The right to reparations for acts of torture: what right, what remedies?*

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1. Introduction

In all legal systems, one who wrongfully injures another is held responsible for redressing the injury caused. Holding the wrongdoer accountable to the victim serves a moral need because, on a practical level, collective insurance might just as easily provide adequate compensation for losses and for future economic needs. Remedies are thus not only about making the victim whole; they express opprobrium to the wrongdoer from the perspective of society as a whole. This is incorporated in prosecution and punishment when the injury stems from a criminal offense, but moral outrage also may be expressed in the form of fines or exemplary or punitive damages awarded the injured party. Such sanctions express the social conviction that disrespect for the rights of others impairs the wrongdoer's status as a moral claimant. Remedies and sanctions thus affirm, reinforce, and reify the fundamental values of society.

International law has long insisted that a state act or omission in violation of an international obligation must cease and the wrong-doing state must repair the harm caused by the illegal act. In the 1927 *Chorzow Factory* case, the PCIJ declared during the jurisdictional phase of the case that "reparation … is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."[1] Thus, when rights are created by international law and a correlative duty imposed on states to respect those rights, it is not necessary to specify the obligation to afford remedies for breach of the obligation, because the duty to repair emerges automatically by operation of law; indeed, the PCIJ has called the obligation of reparation part of the general conception of law itself.[2]

In a later phase of the same case, the Court specified the nature of reparations,

*) Unabridged keynote lecture

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1) Chorzów Factory (Ger. v. Pol), Jurisdiction, 1927 PCIJ, ser. A, No. 9, para. 184 (Apr. 11).

2) Chorzów Factory (Ger. v. Pol.), Merits, 1928 PCIJ (ser. A) No. 17 (Sept. 13), at 29 ("[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."). According to Fitzmaurice, "[T]he notion of international responsibility would be devoid of content if it did not involve a liability to 'make reparation in an adequate form'." Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice[6] (1986).

holding that "it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."[3] According to the Court:

The essential principle contained in the actual notion of an illegal act ... is that reparation must, so far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[4]

These interrelated principles – that an international delict generates an obligation of reparation, and that reparation must insofar as possible eradicate the consequences of the illegal act – are the foundation of the international law on remedies. The 2001 International Law Commission's Draft Articles on State Responsibility[5] reaffirmed them, but they also innovated in significant ways to reinforce broader community interests in upholding the international rule of law. The ILC innovations reflect the fact that reparations not only help address the needs of the injured party, they avoid a climate of impunity and preserve principles of legality. In this respect, reparations for human rights violations not only may provide a remedy for past abuse, but may help persuade those in power to comply with human rights norms in the future and thus reduce the incidence of violations.

The ILC Draft Articles largely conceive of reparations as a set of duties imposed on a wrong-doing state in the framework of the traditional inter-state law of state responsibility. This presentation considers the extent to which the inter-state obligations set forth have been transformed into an international right of reparations for individuals who have been tortured or suffered other abuse at the hands of state agents. It also looks at the nature of the procedural and substantive remedies that form part of modern human rights law. It concludes that the right to

3) Chorzow Factory, Jurisdiction, supra n. 1 at 21, reaffirmed in the Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion, 1949 ICJ Rep., para. 184. The ICJ has indicated that the basic principle of reparation articulated in the Chorzow Factory case applies to reparation for injury to individuals, even when a specific jurisdictional provision on reparation is contained in the statute of a tribunal. Application for Review of Judgment No. 158 of the UNAT, Advisory Opinion, 1973 ICJ Rep. 197-198 (July 12), citing Case Concerning the Factory at Chorzow (Merits)(Ger. v. Poland), 1928 PCIJ, ser. A, No. 17 (Sept. 13).

4) Factory at Chorzów, Merits, supra n. 2 at 47.

5) Draft Articles on Responsibility of States for Internationally Wrongful Acts, pt. 2, Arts. 28-41, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at <www.org.un/law/ilc>, reprinted in James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002).

6) Article 3 of the Hague Convention Regarding the Laws and Customs of Land Warfare obliges contracting parties to indemnify for a violation of the regulations. Similarly, Protocol I to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts states that any party to a conflict who violates the provisions of the Geneva Conventions or the Protocol "shall ... be liable to pay compensation."

reparations is a part of international human rights law, contained in global and regional human rights treaties and other normative instruments, including those concerned with international humanitarian law[6] and international criminal law.[7] The growing consensus on reparations has had a clear impact in national and international venues. The demands of justice that underlay these developments will continue to be pressed in these venues as states grapple with the aftermath of serious abuses.

2. Treaty obligations

The protection of human rights is generally recognized to be a fundamental aim of modern international law. In recent decades, almost every international organization, regional and global, has adopted human rights norms and responded to human rights violations by opening avenues of redress for individuals against oppressive action by member states. The proscription of torture is among the non-derogable, most fundamental norms of international human rights law, recognized as a breach of customary international law by domestic courts[8] and as a jus cogens norm by international tribunals.[9] The right to be free from torture can never be suspended or overridden, whether by claims of national security or other purported justification.

The remedial task is to convert this law into results by providing redress and deterrence. The element of enforceability in fact is often included in the definition of legal rights,[10] because a right entails a correlative duty to act or refrain from acting for the benefit of another person.[11] Unless this duty is somehow enforced or enforceable, it may be seen as only a voluntary obligation that can be fulfilled or ignored at will. The aim of remedies, to vindicate interests that have been injured, thus requires that human rights law, representing fundamental interests, develop not only a primary theory of what duties are owed, but a secondary theory of what duties exist when a primary duty is violated.

In practice, the survivor of abuse typically seeks to have government conduct declared wrongful and to have a remedy imposed against the individual and the state responsible for the wrong. Remedies may range from relatively nonintrusive remedies, such as declaratory judgments and monetary damages, to injunctions, prohibitions and affirmative orders. A declaratory judgment merely pronounces a particular practice or condition to be illegal, leaving officials free to choose if and how to remedy the situation. A damage award attempts to assess the harm that the misconduct has caused,

7) Statute of the Permanent International Criminal Court, Art. 75.

8) See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Hanoch v. Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring) (torture is violation of customary international law); *Tel-Oren*, 726 F.2d at 819–20 (Bork, J., concurring) ('the proscription of official torture [is] a principle that is embodied in numerous international conventions and declarations, that is "clear and unambiguous" . . . and about which there is universal agreement "in the modern usage and practice of nations" '); *Forti v. Suarez Mason*, 672 F. Supp. 1531 at 1541 (prohibition against official torture is 'universal, obligatory, and definable').

9) See, e.g., ICTY, *Furundzija Case*, Judgment of Dec. 10, 1998, IT-95-17/1; Eur.Ct.H.R., *Al-Adsani v. U.K.*, 21 November 2001, 34 Eur. Hum. Rts. Rep. 11 (2002).

10) See M. Ginsberg, *On Justice in Society* (1965), 74; I. Jenkins, *Social Order and the Limits of Law* (1980), 247.

11) W. Hohfeld, *Fundamental Legal Conceptions* (W. Cook (ed.), 1919), 38.

however difficult that may be, and impose the cost upon the wrongdoer. While there is always a danger of commodification, money is a substitute for restitution, because what has been taken cannot be restored in fact. In general, then, tribunals seek to create a hypothetical by aiming to produce the situation that would have existed if the wrongdoer had not violated the rights of the victim. This remedial role of tribunals is expressly mandated by international human rights law.

a. Global treaties

Global human rights instruments expressly guarantee the right to a remedy and oblige states parties to provide a remedy when human rights are violated. In addition, the UN General Assembly has adopted two declarations on the subject, giving greater detail and precision to the obligations of states. International human rights tribunals reviewing complaints of human rights violations have assessed state compliance with the obligation, in the process condemning state laws and policies that grant impunity to violators.

