REPARATION FOR TORTURE

A SURVEY OF LAW AND PRACTICE IN THIRTY SELECTED COUNTRIES

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FOREWORD

The initiative of the Redress Trust to launch the *Audit Project: A Survey of the Law and Practice of Reparation for Torture in 30 Countries Worldwide* is timely and welcome. The present publication provides a comprehensive account of this project and contains convincing arguments to capture the pressing problems of the torture victims' right to redress and reparation.

International standards relating to the right of victims to reparation are included in many human rights instruments and recent developments in the area of international criminal law set an important victim-oriented trend in criminal justice. Moreover, renewed efforts are made to underscore the need for reparational justice by means of a constructive review of the *Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law*.

However, as the findings of the present project clearly demonstrate, domestic law and practice fall far below the international standards to which countries have committed themselves. In a study I carried out in an earlier capacity as Special Rapporteur on the right to reparation I commented that "…large categories of victims of gross violations of human rights, as a result of the actual contents of national laws or because of the manner in which these laws are applied, fail to receive the reparation which is due to them. Limitations in time, including the application of statutory limitations; restrictions in the definition of the scope and nature of the violations; the operation of amnesty laws; the restrictive attitude of courts; the incapability of certain groups of victims to present and to pursue their claims; lack of economic and financial resources: the consequence of all these factors, individually and jointly, is that the principle of equality of rights and due reparation of all victims are not implemented" (UN doc. E/CN/4/Sub. 2/1993/8, para: 124).

After the turn of the century, now some ten years later, the plight of victims has remained largely unchanged, in spite of continuous efforts by international monitoring mechanisms to bridge the gaps between international standards and national performance. Thus, as far as reparation for victims of torture is concerned, the then Special Rapporteur on Torture, Sir Nigel Rodley, reported in the year 2000 to the fifty-fifth session of the United Nations General Assembly that in response to his requests to Governments for information on the nature and amount of any compensation made to victims of torture or his/her relatives, he had rarely received details regarding reparation (UN doc. A/55/290). As his successor I cannot but confirm Sir Nigel's findings, which still reflect the actual state of affairs that the rights of victims are largely ignored. While the neglect or denial of the rights of victims of gross violations of human rights is a general feature of today's domestic practice, victims of torture often find themselves in an even more desperate situation.

In the present audit project a number of reasons are exposed why in particular torture survivors and victims are sadly deprived of their entitlement to reparational justice. Perhaps more than other victims, torture survivors encounter the lack of political will on the part of public authorities to investigate and acknowledge torture practices inflicted by officials linked up with these very authorities and shielded by them from criminal responsibility. In addition, like other victims and persons who belong to the downtrodden and the destitute strata of

national and international society, torture survivors often lack access to justice and to effective recourse procedures; independent judicial and administrative agencies are unavailable and the authorities are simply incapable or unwilling to set up and maintain reparational schemes and programmes for the benefit of victims.

An important step in the long process towards the rectification of these and many other deficiencies in the administration of justice is to identify such deficiencies, to explain their causes and to recommend policies for remedy and redress. This is the purpose of this audit project, with its focus on findings and analysis of laws and practices in 30 countries. As the UN Secretary-General stressed in his report *Strengthening of the United Nations: an agenda for further change* (UN doc. A/57/387, paras. 50ff.), human rights have to be supported first and foremost at the country level. Building strong human rights institutions at the country level and the emplacement or enhancement of national protection systems, reflecting international human rights norms, should be a principal objective. The audit project launched by The REDRESS TRUST responds to the need to enhance such national protection systems, of which reparational justice for torture victims and survivors is an essential ingredient, with the ultimate aim and perspective in mind of fully suppressing and preventing the crime of torture.

Theo van Boven
Special Rapporteur of the UN Commission on Human Rights on Torture

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EXECUTIVE SUMMARY

Summary analysis

An analysis of law and practice on the right to reparation for torture in thirty countries from five regions was undertaken.[2] The study reveals considerable deficiencies in most countries, the main ones being the inadequacy of the laws and the large discrepancy between the law and its implementation. The chief conclusion from this analysis is that torture survivors and their relatives do not have recourse to effective remedies for their suffering and very rarely receive reparation of any kind.

Torture is, or has been, endemic in many of the countries under scrutiny, used either as a means of criminal investigation and/or against political opponents. The lack of legal safeguards contributes to the persistence of torture but impunity for perpetrators remains the biggest single obstacle to the prevention of torture and to fair and adequate reparation. Even in those countries where monetary compensation has been awarded, full reparation that should include rehabilitation and guarantees of non-repetition is denied.

The general absence of proper systems for the collection of torture specific data makes it extremely difficult to estimate both the extent of torture, the number of complaints, subsequent investigations and/or prosecutions and whether or not reparation has been awarded. One of the contributory factors to this gap in documentation is the failure in many of the countries to make torture a specific offence within domestic law. This in turn enhances the already weak political will to deal with the crime of torture and a consequent apathy at the judicial levels to pursue and prosecute torturers.

Regional Comparisons

A comparison of law and practice in the regions demonstrates more similarities than differences: namely a high incidence of torture and flawed legal remedies to investigate complaints, prosecute offenders, and award reparation. Nevertheless some differences do emerge. For example, although torture continues to be widespread, the jurisprudence of the Supreme Courts in both India and Sri Lanka has been impressive in awarding compensation to victims. Impunity remains a major problem in all three South Asian countries reviewed, despite the fact that in Sri Lanka a Torture Convention Act has recently been adopted and a special unit to investigate allegations set up. Conditions in Nepal are worsening, despite the introduction of special, but flawed, legislation to allow torture survivors to claim compensation.

