-American Commission and the victims, or their legal representatives, submitting comments on these reports.

The possibility to challenge non-compliance and the procedure to do so are equally relevant to guaranteeing effective enforcement. On this issue for example, while it remains to be decided whether a case can go back to the European Court for review of enforcement measures, the Inter-American Court on the other hand has held public hearings on compliance and has sometimes modified the reparations decisions (e.g. to authorise the parties to invest in term-deposit certificates rather than to create a trust

83) For example the protective mission to Sudan to establish facts pertaining to pending communications nos. 48/90 and 50/91, see section V, pg. 19 of the Report of the African Commission on Human and People's Rights Mission to the Sudan DOC/OS/35a(XXII).

84) For example the mission report to Nigeria reports '[i]t had been agreed to at the beginning

of the mission that the cases against Nigeria before the Commission would be taken up with the appropriate authorities. The hope was that all of them would be settled amicably.' See pg. 17 of the Mission Report to Nigeria DOC/OS/(XXV)/99.

85) Louw 2005.

86) Ibid.

fund, because this was the most favourable arrangement for the minor beneficiaries⁸⁷).

4. Enforcement of the different forms of reparation awarded by international bodies

The form of reparation, whether it is a monetary or a non-monetary award, also plays an important role in its enforceability. Monetary awards such as compensation can be implemented directly without affecting the structural system of the state, and in this respect may be easier to implement for some states. Still, not all states are willing to afford monetary compensation, particularly in situations of massive and/or systematic violations or where the state has severe economic constraints. In contrast, non-monetary awards calling for legal or institutional reforms (e.g. cancelling an amnesty decree to make way for the prosecution of alleged torturers, affording victims with new opportunities to challenge the legality of detention, removal of the immunity of senior officials) will usually require a series of procedural steps within the legislative and/or judicial branches of the government, and for this reason it will invariably take more time and be more complicated for the state to implement such awards.

In general, there is a different compliance rate for monetary compensation as compared with other forms of reparation. This is in part because the types of actions that need to be taken by states to implement non-monetary measures are more complex. In practice, the Committee of Ministers of the Council of Europe pays particular atten-

tion to states' compliance with the obligation to implement general measures, since it considers that such measures constitute the essence of the European Convention of Human Rights. The Committee has stressed on several occasions that "*the necessity of taking such measures is all the more pressing in the case of repeated violations as serious as those (...) resulting from torture, inhuman treatment, destruction of property, illegal killings and disappearances.*"⁸⁸ In the same way, the Inter-American Court has ordered a variety of measures dealing with structural, institutional and legal reforms that aim to redress the victim(s) and to eradicate the circumstances that allowed the violations to occur in the first place.

In the European system, the implementation procedure in cases where the violations reveal a structural problem requires the respondent state to identify under the supervision of the Committee of Ministers the appropriate measures to prevent new similar violations. Once such measures are identified, the Committee assesses their efficiency to achieve the result required and supervises their adoption. However, the experience of the Committee, particularly with respect to Turkey, has shown that the prevention by states of torture and other serious abuses is a multi-dimensional and time-consuming process. Following the first finding of the violation of Article 3 in *Erdagöz v Turkey*,⁸⁹ the Committee closed its supervision of general measures after comprehensive legislative reforms and administrative measures which *prima facie* appeared to significantly

87) Caballero Delgado and Santana Case, compliance with judgment. Order of the IACHR of 4 Dec. 2001 and Note CDH-10.319/643 of 20 Jan. 1999.

88) Interim Resolutions DH(99)434 and

DH(2002)98 concerning the action of the Turkish security forces.

89) 21890/93 [1997] ECHR 85 (22 October 1997).

strengthen the protection against torture and ill-treatment in police custody.⁹⁰ Later judgments of the Court and reports of the Commission showed that the measures adopted following the *Erdagöz* case were insufficient for the effective prevention of torture and ill-treatment in Turkey. Additional serious shortcomings were revealed in the regions subject to the emergency rule in the south-east of the country. The factual context of the violations can also engender difficulties. For example, violations committed during a large-scale military conflict present particular complexities. The circumstances in which these violations occurred, their massive character and the long time that lapses since the event, may make it more difficult to conduct effective domestic investigations in accordance with the remedial measures ordered by the Court. The factual context of the violations can also engender difficulties.