The texts of the treaties are clear on the duty of states parties to provide reparations for violations of rights guaranteed by national and international law. The International Covenant on Civil and Political Rights, which contains an absolute prohibition of torture, contains three separate articles on remedies, addressing the right of access to an authority competent to afford remedies and the right to an effective and enforceable remedy in Art. 2(3). Arts. 9(5) and 14(6) add that anyone unlawfully arrested, detained, or convicted shall have an enforceable right to compensation or be compensated according to law. The United Nations Convention against Torture, Article 14, is also forthright on the topic. Its mandate reads:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.[12]

Applying these and similar provisions, nearly all UN treaty bodies have discussed reparations and identified the kinds of remedies required, depending on the type of violation and the victim's condition. There are many common aspects to the approach to reparations by UN treaty bodies. All of them strongly affirm the right of access to justice before an independent and impartial tribunal. They also adhere to the view that substantive reparations are a right of victims. The term "victims" has been given broad reading to include not only the person abused, but the family members of the person as well. A few of the more significant decisions are described in this section.

The Human Rights Committee adopted a General Comment entitled "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant," concerning Article 2.[13] As the overarching framework of state obligations in the Covenant, Article 2 imposes both positive and negative obligations on the States Parties, including an obligation to provide redress for violations committed by private parties as well as state agents. On the procedural side, the

12) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, Article 14.

13) CCPR/C/74/CRP.4/Rev.3, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, May 5, 2003.

Comment notes the importance attached "to States Parties" establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law."[14] Administrative mechanisms are required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. "A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant."[15] In addition, cessation of an ongoing violation is an essential element of the right to an effective remedy.

Concerning substantive redress, the Comment affirmed that Article 2(3) requires states parties to make reparation to individuals whose rights have been violated. Otherwise, the obligation to provide an effective remedy is not discharged. Detailing this duty, the Comment suggests that the Covenant generally entails compensation, but, where appropriate, reparation can also involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition, and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

The duty to prosecute applies to violations of the Covenant that amount to criminal acts under either domestic or international law, which is the case with acts of torture. Commission of such acts can constitute a crime against humanity when committed as part of a widespread or systematic attack on a civilian population. In the Comment, the Committee also noted the possible need for provisional or interim measures to avoid continuing violations and repair harm at the earliest possible opportunity.

b. Regional instruments

Regional human rights treaties are equally concerned with ensuring that those whose rights are violated have access to justice and reparations. The European Convention for the Protection of Human Rights and Fundamental Freedoms[16] guarantees freedom from torture and in Articles 6 and 13 recognizes rights of access to justice and an effective remedy when rights are violated. The Council of Europe's Committee of Ministers reinforced Article 13 with a recommendation adopted in 1984 that calls on all Council of Europe member states to provide remedies for governmental wrongs.[17] European Convention Article 5(5) further requires that states compensate for arrests made in violation of Article 5.[18] Two texts of the European Union also address access to justice and compensation for victims of crimes.[19]

In the Inter-American system, Article XVII of the American Declaration of the Rights and Duties of Man,[20] guarantees every person the right to resort to the courts to ensure respect for legal rights and to obtain protection from acts of authority

14) Id, para 15. An earlier draft said that the Committee attaches "great" importance to the topic.

15) Id, para 14.

16) European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221 (hereinafter European Convention on Human Rights).

17) Recommendation No. R(84) 15 on Public Liability, adopted by the Committee of Ministers on 18 September 1984.

18) *Brogan v. United Kingdom* (1988) 145B Eur. Ct.H.R. (ser.A) and *Fox, Campbell and Hartley v. United Kingdom* (1990) 182 Eur.Ct.H.R. (ser. A).

that violate any fundamental constitutional rights. The American Convention on Human Rights goes further, entitling everyone to effective recourse for protection against acts that violate the fundamental rights recognized by the constitution "or laws of the state or by the Convention", even where the act is committed by persons acting in the course of their official duties.[21] The states parties are to ensure that the competent authorities enforce the remedies granted and, indeed, are obliged to respect and ensure the free and full exercise of all rights guaranteed by the Convention (Article 1(1)). These obligations are linked to the fair trial provisions of Article 8, which requires the state to provide a fair hearing before a competent, independent and impartial tribunal. Article 10 of the Convention further provides that every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.

The Inter-American Court has stated that under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1).[22] The Court has also concluded that the obligation of Convention parties to ensure rights generally requires that remedies include due diligence on the part of the state to prevent, investigate, and punish any violation of the rights recognized by the Convention.[23]

The African Charter on Human and Peoples' Rights[24] has several provisions on remedies. Article 7 guarantees every individual the right to have his cause heard, including "the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force." In addition, Article 21 refers to "the right to adequate compensation" in regard to "the spoliation of resources of a dispossessed people." Article 26 imposes a duty on States Parties to the Charter to guarantee the independence of the courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of rights and freedoms guaranteed by the Charter. The African Commission

19) See Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA, OJ L 82 of 2 March 2001 and Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ L 261/15 of 6 August 2004.

20) Adopted 2 May 1948, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948).

21) Article 25, American Convention on Human Rights, adopted 22 November 1969, in force 18 July 1978, OEA/ser.L/V/II.23, doc. 21 rev. 6 (1979), O.A.S.T.S. No. 36 at 1.

22) *Velasquez Rodriguez Case* (Preliminary Exceptions), (1987) 1 Inter-Am.Ct.H.R.(ser. C) para. 91; *Case of Las Palmeras*, (2001), 90 Inter-Am.Ct. H.R. (ser.C), para. 60; *Case of 19 Merchants*, (2004) 109 Inter-Am.Ct.H.R. (ser.C), para. 194; *Serrano-Cruz Sisters*, (2005) 120 Inter-Am.Ct. H.R. (ser.C), para. 194; *Moiwana Village v. Suriname*, (2005), 124 Inter-Am.Ct.H.R. (ser.C), para 142.

23) *Velasquez Rodriguez Case* (Merits), (1988) 4 Inter-Am. Ct.H.R. (ser .C), para. 166.

24) 27 June 1981, in force 21 October 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, (1982) 21 I.L.M. 58.

emphasizes the need for independence of the judiciary and the guarantees of a fair trial, calling attacks on the judiciary "especially invidious, because while it is a violation of human rights in itself, it permits other violations of rights to go unredressed."[25]

3. "Soft law" instruments

Declarations, resolutions and other non-treaty texts adopted by UN human rights Charter-based and treaty bodies also guarantee the right to a remedy. The UN efforts have been undertaken in the context of studies on impunity, disappearances, victims of crime, and historical injustices. Several of these are considered here.

The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[26] contains broad remedial guarantees for those who suffer pecuniary losses, physical or mental harm, and "substantial impairment of their fundamental rights" through acts or omissions, including abuse of power. Victims are entitled to redress and to be informed of their right to seek redress. Victims of public officials or other agents acting in an official or quasi-official capacity in violation of national criminal laws should receive restitution from the responsible state. Abuse of power that is not criminal under national law but that violates internationally recognized norms relating to human rights should be sanctioned and remedies provided, including restitution and/or compensation, and all necessary material, medical, psychological, and social assistance and support.

Special rapporteurs appointed by the Commission to study particular rights or duties have noted or emphasized the right to reparations. The mandate of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has focused primarily on the prevention of torture, but has recently discussed remedies for victims.[27] The Rapporteur receives information, most often provided by non-governmental organizations, on specific cases of alleged torture and brings this information to the attention of the government concerned, which is asked for comments. The Rapporteur "requests the Government to look into the matter and to see to it that, if the outcome of the inquiry confirms the allegation is true, the perpetrators will be punished and the victims will be compen-

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25) Af. Comm'n Hum. Rts, Comm. 129/94, *Civil Liberties Org'n v. Nigeria*, AGH/207 (XXXII) Annex VIII 17, at 19.

26) U.N.G.A. Res. 40/34 of 29 November 1985. Paragraph 4 states that victims are entitled to access to the mechanisms of justice and prompt redress for the harm they have suffered. Procedures are to be expeditious, fair, inexpensive and accessible. Where appropriate, restitution should be made to victims, their families or dependants by offenders or third parties responsible for their behavior. (Para. 8) Victims of abuse of power are defined as those harmed by acts which do not yet constitute violations of national criminal laws. In 1990, the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August - 7 September 1990), recommended that states base national legislation upon the Declaration and requested the UN Secretary-General to study the feasibility of establishing an international fund for victims of transnational crimes. Report of the Congress, A/CONF.144/28. The Council of Europe produced the European Convention on the Compensation of Victims of Violent Crimes (1983), a 1985 recommendation R(85) 11 on the position of the victim in the framework of criminal law and procedure, and a 1987 recommendation R(87)21 on assistance to victims and prevention of victimization.

27) The current mandate is described in *Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38*, E/Cn.4/2003/68, 17 Dec. 2002, para. 3.

sated." In annual reports to the Commission, the Rapporteur routinely recommends an end to torture and sometimes calls for specific remedial measures.

In his 2003 report, the Special Rapporteur addressed a revised series of recommendations to UN member states which specify that all detained persons should have the ability to challenge the lawfulness of detention, e.g. through habeas corpus or amparo. In addition, the Rapporteur recommended that an inquiry always be undertaken when there is a complaint of torture. If the complaint is well-founded, it should result in compensation to the victim or relatives and the trial of anyone suspected of committing torture or severe maltreatment. If guilt is established, the person should be punished.[28] The recommendations are clear that any amnesty or similar laws that would prevent prosecution in the name of national reconciliation should be abrogated. Paragraph (l) of the recommendations details the various forms of redress:

Legislation should be enacted to ensure that the victim of an act of torture obtains redress and fair and adequate compensation, including the means for the fullest rehabilitation possible. Adequate, effective and prompt reparation proportionate to the gravity of the violation and the physical and mental harm suffered should include the following elements: restitution, compensation, rehabilitation (including medical and psychological care as well as legal and social services), and satisfaction and guarantees of non-repetition. Such legislation should also provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her retraumatization in the course of legal and administrative procedures designed to provide justice and reparation.[29]

In 1992, the Sub-Commission took up the question of the impunity of perpetrators of violations of human rights.[30] The final report submitted in 1997 speaks of three fundamental rights of victims: the right to know, the right to justice, and the right to reparation.[31] The report refers to "the right of victims or their families to receive fair and adequate compensation within a reasonable period of time"[32] and annexes set of principles on his topic, including issues

28) E/CN.4/2003/68, p. 12.

29) Ibid.

30) Sub-Commission Resolution 1992/23 of August 1992, approved by the Commission on Human Rights in resolution 1993/43 of 5 March 1993. The 1992 Vienna Conference on Human Rights supported the efforts of the Commission and Sub-Commission to intensify opposition to the impunity of perpetrators of serious violations of human rights. See the Vienna Declaration and Program of Action, A/CONF/157/3, para. II.91. The special rapporteurs, El Hadji Guisse and Louis Joinet, prepared an interim report for the 1993 session. E/CN.4/Sub.2/1993/6. In 1994, the Sub-Commission split the study into two parts, asking Mr. Guisse to complete the report in regard to economic, social and cultural rights, and Mr. Joinet to undertake to report on civil and political rights. Resolution 1994/34 of 26 August, 1994, E/CN.4/Sub.2/1994/56, p. 81. Each rapporteur presented reports in 1995 and 1996. See: E/CN.4/Sub.2/1995/19; E/CN.4/Sub.2/1996/15; E/CN.4/Sub.2/1995/18.

31) The right to know includes the right to the truth and the duty to remember. Two specific proposals call for the prompt establishment of extrajudicial commissions of inquiry as an initial phase in establishing the truth, and taking urgent measures to preserve access to archives of the period of violations. The right to justice implies the denial of impunity. The right to reparation refers to individual measures intended to implement the right to reparation (restitution, compensation and rehabilitation) as well as collective measures of satisfaction and guarantees of non-repetition.

directly relating to the right to restitution, compensation and rehabilitation of victims.[33] In resolution 2003/72, the Commission requested the Secretary-General to appoint an independent expert to study best practices and make recommendations to assist states in strengthening their domestic capacity to combat impunity, making use of the principles on the topic. The study, submitted in 2004, contains a chapter on the right to reparation,[34] which it refers to as a fundamental tenet of international human rights law.

Finally, after some fifteen years of study, negotiations and drafting, the United Nations in 2005 adopted *Basic principles and guidelines on the right to remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*.[35] The UN Sub-Commission on Promotion and Protection of Human Rights, began its work on reparations in 1988, recognizing in a resolution that all victims of gross violations of human rights and fundamental freedoms *should be* entitled to restitution, fair and just compensation, and the means for as full a rehabilitation as possible for any damage suffered.[36] A special rapporteur appointed by the Sub-Commission,[37] Theodoor van Boven, submitted a series of reports that ended in 1994 with a proposed a set of principles and guidelines.[38] After the Human Rights Commission asked for a revision in the light of comments from governments and others,[39] a new version expanded the text by adding humanitarian law violations and by articulating state duties before setting forth the basic principles on the right to a remedy. In 1998, the Commission appointed an independent expert, Mr. Cherif Bassiouni, who prepared another revision of the draft basic principles and guidelines.[40]

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32) E/CN.4/1998/68, Chapter II, section K.

33) E/CN.4/Sub.2/1997/20 of 26 June 1997 and E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997.

34) *Independent Study on Best Practices, including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity, by Professor Diane Orentlicher,* E/CN.4/2004/88, 24 Feb. 2004.

35) U.N.G.A. Res. A/Res/60/147 of Dec. 16, 2005. The text was previously approved by the Commission on Human Rights, Res. 2005/35 of 19 April 2005 (adopted 40-0 with 13 abstentions).

36) Emphasis added in the text. Members of the Sub-Commission introduced the topic for study after attending a conference in Canada on the issue of World War II claims against Japan by persons used as forced laborers who had never received reparations. Communication from Th. Van Boven, May 4, 2004, on file with the author.

37) United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Resolution 1989/13 of 31 August 1989. The Human Rights Commission authorized the study by resolution 1990/35 of 2 March 1990, and the Economic and Social Council approved by resolution 1990/36 of 25 May 1990.