Since 1997, when Peru complied with the Inter-American Court's order to release a Petitioner from prison⁹¹, a new level of state compliance was reached within the Inter-American System. In subsequent cases in which the Inter-American Court declared a domestic law or judgment to be in violation of the American Convention, States amended laws⁹², domestic courts declared laws to be unconstitutional⁹³, and/or an-

nulled domestic judgments.⁹⁴ However, the Inter-American Court, in almost every case, has also ordered the state to investigate, prosecute and punish the individuals responsible for the human rights violations. These latter orders are rarely fulfilled. In many states impunity still reigns, and the state structures lack the means or the will to bring the perpetrators to justice.⁹⁵

5. The specificity of the findings and remedial measures

Although it would seem clear that the degree of precision with which findings are recorded and the specificity of the remedial measures will impact upon the extent to which the measures will be enforced, in practice, human rights bodies and courts have generally seen their role as declaratory.⁹⁶ These organs have tended to identify the violations/articles breached in their decisions and called upon states to implement 'appropriate' remedies in accordance with their domestic legal systems. For example, the UN Human Rights Committee and Committee against Torture express their Views in very general terms: appropriate compensation, release of the prisoner, amendment of legislation, etc.

While this might be appropriate in certain cases⁹⁷, there are some measures which require a minimum degree of specificity in

90) See Resolution (96)17.

91) *Loayza Tamayo v. Peru (Merits)*, Judgment of September 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997), para. 84, op. para. 5.

92) *Cantoral Benavides v. Peru (Reparations)*, Judgment of 3 December 2001, Inter-Am. Ct HR, Ser.C No. 88, para. 76.

93) *Suarez Rosero v. Ecuador (Reparations)*, Judgment of 20 Jan 1999, Inter-Am Ct HR Ser.C. No. 44 paras. 81-83.

94) *Cesti-Hurtado v. Peru (Reparations)*, Judgment of 31 May 2001, Inter-Am Ct HR Ser C, No. 78, para. 15.

95) *Pasqualucci, The Practice and Procedure in the Inter-American Court of Human Rights* (Cambridge, 2004).

96) See e.g. *Assanidzé v. Georgia* 71503/01 [2004] ECHR 140 (8 April 2004).

97) At times, the recommendation for an appropriate remedy is left deliberately vague. See e.g. *Views of the Committee against Torture in Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) at para. 15.

the decisions and/or clarification on the legal principles that should be applied by the enforcing state. For example, when international bodies order criminal investigations, these measures are hardly ever enforced. Domestic statutes of limitation commonly bar criminal investigations⁹⁸ even though international law stipulates that limitation periods are not applicable to some of the most serious international crimes, and in other cases the extension of the limitation periods may be appropriate. As well, states have argued that it is not possible to reopen already closed investigations or to retry individuals, as this would breach the principle of *res judicata*. The Committee of Ministers of the Council of Europe has taken the position that the extension or removal of limitation periods may be appropriate in respect of future cases but that it is difficult to apply it to the case in question because of the problem of retroactivity (cf. Article 7 of the ECHR). In such cases the Committee has explored other remedial measures (e.g. disciplinary proceedings)⁹⁹ but such measures may also encounter similar legal obstacles and might not be sufficient to adequately redress the

violation(s)¹⁰⁰. The Inter-American Court recently ruled that trials in breach of due process guarantees and which are not held with the objective of truly bringing perpetrators to justice and to punish them cannot be considered as valid proceedings capable of raising issues of *res judicata*.¹⁰¹

Whereas the practice of the European Court is also to establish the existence of a violation and the process of giving effect to that finding is left to the state concerned and Committee of Ministers, the recent practice of the Court indicates a willingness to give some guidelines to the responsible states on how best to remedy consequences of a particular violation of the Convention. In a similar way, the African Commission has further developed a practice whereby it not only lists the articles violated by a state but also recommends remedial measures to be adopted by the state concerned. The primary aim of this procedure has been expressed by the Commission as the initiation of “a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice, complained of”.¹⁰²

98) E.g. *Pantea v. Romania*, judgment of 3 June 2003, CM/Del/OJ/DH (2005)922 Vol. I Public, p.24; *Kmetty v. Hungary*, judgment of 16 December 2003, CM/Del/OJ/DH(2005)928 Vol. I Public, p.13; *Bati and others v. Turkey*, judgment of 3 June 2004, p. 26.