38) *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Preliminary report submitted by Theo van Boven, Special Rapporteur*, E/CN.4/Sub.2/1990/10, 26 July 1990; *Progress reports*, E/CN.4/Sub.2/1991/7 and E/CN.4/Sub.2/1992/8; *Final report*, E/CN.4/Sub.2/1993/8. The final van Boven report was sent to the U.N. Commission on Human Rights for consideration at its 1994 session. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1993/29 of 25 August 1993, E/CN.4/Sub.2/1993/45, 69-70. Governments and non-governmental organizations were asked to comment.

39) E/CN.4/Sub.2/1996/17 of 24 May 1996; E/CN.4/1997/104, Annex, of 16 January 1997 submitted in accordance with Sub-Commission resolution 1996/28.

40) E/CN.4/2000/62.

In 2002, pursuant to Commission resolution 2002/44, an international consultation in Geneva was held following which new revisions were made over the next year.[41] At its 2004 session, the Commission rather weakly affirmed that "victims of grave violations of human rights should receive, in appropriate cases, restitution, compensation and rehabilitation"[42] and asked for yet another revision. A final draft appeared October 1, 2004 which the Commission adopted without change; however thirteen states abstained from voting in favor of the Principles and Guidelines.[43] Only the German government explained its vote, but given the earlier U.S. opposition to including humanitarian law in the draft, it is probably fair to assume that its abstention was at least in part based on objections similar to those raised by Germany. According to the German government representative:

His delegation . . . deeply regretted having been unable to support the "Basic principles and guidelines" as included in the annex to resolution E/CN.4/2005/L.48. The text was an inaccurate reflection of customary international law. It erroneously sought to apply the principles of State responsibility to relationships between States and individuals and failed to differentiate adequately between human rights law and international humanitarian law. While certain instruments provided for the presentation of individual claims for the violation of human rights, such provisions did not exist for violations of international humanitarian law. The claim that such a right existed under the Hague Convention No. IV of 1907 or Protocol I Additional to the 1949 Geneva Conventions was entirely unsubstantiated. While the absence of a legal basis for individual reparation claims for violations of international humanitarian law might be regrettable, it must be taken into account. His delegation had repeatedly raised those concerns, which had compelled it to abstain from voting.[44]

The text of the *Basic Principles and Guidelines*, which was approved by the U.N. General Assembly, asserts that it does not create any new substantive international or domestic legal obligations, but instead concerns implementing existing legal obligations. Oddly, the report of the High Commissioner for Human Rights noted that "shall" was used in cases where a binding international norm is in effect; otherwise the term "should" was used.[45] In fact, liberal use of "should" in reference to existing obligations

41) Commission resolution 2003/34.

42) Commission resolution 2004/34.

43) Those abstaining were: Australia, Egypt, Eritrea, Ethiopia, Germany, India, Mauritania, Nepal, Qatar, Saudi Arabia, Sudan, Togo, and the United States of America.

44) E/CN.4/2005/SR.57.

45) E/CN.4/2003/63 of 27 December 2002.

46) Paragraph 18, for example, provide that victims of gross violations of international human rights and humanitarian law "should, as appropriate and proportional to the violation and the circumstances of each case, be provided with full and effective reparation . . . which include the following forms: restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition." The following paragraph contains a definition of restitution that is by no means innovative, but which uses "should": "Restitution should, whenever possible, restore the victim to the original situation before the violations . . . occurred." The next paragraph says that "compensation should be provided for any economically assessable damage . . . ." All of these statements appear to restate existing law and could have used "shall."

weakens the text and wrongly suggests that the right to a remedy is not current law.[46]

The preamble calls for the establishment, strengthening and expansion of national funds for compensation to victims and the expeditious development of appropriate rights and remedies for victims. It also asserts that the Principles are victim-oriented and directed at gross violations of international human rights law and serious violations of international humanitarian law "which, by their very grave nature, constitute an affront to human dignity." Consistent with the references to human dignity, the preamble recites its rationale for ensuring a right to a remedy, stating that by so doing, "the international community keeps faith and human solidarity with victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law." The following paragraph refers to "compassion" for victims and solidarity with humanity at large.

The decision to limit the major part of the Principles and Guidelines to "gross" and "serious" violations represents a compromise. In fact there are three separate categories of conduct referred to in the text: (1) obligations arising with reference to all internationally guaranteed human rights and international humanitarian law; (2) international crimes; and (3) "gross" violations of human rights law and "serious" violations of humanitarian law.

Parts I and II address the content and scope of obligations to respect, ensure respect for and enforce all international human rights and humanitarian law. These two sections distinguish and emphasize the dual nature of remedial rights: access to justice, on the one hand, and substantive remedies, on the other hand. Access to justice is required to be "fair, effective and prompt." Reparations should also be adequate, effective, prompt and appropriate. Action should be taken to prevent violations and to investigate promptly, thoroughly and impartially those which occur.

The remaining sections of the Principles and Guidelines apply to specific sub-sets of rights and obligations. Parts III and IV are concerned with human rights and humanitarian law violations that constitute crimes under international law. They iterate the duty of states to investigate and as appropriate, if evidence so warrants, to submit to prosecution those alleged to have committed crimes under international law. The text favors international judicial assistance and other forms of cooperation as well as the exercise of universal jurisdiction by states, where international law provides for it, and without application of statutes of limitations.

Most of the remainder of the Principles and Guidelines (Parts V-X) concern gross violations of human rights law and serious violations of international humanitarian law. They set forth the rights of access to justice and to substantive remedies. Part VII adds a third component to remedial rights, the "right to access to factual information and other relevant information concerning the violations." The meaning and scope of "other relevant information" that is not factual is unclear.

The notion of "victim" can include a dependant or member of the immediate family or household of the direct victim, or anyone who is injured in intervening to assist a victim or prevent further violations. Part VI on treatment of victims makes clear that victims should be treated with compassion and respect for their dignity and human rights, ensuring their safety and well-being and that of their families.

Access to justice forms the contents of Part VIII. Victims "shall" have equal access to an effective judicial remedy, although

administrative or other remedies may be provided in accordance with domestic or international law. Access to justice "should" include all available and appropriate international processes in which a person may have legal standing. Despite its use of "shall", the requirement of a judicial remedy goes further than the law contained in many human rights instruments, which call for an independent and impartial process that may be non-judicial in nature.[47] To make access to justice effective, states "should", inter alia, disseminate information about available remedies, take measures to protect victims and witnesses and "facilitate assistance" to victims. The latter term may suggest or refer to financial aid to indigent victims, but this is not made explicit in the text or commentary.

Part IX which details the forms of reparation and other appropriate remedies continues to shift between "shall" and "should." Part IX affirms that reparation "is intended to promote justice" by redressing injury and thus should be proportional to the gravity of the violations or the harm suffered. The inclusion of these two elements (scope of the injury and magnitude of the misconduct) as tests for the nature and range of reparations give more flexibility to the decision-maker in affording redress than if either factor alone were the basis for judgment.

The Principles and Guidelines diverge from the reparations provisions of the recent ILC Articles on State Responsibility in several respects. First, cessation of the breach is included among forms of satisfaction in the Principles and Guidelines, whereas the ILC convincingly places it as an obligation prior to and independent of reparation. Cessation is not part of reparation, but is part of the general obligation to conform to the norms of international law; it not a right of the victim capable of being waived.

The various forms of reparation follow the traditional categories found in the ILC Articles: restitution, compensation, satisfaction and guarantees of non-repetition. The Principles and Guidelines also add rehabilitation, something not in the ILC Articles. Restitution "should, whenever possible" restore the victim to a pre-violation status. Efforts to strengthen the language by using "shall" apparently ran into government objections during the consultations. The paragraph on compensation reiterates that the compensation provided should be "proportional to the violation" which allows the egregiousness of the act to be considered in evaluating moral damages, while not suggesting that punitive damage awards are appropriate. The Principles and Guidelines quite rightly include expenses for legal and medical assistance within the recoverable costs, as they are directly attributable to the wrong done.

Non-monetary remedies, apart from rehabilitation, are included as forms of satisfaction. While the ILC Articles disfavor satisfaction, they have been important in

47) Article 2(3)(b) of the ICCPR, for example, provides that each state party undertakes to ensure that any person claiming a remedy for guaranteed rights shall have the issue of reparations determined "by a competent judicial, administrative or legislative authorit[y], or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy." Article 6 of CERD similarly provides for remedies to be assured "through the competent national tribunals and other State institutions." It is not apparent that remedies for gross and systematic violations require greater judicial supervision that do remedies for individual violations; indeed, an argument can be made that the former require policy decisions and allocations of resources that may be better dealt with through other procedures.

48) The ICJ refused to indicate any guarantees of non-repetition in its judgments concerning US failure to comply with the Vienna Convention on Consular Relations, despite actions brought by several states asserting multiple violations of the Convention. See LaGrand (Ger. v. US); Avena and Others (Mex. v. U.S.).

49) Comm. No. 30/1978 *(Irene Bleier Lewenhoff and Rosa Valino de Bleier v. Uruguay)* U.N.UAOR, 37th Sess. Supp., No. 40, at 130, U.N. Doc. A/37/40 (1982) (deprivation of the right to life); Comm. No. 84/1981 (*Guillermo Ignacio Dermit Barbato and Hugo Harold Dermit Barbato v. Uruguay*) U.N. GAOR , 38th Sess., Supp. No. 40 at 124, U.N. Doc. A/38/40 (1983) (deprivation of the right to life); Comm. No. 107/1981 (*Elena Quinteros Almeida and Maria del Carmen Almeida de Quinteros v. Uruguay*) (disappearance) U.N. GAOR, Hum.Rts. Comm., 38th Sess., Supp. No. 40 at 216, U.N. Doc. A/38/40 (1983); Comm. No. 146/1983 and 148–154/1983 (*John Khemraadi Baboeram et al. v. Suriname)* U.N. GAOR, 40th Sess., Supp. No. 40 at 187 U.N. Doc. A/40/40 (1985) (deprivation of the right to life); Comm No. 161/1983 (*Joaquin David Herrera Rubio v. Columbia*) (disappearance and death) U.N. GAOR, Hum. Rts. Comm., 43rd Sess., Supp. No. 40, at 190, U.N. Doc. A/43/40 (1988); Comm. No. 194/1985 (*Jean Miango Muigo v. Zaire*) U.N. GAOR, Hum. Rts. Comm., 43rd Sess., Supp. No. 40, at 218, U.N. Doc. A/43/40 (1988) (right to life); Comm. No. 181/1984 (*A. and H. Sanjuan Arevalo v. Columbia*) (disappearances) U.N. GAOR, Hum. Rts. Comm., 45th Sess., Supp. No. 40, at 31 (Vol. 1), U.N. Doc A/45/40 (1990); Comm. No. 25/1978 (Carmen Amendola and Graciela Baritussio v. Uruguay) U.N. GAOR, Hum. Rts. Comm., 37th Sess., Supp. No. 40 at 187, U.N. Doc A/37/40 (1982) (torture); Comm. No. 124/1982 (*Tshitenge Muteba v. Zaire*) U.N. GAOR, Hum. Rts. Comm., 39th Sess., Supp. No. 40 at 182, U.N. Doc A/39/40 (1984) (torture); Comm No. 176/1984 (*Walter Lafuente Penarrieta et al. v. Bolivia*) U.N. GAOR, Hum. Rts. Comm., 43rd Sess., Supp. No. 40, at 199, U.N. Doc A/43/40 (1988).

50) Cases *Bleier, Barbato, Quintero, Baboeram, Miango, Muteba*, *supra* n. 33.

51) *Cases Bleier, Barbato, Muteba, Quinteros, Baboeram, Miango and Penarrieta, supra n. 33;* Case 45/1979 (*Suarez de Guerrero v. Colombia*) (killing by deliberate police action) U.N. GAOR, Hum. Rts. Comm., 37th Sess., Supp. No. 40, at 137, U.N. Doc A/37/40 (1982); Case No. 25/1978 (*Carmen Amendola and Graciela Baritoussio v. Uruguay*) (torture and detention); Case No. 110/1981 (*Antonio Viana Acosta v. Uruguay*) U.N. GAOR, Hum. Rts. Comm., 39th Sess., Supp. No. 40, at 169, U.N. Doc A/39/40 (1984) (torture).

52) Cases *Bleier, Barbato, Quintero, Baboeram*, Herrera *supra* n. 33; Case No. 80/1980 *(Elena Beatriz Vasilskis v. Uruguay*) U.N. GAOR, Hum. Rts. Comm., 38th Sess., Supp. No. 40 at 173, U.N. Doc A/38/40 (1983) (torture); Case No. 88/1981 (*Gustavo Raul Larrosa Bequio v. Uruguay*) U.N., GAOR, Hum. Rts. Comm., 38th Sess., Supp. No. 40 at 173, U.N. Doc A/38/40 (1983) (torture), *Muteba, Penarrieta, supra* n. 33.

53) Cases *Bleier, Barbato, Quintero, Baboeram, Herrera supra* n. 33; Case No. 80/1980 (*Elena Beatriz Vasilskis v. Uruguay*) U.N. GAOR, Hum. Rts. Comm., 38th Sess., Supp. No. 40 at 173, U.N. Doc A/38/40 (1983) (torture); Case No. 88/1981 *(Gustavo Raul Larrosa Bequio v. Uruguay*) U.N., GAOR, Hum. Rts. Comm., 38th Sess., Supp. No. 40 at 173, U.N. Doc A/38/40 (1983) (torture), *Muteba, Penarrieta, supra* n. 24; Comm. No. 965/2000 (*Karakurt v. Austria)* (modify the applicable law to eliminate discrimination).

54) Comm. No. 577/1994 (*Polay Campos v. Peru*), UN Doc A/53/40, Vol. II, 36, para. 10 (denial of a fair trial requires release of the applicant); Comm. No. 788/1997 (*Cagas et al. v the Philippines)*, UN Doc. A/57/40, Vol I, 116 (where authors had been detained for more than nine years without trial, either try them promptly or release them).

55) Comm. 641/1995 (*Gedumbe v. Congo*), UN Doc. A/57/40, Vol. 1I, 24, para. 6.2 (the author is entitled to reinstatement to public service and to his post, with all the consequences that this implies, or, if necessary to a similar post, with arrearages in salary); an identical remedy was awarded in Comm. No. 906/2000, (*Chira Vargas v. Peru*), Views of 22 July 2002, *id* at 228. The Committee also called for measures to ensure that similar violations do not recur in the future.

56) Comm. 747/1997 (*Des Fours Walderode v. the Czech Republic*), Views of 30 October 2001, UN Doc A/57/40, Vol II, 88, para. 95; Comm. No. 774/1997 (*Brok v. Czech Republic)*, Views of 31 October 2001, UN Doc. A/57/40, Vol. II, 110, para. 9 (restitution required for discrimination in property restitution).

the human rights field where the disparity of power between the state and individuals whose rights are violated make the state's role in disclosure of the violations and the reasons for them particularly important. Satisfaction thus includes truth-telling, recovery and reburial of victims' remains, actions to restore victims' reputation, apology and commemorations. It also may include judicial and administrative sanctions against those responsible, although the draft is clear that the duty to prosecute only applies to crimes and not to all human rights violations.