99) *Bati and others v. Turkey*, *ibid* note 98.

100) ECHR, *Pantea v. Romania*.

101) According to the Court, “the development in the legislative and international jurisprudence [...] has allowed the assessment of the so called sham trial (“cosa juzgada fraudulenta”) which is the result of either a trial that has not respected due process guarantees, or of lack of judicial independence and impartiality. It has been probed beyond doubt [...] that the domestic trial in this case was contaminated for such vices. Therefore, according

to the standards of the American Convention, the State cannot invoke the domestic judgments issued without the above-mentioned requirements as an excuse that would free it from its international responsibility to duly investigate and sanction the perpetrators of human rights violations. [...]” ICtHR, *Case of Carpio Nicolle Vs. Guatemala*. Judgment of 22 November 2004. Series C No. 117, at paras. 131 and 132 (unofficial translation).

102) *Free Legal Assistance Group Case (1996) (Merits)*, communication no.25/89, see also communication no.16/88, *Comite Culturel pour la Democratie au Benin v. Benin (Merits)* joined with communication no.17/88, *Hilaire Badjougoume v. Benin (Merits)* and communication no.18/88, *El Hadj Boubacar Diawara v. Benin (Merits)*, adopted at the 16th ordinary session of the Commission in October 1994.

At the same, it is important to note, that while states have failed greatly in implementing reparation awards and decisions, sometimes the time frame or measures envisaged are not precise or realistic. As already mentioned, the HRC gives a State Party ninety days to provide information on measures taken to comply with its Views, but in practice the 90-day deadline is generally insufficient for the majority of states to provide adequate follow-up information. Similarly, some orders by the Court or human rights bodies have been unrealistic (e.g. that a state's Criminal Code be reformed in 30 days), since in order to comply with the judgments or decisions different organs within the state apparatus have to implement these measures.

III. Conclusion

There are still some remaining questions in regards to nature and scope of the right to reparation. Among other factors, the non-binding nature of some international procedures and the general lack of enforcement mechanisms available to victims have hindered a comprehensive interpretation of the scope and nature of the right to a remedy and reparation.¹⁰³ It is clear notwithstanding that right to reparation entails the right to effective remedies. This in turn calls for the swift enforcement of reparation decisions. While political will is important to ensure implementation of reparation decisions, there are a series of other matters that need to be considered when assessing the enforcement of reparation decisions, in particular the different forms of reparation that may be awarded (restitution, compensation,

rehabilitation, satisfaction and guarantees of non-repetition) and the subsequent required involvement of different organs of the state in the enforcement stage.

For these reasons it is important to enable collateral mechanisms of enforcement at the domestic level, as well as effective procedures, to challenge non-compliance. At the same time, it would seem useful for human rights bodies to be more specific in the remedial measures required in each individual case as well as the legal principles applicable when implementing such measures. It would appear easier for authorities (and follow-up bodies) to ensure that the impugned shortcomings are remedied when these are characterised accurately by the Courts or other decision making bodies. Similarly, enforcement would appear easier if human rights bodies are more succinct, precise, and realistic when ordering or recommending forms of reparation awarded – taking into account the amount of time and the type of activities that are required to implement the measures. In other words, more guidance from the human rights bodies is required to effectively enforce reparation decisions in cases of torture and other international crimes.

103) See for example Dinah Shelton "Commitment and Compliance, the Role of Non-Binding norms in the international legal system" (2000).

Annex 1

Forms of Reparation

a) Restitution

This form of reparation consists of re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. However, it is generally not possible to restore victims to their original situation before the violations occurred since it is not possible to “undo” the pain and suffering caused by the violations; though certain aspects of restitution might be possible – such as restoring an individual’s liberty, legal rights, social status, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.¹⁰⁴ The term “juridical restitution” is sometimes used where restitution requires or involves the modification of a legal situation within the legal system of the respon-

sible state. Such cases include revocation, annulment or amendment of a constitutional or legislative provision enacted in violation or a rule of international (human rights) law. In some cases, both material and juridical restitution may be sought. For example, the return of exiled persons to their country and the restoration of their rights, including property rights and if possible, the return of their property or the compensation of its value at the time of the indemnification. What will be required in terms of restitution will often depend on the content of the primary obligation that has been breached. Restitution, as the first of the forms of reparation,¹⁰⁵ is of particular importance where the obligation breached is of a continuing character. In the case of unlawful detention or disappearance, for example, the state will

104) E/CN/4/2000/62, para 22. See also, Principles 8–10 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985.

105) Because restitution most closely conforms to the general principles that the responsible state is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by the Permanent Court in the *Factory Chorzow* case

when it said that the responsible state was under “the obligation to restore the undertaking and, if this not possible, to pay its value at the time of the indemnification, which value is designated to take the place of restitution which has become impossible”. For this reason the terms “restitution” or “restitution in integrum” are many times used as a synonymous to “full reparation”. According to Inter-American Court of Human Rights for example, “compensation under Article 63(1) of the [American] Convention must attempt to provide restitution in integrum for the damages caused by the measure or situation that constituted a violation of human rights”. See *Velásquez Rodríguez Case*, Annex D.

be required to put an end to the situation either as a matter of cessation or restitution.

b) Compensation:

Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured party as a result of the breach. The scope of this obligation is delimited by the capacity that the damage has to be evaluated in financial terms.¹⁰⁶ The appropriate heads of compensable damage and the principles of assessment to be applied in quantification can vary in accordance with the content of the primary obligations and the evaluation of the respective behaviour of the parties and more generally, in order to reach an acceptable outcome.¹⁰⁷ The Inter-American Court of Human Rights held in the *Velásquez Rodríguez Case* that “*it is appropriate to fix the payment of ‘fair compensation’ in sufficiently broad terms [...]*.”¹⁰⁸ Awards of compensation encompass material losses (loss of earnings, pension, medical expenses, etc.) and non-material or moral damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of

companionship or consortium), the latter usually quantified on the basis of an equitable assessment.

An international court or tribunal which has jurisdiction with respect to a claim of state responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.¹⁰⁹ Compensation is for any damage caused by the act, whether material or moral.¹¹⁰ “Moral damage” to an injured state and “moral damage” to the injured individuals receive different treatment from the point of view of international law.¹¹¹ The distinction between payment of monies by way of compensation and payment of monies for other purposes is commonly emphasized in relevant literature; explicit indications in the same sense are also to be found in jurisprudence.¹¹²

The function of compensation, as its title indicates, is purely compensatory. Compensation corresponds to the financially assessable damage suffered by the injured party (whether a state or an individual). It is not concerned with the punishment of the responsible state, nor does compensation have

106) Commentary to the Draft Articles on State Responsibility for Internationally Wrongful Acts; Report of the International Law Commission on its Fifty-third Session, GA, Supplement No. 10 (A/56/10); cph. IV.E.

107) Cf. GH Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), p. 242.

108) *Velásquez Rodríguez Case*, Interpretation Of The Compensatory Damages Judgment, Judgment Of 17 August 1990, Inter-Am. Ct. H.R. (Ser. C) No. 9 (1990). Para. 27.

109) See *Factory at Chorzow* note; *Fisheries Jurisdiction*, (Federal Republic of Germany v. Iceland), Merits, ICJ Reports 1974, p. 175; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v/. United States)*, Merits ICJ Reports 1986, p. 14.

110) The applicable principles of international law for moral damage caused to individuals are reflected in the *Lusitania* opinion See Reports of International Arbitral Awards, Vol. 7, p. 32,40 (1923).