Guarantees of non-repetition, like satisfaction, are seen as largely inappropriate at the inter-state level,[48] but they are very important in human rights cases. The specific measures recommended in the draft mainly comprise strengthening of national institutions under the rule of law, including independence of the judiciary and civilian control of the military and security forces.

Final provisions recall the duty of non-discrimination and the due process rights of any accused person.

4. The content of remedial rights and duties

Comparing the texts that have emerged and international practice affords a glimpse into the key legal issues, underlying aims, priorities, and assumptions linked to norms on reparations. It is clearly accepted that the right to a remedy comprises two aspects, on the one hand, the procedural right of access to justice and, on the other hand, the substantive right to redress for injury suffered because of an act or acts committed in violation of rights contained in national or international law. Invoking the right of access to justice, victims have pressed claims in domestic and international tribunals, both of which increasingly face claims for reparations.

On the procedural side, the attributes of an effective remedy include the institutional independence of the remedial body from the authority responsible for the violation, the ability to invoke the guaranteed right, procedural fairness, the capability of the remedial body to afford redress, and effectiveness in fact. As seen above, some international agreements explicitly call for the development of judicial remedies for the rights they guarantee, although effective remedies also may be supplied by non-judicial bodies.

On the substantive side, the jurisprudence of the UN Human Rights Committee to date has specified one or more of the following remedies for violations of the Covenant:

(a) public investigation to establish the facts[49]
(b) bringing to justice the perpetrators[50]
(c) compensation[51]
(d) ensuring non-repetition of the violation[52]
(e) amending the law[53]
(f) providing restitution of liberty,[54] employment[55] or property[56]
(g) providing medical care and treatment[57]
(h) permitting the victim to leave the country[58]
(i) enjoining an imminent violation.[59]

Guarantees of non-repetition are an important aspect of the Committee's approach to remedies. It frequently calls upon states parties to take steps to ensure that similar violations do not occur in the future. It also has stressed repeatedly that states parties are under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant.[60] In the *J.D. Herrera Rubio* case, the Committee concluded that Colombia had not taken the measures needed to prevent the disappearance and death of the parents of the author of the communication,

had failed to adequately investigate, and that accordingly it had the duty to adopt effective measures of reparations, proceed with the investigations, and take measures to ensure that similar violations did not occur in the future.[61] Similarly, in *Frances et al v. Trinidad and Tobago,*[62] the Committee, calling the conditions of detention "deplorable," held that the state was under an obligation to improve the conditions of detention in its prisons without delay in order to bring them into line with Article 10 of the Covenant.

The focus of the Committee against Torture has largely been on rehabilitation of torture survivors. It recommended to the government Zambia that it establish rehabilitation centers and called on 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."[63] On individual complaints, the Committee has recognized that a breach of the Convention requires the state to take remedial measures, including guarantees of non-repetition. In the case of *O.R., M.M. and M.S. v. Argentina*, the Committee found the cases inadmissible because they related to events prior to the entry into force of the Convention for the state. The Committee nonetheless expressed its view that the national "Full Stop Law" and "Law of Due Obedience" (the second adopted after ratification of the Convention) were "incompatible with the spirit and purpose" of the Convention against Torture, but the Committee observed that it could not fail to indicate that "even before the entry into force of the Convention against Torture, there was a general rule of international law that obliged all States to take effective measures to prevent torture and to punish acts of torture". The state was encouraged to adopt "appropriate measures" of reparation.[64]

The case law of regional human rights bodies is insistent on the obligation of states to provide broad and effective remedies on behalf of both direct and indirect victims. The European Court, for example, has made clear that failure to investigate and account for the disappearance of an individual con-

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57) Comm. No. 63/1979 (*Raul Sendic Antonaccio v. Uruguay*) (cruel, inhuman or degrading treatment or punishment); Comm. 684/1996, (*Sahadath v. Trinidad and Tobago*), Views of 2 April 2002, UN Doc A/57/40 Vol II, 66, para. 9 (the state party is under an obligation to provide appropriate medical and psychiatric care and improve the conditions of detention).

58) Comm. No. 52/1979 *(Sergio Ruben Lopez Burgos v. Uruguay*), I Selected Decisions 88, para 14 ("the State party is under an obligation, pursuant to article 2(3) of the Covenant, to provide effective remedies to Lopez Burgos, including immediate release, permission to leave Uruguay and compensation for the violations which he has suffered, and to take steps to ensure that similar violations do not occur in the future.")

59) Comm. No. 930/2000 *(Hendrick Winata et al. v. Australia*), UN doc. A/56/40, 199, para. 9 (wrongful threatened deportation of foreign parents of a naturalized child requires "refraining from removing the authors from Australia before they have had an opportunity to have their application for parent visas examined with due consideration given to the protection required by Barry Winata's status as a minor.")

60) Comm. No. 63/1979 (*Raul Sendic Antonaccio v. Uruguay*) (cruel, inhuman or degrading treatment or punishment).

61) CCPR, views of 2 November 1987, ICCPR, Selected Decisions of the Human Rights Committee under the Optional Protocol, vol. II, 1990, 194–95.

62) Case 899/1999, *Frances et al v. Trinidad and Tobago*, Views of 25 July 2002, UN Doc. A/57/40, Vol. II, 211, para. 7.

63) CAT/C/SSVII/Concl., 23 Nov. 2001 (Zambia); CAT/C/XXVII/Concl. 2, 22 Nov. 2001 (Indonesia).

stitutes a violation of the rights of remaining family members under Convention Article 3, which prohibits torture and cruel, inhuman and degrading treatment. In *Kurt v. Turkey*, judgment of 25 May 1998, the Court held that the failure to account for her son was a violation of the applicant mother's right to be free from torture and her right to a remedy under Article 13. The Court was clear that Article 13 imposes an obligation on the state to conduct for the benefit of relatives a thorough and effective investigation into the disappearance of a person in government custody, capable of leading to the identification and punishment of those responsible and with effective access for the relatives (para. 140).

In *Aksoy v. Turkey* the Court similarly established the link between the prohibition of torture in Article 3 and the Article 13 requirement of a remedy. According to the Court, the fundamental importance of the ban on torture means that Article 13 imposes, without prejudice to any other domestic remedy, "an obligation on states to carry out a thorough and effective investigation of incidents of torture." This duty arises whenever an individual has an "arguable claim" of torture committed by state agents. It entails "in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the individual to the investigatory procedure." Thus, the substantive prohibitions of Article 3 are coupled with procedural duties that include investigation, prosecution, punishment and redress. Failure of the state to act on any of these points violates both Article 3 and Article 13.

The Inter-American Court has perhaps best summed up the requirements of international human rights law to afford full reparations. It has held that the obligation of reparation constitutes a rule of customary law that enshrines one of the fundamental principles of contemporary international law on state responsibility.[65] Thus, when an illicit act is imputed to the state, there immediately arises state responsibility for the breach of the international norm involved, together with the subsequent duty to make reparations and put an end to the consequences of the violation. The reparation of harm caused by the violation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in restoring the situation that existed before the violation occurred. When this is not possible, the state should adopt a series of measures (which the Court can order in cases before it) that, in addition to guaranteeing respect for the rights violated, will ensure that the damage resulting from the infractions is repaired, by way, *inter alia*, of payment of an indemnity as compensation for the harm caused. All aspects of reparations (scope, nature, modalities, and designation of beneficiaries) are governed by international law.