111) Non-material and moral damage to states may in certain cases be redressed by satisfaction. However, moral damage caused to individuals should be redressed by an award of compensation as long as it is assessable in economic terms. See commentary to the Draft Articles on State Responsibility;

112) This difference is generally addressed in the context of compensatory or exemplary damages. The second is not considered part of reparation. See for example the *Lusitania Case*, supra., n. 7

an expressive or exemplary character. In this regard, the Inter-American Court of Human Rights held that international law did not recognise the concept of punitive or exemplary damages.¹¹³

Compensation for personal injury has been dealt with extensively by arbitral, regional and international tribunals, including human rights bodies, in particular the European and Inter-American Courts of Human Rights. The decisions of these human rights bodies on compensation draw on principles of reparation under general international law.¹¹⁴ Awards of compensation encompass material losses (loss of earnings, pension, medical expenses, etc) and non-material or moral (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium) suffering, the latter usually quantified on the basis of an equitable assessment.

c) Rehabilitation

Rehabilitation is an important component of reparation and it is a right specifically recognised in international human rights instruments.¹¹⁵ The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power stipulates that: “victims should receive the necessary material, medical, psychological and social assistance and

support.” The Special Rapporteur on the right to reparation has noted that reparation should include medical and psychological care and other services as well as legal and social services.¹¹⁶ Rehabilitation may be provided “in kind” or the costs may form part of a monetary award. It is important to distinguish between indemnity paid by way of compensation (for material and/or moral damage) and money provided for rehabilitation purposes.

A number of decisions have specifically included rehabilitation in reparations awards. The Committee against Torture, for instance, recommended that the Government of Zambia establish rehabilitation centres for victims of torture,¹¹⁷ and advised the Government of Indonesia to “take immediate steps to address the urgent need for rehabilitation of the large number of victims of torture and ill treatment in the country.”¹¹⁸ The Inter-American Court has been the most active of the regional courts in referring to the importance of rehabilitation in the overall framework of reparations. A series of judgments have awarded rehabilitation as part of broader awards. In the *Barrios Altos* case, the Court approved the agreement signed by the state and the victims wherein the state recognised its obligation to provide “diagnostic procedures, medicines, specialized aid, hos-

113) Velásquez Rodríguez, *supra*.

114) See e.g. the decision of the Inter-American Court in the Velásquez Rodríguez. Cf. also Papamichalopoulos v. Greece (Article 50), ECHR, Series A. No. 330-B (1995).

115) See for example the UN Convention on the Rights of the Child U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990, and its Optional Protocol U.N. Doc. A/54/49, Vol. III (2000), entered into force February 12, 2002; UN Convention against Torture U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987; Declaration

on the Protection of All Persons from Enforced Disappearances GA Res. 47/133 of 18 December 1992 ; Declaration on the Elimination of Violence against Women GA Res. 48/104 of 20 December 1993.

116) Principle 24, Final report of the Special Rapporteur, Professor M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, E/CN.4/2000/62, 18 January 2000.

117) CAT/C/XXVII/Concl.4, 23 November 2001.

118) CAT/C/XXVII/Concl.3, 22 November 2001.

pitalisation, surgeries, labouring, traumatic rehabilitation and mental health.”¹¹⁹ In other cases, the Court provided for the future medical treatment of victims where there was a direct link between the condition and the violation.¹²⁰

d) Satisfaction and guarantees of non-repetition

Satisfaction and guarantees of non-repetition refer to the range of measures that may contribute to the broader and longer-term restorative aims of reparation. A central component is the role of public acknowledgment of the violation, the victims’ right to know the truth and to have the perpetrators held accountable.¹²¹ The Basic Principles on Reparation lists measures such as cessation of continuing violations, judicial sanctions against persons responsible for the violations, an apology, including public acknowledgement of the facts and acceptance of responsibility, commemorations and tributes to the victims, and implementing preventative measures, such as ensuring effective civilian control of military and security forces, and protecting human rights defenders and persons in the legal, media and other related professions.