The Inter-American Court has regularly ordered the state before it to take specific action to remedy a breach of the Convention, as well as to pay compensation. The Court has ensured the effectiveness of the remedies by setting up trust funds, appointing experts, designing non-monetary remedies, and maintaining cases open until the awarded remedies have been fully carried out.

64) Comms. 1/1988, 2/1988 and 3/1988, decision 23 Dec. 1989, U.N. Report of the Committee against Torture, G.A.O.R. XLV Sess. 1990 at 111-112.

65) *Moiwana Village v. Suriname*, (2005), 124 Inter-Am.Ct.H.R. (ser.C) para. 169.

As the Court's practice reflects and is clear from the nature of human rights violations, the payment of money is not the most appropriate form of redress in many cases and is usually inadequate unless coupled with other measures. Some human rights bodies have suggested that non-monetary remedies, i.e., those that require a state to take specified actions rather than pay compensation, are required to ensure adequate redress. The state should provide measures of rehabilitation, including medical and psychological care, rehabilitation for any form of physical or mental damage, legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty, family life, citizenship, employment or property, return to the place of residence, and similar forms of restitution, satisfaction and reparation to remove the consequences of the violation. Such actions can be useful not only in giving satisfaction to the victim, but in eliminating the cause of the violation and promoting respect for the human right that was violated. Common non-pecuniary reparations measures adopted include a public acknowledgment of the violation at official ceremonies;[66] publication of the violation and remedies afforded in local media,[67] an official apology by state officials,[68] or other public acts designed "to restore the victims' reputation and honor."[69]

Compensation, however inadequate, is the most common form of reparation. There are three kinds of compensatory damages: nominal (a small sum of money awarded to symbolize the vindication of rights and make the judgment a matter of record); pecuniary damages (intended to represent the closest possible financial equivalent of the monetary loss or harm suffered); and moral damages (compensation for dignitary violations, including fear, humiliation, mental distress). Compensatory damages generally provide for:

(1) past physical and mental suffering
(2) future physical and mental suffering
(3) medical expenses
(4) loss of earnings and earning capacity
(5) incidental out of pocket expenses, including e.g. travel, nursing care
(6) property injury or loss and
(7) permanent disability and disfigurement.[70]

The problem of calculating damages is complex. A decision-maker considering the case of a person who suffers a permanent disability as a result of official torture[71] can calculate the costs already incurred, such as past medical expenses, therapy charges, damage to property and lost earnings prior to judgment. Justice also demands, however, that the court consider lost future earnings and opportunities, and other losses which require prediction of future events, including loss in enjoyment of life. Reduced life expectancy may be claimed, although national

66) *Contreras San Martin Case*, at para. 17; *Carrillo Saldana Case*, at para. 13.

67) *Livia Robles Case*, at para. 13. *See also Merciadri de Morini Case*, at para. 14. In *Merciadri de Morini*, the state decreed amendments to national electoral legislation that reflected the state's decision in the petition before the Commission.

68) *Contreras San Martin Case*, at para. 14, 22-23.

69) *Carabantes Galleguillos Case*, at para. 12, 14; *Contreras San Martin Case*, at para. 14.

70) *Berry v. City of Muskogee*, 900 F.2d 1989 (10th Cir. 1990): "In an action involving death, appropriate compensatory damages would include medical and burial expenses, pain and suffering before death, loss of earnings based upon the probable duration of the victim's life had the injury not occurred, the victim's loss of consortium, and other damages recognized in common law tort actions".

jurisdictions are split on whether this is recoverable.[72]

There are few developed principles for calculating awards of non-monetary injuries like pain and suffering, fright, nervousness, grief, anxiety, and indignity.[73] While these injuries constitute recognized elements of damages, they are particularly personal and therefore difficult to measure. There is no objective test to measure the severity of a victim's pain, yet common human experience recognizes the reality of physical and emotional suffering.[74] The inherently subjective reaction to claims of pain and suffering can lead judges to award widely varying amounts for similar injuries. Some argue that intangible injury is so difficult to assess that there should be a conventional, set figure, perhaps calculated by unit of time.[75] Others claim that intangible harms like the loss of enjoyment of life are economic losses that can be consistently calculated from an *ex ante* perspective that asks how much a reasonable person would have paid to eliminate the risk that caused the injury.[76]

In practice, it seems clear that the award of moral damages is influenced by the government's conduct, but excessive amounts will not be awarded in the nature of aggravated or punitive damages. The Inter-American Court has said that the amount of moral damages should be "based upon the principles of equity" considering the "special circumstances of the case".[77] During one period the Court awarded an identical amount to each victim rather than individualizing the award,[78] setting the amount at US$20,000 per victim. Given that the average monthly income in one case was estimated at US$125, the sum was significant, although it was considerably less than the moral damages awarded in the *Velasquez Rodriguez* and *Godinez Cruz* cases. The state accepted responsibility in the former case, however, and this was explicitly relied upon by the Court as a factor in assessing moral damages.

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71) See M. Brody, 'Inflation, Productivity, and the Total Offset Method of Calculating Damages for Lost Future Earnings,' (1982) 49 *U. Chi. L.Rev.* 1003.

72) See J. Fleming, 'The Lost Years: A Problem in the Computation and Distribution of Damages,' (1962) 50 *Cql. L. Rev.* 598. Mexico's law implementing the United Nations Convention against Torture establishes the liability of persons who commit any of the designated offences for the legal, medical, funeral, rehabilitation and other expenses incurred by the victim or relatives of the victim. Federal Act for the Prevention and Punishment of Torture, Article 10. The law also calls for the offender to make good the damage for loss of life, impairment of health, loss of freedom, loss of income, incapacity for work, loss of or damage to property, and defamation of character. See *Report to the United Nations on Human Rights in Mexico*, HRI/CORE/1/Add.12/Rev.1.

73) See M. Plant, 'Damages for Pain and Suffering,' (1958) 19 *Ohio State L.J.* 200.

74) M. Geistfeld, 'Placing a Price on Pain and Suffering: A Method for Helping Juries Determining Tort Damages for Nonmonetary Injuries,' (1995) 83 *Cal.L.Rev.* 773.

75) B.S. Markensinis, *Tort Law* (1994), 708.

76) The dollar value of non-pecuniary loss is said to equal the difference between what people are willing to pay to avoid a particular risk or injury or death and the solely financial component – medical expenses, lost earnings – associated with that risk. Even someone fully insured against economic losses will pay for some safety measures and require a wage premium to run risks at work. Such behaviour is said to show the economic value of non-economic losses. See T. Miller, 'The Plausible Range for the Value of Life: Red Herrings Among the Mackerel,' (1990) 3 *J. Forensic Econ.* 17.

77) *Velasquez Rodrigues Case (Reparations), supra* n. 29, at para. 27; *El Amparo Case, supra* n. 29, at para. 37.