The Basic Principles and Guidelines list

certain measures that constitute both guarantees of non-repetition and satisfaction to victims. The following are some examples:

- Cessation of continuing violations;
- Apology, including public acknowledgement of the facts and acceptance of responsibility;
- Judicial or administrative sanctions against persons responsible for the violations;
- Commemorations and tributes to the victims.¹²²

The Tribunal in the Rainbow Warrior arbitration pointed out that: “There is a long established practice of states and international courts and tribunals using satisfaction as a remedy or form of reparation (in the wide sense) for the breach on an international obligation ...”¹²³ Satisfaction may consist of an acknowledgement of the breach, an expression of regret, a formal apology, a declaratory judgment or another appropriate modality. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.¹²⁴

One of the most common forms of satisfaction is a declaration of the wrongfulness of the act by a competent court or tribunal.

119) *Chumbipuma Aguirre et al. vs Peru (Barrios Altos Case)*, Series C No. 87, Reparations, Judgment of 30 November 2001, para. 40.

120) See, for example, *Cantoral Benavides Case vs Peru*, Series C No. 88 Reparations Judgment of 3 December 2001; *Durand and Ugarte Case vs Peru*, Series C No. 89 Reparations agreement between the victims and the State, 3 December 2001.

121) Question of the impunity of perpetrators of human rights violations (civil and political); E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, para. 17.

122) See also, Joinet report, para. 42, who notes that, “on a collective basis, symbolic measures intended to provide moral reparation, such as formal public recognition by the state of its responsibility, or official declarations aimed at restoring victims’ dignity, commemorative ceremonies, naming of public thoroughfares or the erection of monuments, help to discharge the duty of remembrance.”

123) *Rainbow Warrior (New Zealand/France)* UNRIAA, vol. XX, p. 217 (1990) at pp. 272-273, para. 122.

124) *Ibid.*

Given that any court or tribunal which has jurisdiction over a dispute has the authority to make a declaration of its findings, as a necessary part of the judicial process, a declaration may sometimes act as a precondition to other forms of reparation, or it may be the only remedy sought. In some instances, the European Court of Human Rights has held that a finding of a violation is sufficient “just satisfaction”, even when the petitioner has specifically sought compensation;¹²⁵ though in others, the Court awarded the full amount of compensation sought for pecuniary and non-pecuniary damages “in view of the extremely serious violations of the Convention [...] and the anxiety and distress that these undoubtedly caused.”¹²⁶

Implementing guarantees of no-repetition to prevent future violations and/or generally safeguards to prevent violations is a common obligation included in human rights instru-

ments. For example, the specific obligation to prevent torture is present in the Convention against Torture and the Inter-American Convention to Prevent and Punish Torture.¹²⁷ The vital role of prevention, as one means of reparation, has been enshrined by the European Convention on the Prevention of Torture,¹²⁸ as well as the newly adopted Optional Protocol to the Convention against Torture¹²⁹ and the Robben Island guidelines.¹³⁰ Prevention is also cited in the Istanbul Protocol¹³¹ as the first legal obligation that states must respect to ensure protection from torture. The *Velasquez Rodriguez* decision importantly recognised the legal duty of a state: “to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim compensation.”¹³²

125) For example, *Chahal v. United Kingdom*, App. No. 22414/93, Judgment of 15 November 1996; *Ahmed v. Austria*, App. No. 25964/94, Judgment of 17 December 1996.

126) For example, *Aksoy v. Turkey*, App. No. 21987/93, Judgment of 18 December 1996 para 113; *Aydin v. Turkey*, App. No. 23178/94, Judgment of 25 September 1997; *Selmouni v. France*, App. No. 25803/92, Judgment of 28 July 1999.

127) A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992).

128) *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Council of Europe, *European Treaties Series*, ETS No. 126.

129) *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. A/RES/57/199 adopted 18 December 2002.

130) *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)*, African Commission on Human and Peoples' Rights, 32nd Session, 17–23 October, 2002: Banjul, The Gambia. Significantly, Article 14 of the Guidelines notes that “States should prohibit and prevent the use, production and trade of equipment or substances designed to inflict torture or ill-treatment and the abuse of any other equipment or substance to these ends.”

131) *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment*, submitted to the United Nations High Commissioner for Human Rights, 9 August 1999, para 10(a): “Taking effective legislative, administrative, judicial or other measures to prevent acts of torture. No exceptions, including war, may be invoked as justification for torture...”

132) para 174. Judgment, *Inter-American Court of Human Rights*, Series C, No. 4 (1988).