In the 2003 decision in *Myrna Mack Chang v. Guatamala*,[79] however, the Inter-American Court began shifting toward recognition that full reparation in some cases involves not only compensation but punishment. The judgment found that the victim was deliberately murdered as a consequence of a military intelligence operation planned and carefully prepared by the high command of the Presidential General Staff. The victim was selected because of her work documenting the abuse of indigenous communities in Guatemala. The government covered up the violation, obstructed the judicial investigation and attacked the investigating police. Judges, prosecutors, attorneys, the next of kin and witnesses were subject to harassment and threats. The Court deemed that the material before it established "aggravated violations" and that rendering a judgment would constitute a form of reparation and be "a way to avoid recidivism of facts such as those suffered by Myrna Mack Chang and her next of kin." The Court found a pattern of extra-legal executions fostered and tolerated by the state and awarded a lengthy list of non-monetary reparations as a consequence, in addition to compensation. The measures ordered were:

- that the State must effectively investigate the facts of the case, with the aim of identifying, trying, and punishing all the direct perpetrators and accessories, and all others responsible for the execution of Myrna Mack Chang, and for the cover-up of the execution and other facts of the case, aside from the person who had already been punished for those facts; and that the results of the investigations must be made known to the public,
- that the State must remove all de facto and legal obstacles and mechanisms that maintain impunity in the instant case, provide sufficient security measures to the judicial authorities, prosecutors, witnesses, legal operators, and to the next of kin of Myrna Mack Chang, and resort to all other means available to it so as to expedite the proceeding,
- that the State must publish within three months of notification of the judgment, at least once, in the official gazette "Diario Oficial" and in another national-circulation daily, the proven facts and operative paragraphs of the judgment,
- that the State must carry out a public act of acknowledgment of its responsibility in connection with the facts of this case and of amends to the memory of Myrna Mack Chang and to her next of kin, in the presence of the highest authorities of the State,
- that the State must publicly honor the memory of José Mérida Escobar, the murdered police investigator,
- that the State must include, in the training courses for members of the armed forces and the police, as well as the security agencies, education regarding human rights and international humanitarian law,
- that the State must establish a scholarship in the name of Myrna Mack Chang,
- that the State must name a well-known street or square in Guatemala City after Myrna Mack Chang, and place a plaque in her memory where she died, or nearby, with reference to the activities she carried out.

78) *El Amparo and Neira Alegria Cases, supra* n. 29.

79) Judgment of Nov. 25, 2003, 101 Inter-Am.Ct. H.R. (Ser. C).

In a concurring opinion, Judge Cancado-Trindade adopted the notion of aggravated responsibility, noting that the nature of the offense makes a link between reparations and combating impunity, with the former then taking on elements of compensation and punishment. He saw exemplary or dissuasive reparations as consistent with the idea of aggravated responsibility to ensure non-repetition of the offenses. He found that this aspect of punitive damages is consistent with the reparatory function of the Court, but not in the sense of monetary compensation (which he viewed as entailing a risk of "commercialization of justice"). Instead, the various forms of non-monetary reparations could be seen as being both compensatory and punitive, because they sought to ensure non-repetition as well as repair the harm caused. Thus, in his view, punitive damages have long been awarded in the Inter-American system. This approach probably claims too much, since some of the measures are clearly intended as satisfaction, but to the extent that all guarantees of non-repetition are intended to deter based on past conduct, they could be seen as containing an element of condemnation or punishment as well as reparation. Judge Sergio Ramirez also rejected the idea of punitive damages in monetary terms because "it corresponds more to the idea of a fine than to that of the reparation of damage and, in any case, it would be payable by the Treasury, which implies an additional burden for the taxpayer and also a reduction in the resources that should go towards social programs." The views of these judges explain more fully what is implicit in the Court's judgment. The idea of "aggravated" violations is now accepted in the Inter-American Court and can be the avenue for various new forms of non-pecuniary remedies.

As the Myrna Mack Chang case exemplifies, international tribunals have been particularly concerned with the issue of impunity. The Inter-American Court's decision in the *Velásquez-Rodríguez* case was the first to go beyond the discussion of redress and articulate the state's additional duty to prevent, investigate and punish serious human rights violations. The judgment thus established a mandatory interaction between criminal and civil remedies for certain serious violations.[80] Domestic norms and judicial practices that impede the investigation, prosecution and punishment of the perpetrators, should be annulled or repealed.[81]

International tribunals have reiterated that the obligation to investigate, prosecute and punish is not a mere formality and "must be complied with seriously."[82] States may not "resort to measures such as amnesty, extinguishment and [others] designed to eliminate responsibility."[83] In the landmark *Barrios Altos* case, the Court held firmly that amnesty laws passed in relation to gross human rights violations do not comply with the dictates of the American Convention or international human rights

80) *Loayza Tamayo Case*, Reparations, 11 Inter-Am. C.H.R. (Ser. C), para. 129(d) (1998); *El Caracazo Case*, 95 Inter-Am. C.H.R. (Ser. C), para. 77 (2002); *Castillo Páez Case*, Reparations, 43 Inter-Am. C.H.R. (Ser. C), para. 49 (1998); *Garrido and Baigorria Case*, Reparations, 39 Inter-Am. C.H.R. (Ser. C), para. 42 (1998).

81) Case 11.771 (*Catalan Lincoleo v. Chile*), Inter-Am. C.H.R. 96, OEA/ser.L/V/II.111, doc. 20 rev. (2001); Case 10.247, et al. (*Extrajudicial Executions and Forced Disappearances*), Inter-Am. C.H.R. 253, OEA/ser.L/V/II.114, doc. 5 rev. (2001); Case 10.488 (*Ellacuria, S.J., et al. v. El Salvador*), Inter-Am. C.H.R.241, OEA/ser.L/V/II.106, doc. 6 rev. (1999).

law generally.[84] Such actions are incompatible with the American Convention because "they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."[85]

Conclusions

The right of victims of torture to receive reparations is now widely acknowledged. Given the general recognition of the right to a remedy in law and practice, many consider it to be a norm of customary international law. Where states fail to provide the necessary remedies for human rights violations, international institutions are the forum of last resort. The authority of human rights tribunals to afford remedies is uncontested. Judicial bodies have inherent power to remedy breaches of law in cases within their jurisdiction. In addition, human rights treaties sometimes confer explicit competence to afford redress on the organs they create to hear cases.

The ancient adage *ubi jus, ibi remedium* (where there is a right there is a remedy) is reflected in the importance given in international human rights law to the existence of effective remedies, which are seen as necessary in order to ensure the full enjoyment of other rights. The international attention to remedies reflects concern with upholding and ensuring the effective enjoyment of guaranteed rights.

International human rights law and practice on remedies is evolving with the need to ensure the rule of law and promote compliance by states with their human rights obligations. International tribunals are also increasingly concerned with reducing their growing caseloads by emphasizing remedies at the national level. There is thus a new emphasis on eliminating systemic violations through changes in domestic laws, in additional to compensating the individual applicant who brings a case to an international tribunal. International tribunals are promoting and using innovative and specific non-monetary remedies, including requirements that the government acknowledge its responsibility and issue an apology, create a memorial to the victims, establish development or scholarship funds, build and operate medical clinics and schools, and provide medical treatment or other forms of rehabilitation. The notion of "aggravated violations" recognized in the Inter-American and European Courts is also having an impact on the nature of remedies and the quantum of compensation. Each decision contributes to the growing jurisprudence to guide states and assist in providing individualized justice to victims of human rights violations.

82) *Villagrán Morales et al. Case*, at para. 100. *See also Suárez Rosero Case*, at para. 79 and 80.

83) *El Caracazo Case*, at para. 119.

84) *See Barrios Altos Case*, Judgment, 75 Inter-Am. C.H.R. (Ser. C), at para. 41- 44.

85) *Barrios Altos Case*, Judgment,), para. 41 (2001).