Africa and the Middle East, with one or two important but qualified exceptions, emerge from this analysis as having an almost complete lack of accountability of perpetrators and the

[2] The following countries were examined: Argentina; Bahrain; Brazil; Chile; China; Egypt; Indonesia; India; Iran; Israel; Japan; Kenya; Lebanon; Mexico; Morocco; Nepal; Nigeria; Peru; Philippines; Romania; Russian Federation; Rwanda; Serbia and Montenegro; South Africa; Sri Lanka; Sudan; Switzerland; Turkey; United Kingdom (Scotland); Uzbekistan; Zimbabwe.

absence of reparation. The obstacles are often structural and in part the result of long periods of military dictatorships, the development of a culture of brutality, and weak mechanisms to deal with a massive backlog of allegations and complaints. Several countries, including Bahrain, Iran, Israel, Kenya, Lebanon, Morocco, Nigeria, Sudan and Zimbabwe have yet to provide any or full reparation to the large number of victims of ongoing or past human rights violations, including torture, often committed as part of State policy. Even efforts in South African through the Truth and Reconciliation Commission have come to little; torture by the police forces continues and the failure to prosecute perpetrators or award reparation to victims has resulted in disillusionment.

The granting of blanket amnesties, a feature of several countries in Latin America, inhibits proper reparation for the victims as it does punishment for the perpetrators of past human rights violations. While some sort of reparation has been awarded to victims of past human rights violations, this has by and large been inadequate and not torture specific. Impunity continues and the legal systems in many Latin American countries fail to provide effective remedies for torture. There is no express legislation to exercise universal jurisdiction and, indeed, these countries have been reluctant to comply with extradition requests.

The discrepancy between law and practice is seen at its greatest in some countries in East Asia and South East Asia, particularly in Indonesia. The failure to award reparation is almost complete despite the opportunities in recent legislation. In the Philippines, torture survivors may be able to claim a symbolic compensation from the Compensation Claims Board or receive some financial assistance through the Commission on Human Rights. Legal actions against the State require its consent, and there is no statutory provision providing for the State's liability for torture. While China and Japan have laws providing compensation for official wrongdoing, in practice these have proved to be inadequate and hardly effective remedies for torture survivors. All these countries have yet to redress past human rights violations. Finally, the lack of regional complaints mechanism makes the prospect of reparation a distant hope.

Europe, with the exception of some countries like Turkey, has a much lower incidence of torture but this is a relatively recent state of affairs. The courts, however, have failed to promote and provide full reparation and there has been a marked reluctance on the part of States to hold officials accountable for wrongdoing particularly in Turkey but also in Switzerland, Romania and the Republic of Serbia and Montenegro. Despite the access to the European Court of Human Rights and the favourable decision on torture cases, failures in domestic laws allow governments to ignore reparation claims, Turkey being the worst offender in this regard.

Russia and Uzbekistan follow the familiar pattern of impunity for the perpetrators of torture and failure to provide any form of reparation. Both countries suffer from the enduring political philosophy of individual weakness vis-à-vis the State. While a human rights culture is developing very gradually in Russia it is still virtually non-existent in Uzbekistan.

Legal Frameworks

International law: The right to reparation for victims of torture is clearly established in international law. Reparation encompasses restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. States are therefore not only obliged to refrain from acts of torture and to take measures to prevent its occurrence, but also have a duty to punish the perpetrators. The right to reparation also entails the obligation of States to afford

effective remedies for victims to obtain reparation, including access to justice. However, it is apparent that domestic courts, with notable exceptions, are reluctant to invoke international law, especially in the absence of implementing legislation. Very few States have enacted specific laws incorporating parts or all of the Convention against Torture. The mechanisms whereby international law is incorporated vary according to the respective legal traditions of the thirty countries. The most usual consequence, however, is that these international norms have little effect in most countries since they cannot be invoked directly and in turn the legal framework for reparation is absent.

Domestic law: Since torture is seldom prohibited in domestic law as a specific offence, it is most often dealt with as a common crime. This precludes treating torture as a different and grave violation of human rights and results in disproportionately low punishment, if any. Other and no less important outcomes of this failure in law include the lack of records on torture, the lack of public awareness of its incidence and prevalence and, crucially, inadequate if any reparation for torture victims and their relatives.

Criminal accountability: Existing provisions for the prosecution of torture perpetrators are equally flawed, some countries even having laws or regulations that virtually guarantee immunity to the perpetrators. In other countries the permission of the authorities is required before any investigations, let alone prosecutions, can take place. In many Latin American countries, amnesty laws still protect those who practised torture during recent periods of military dictatorship.

Although there are significant differences in the legal mechanisms for investigating and prosecuting torturers the unifying feature is that bodies, which lack independence often initiate these processes. This structural flaw results in many cases collapsing for want of sufficient, especially independent medical, evidence. Additional obstacles to systematic investigations and subsequent prosecutions include the reluctance on the part of victims and/or their families to pursue cases, for fear of retribution in the absence of effective laws affording protection.

Some countries have established national human rights commissions, which can play a vital role in preventing torture and ensuring reparation. However, once again these commissions often lack genuine independence and commonly can only recommend prosecution and to this extent are dependent on the judiciary to take strong action. There is little evidence of this happening. Even where judges have called for action to be taken, implementation does not always follow. Furthermore, trials are themselves long drawn out due to lack of evidence, police co-operation and, crucially, the lack of witness protection programmes. Sentencing tends to be lenient and certainly not proportionate to the damage inflicted on victims and compensation, if awarded, is far too low.

It is concluded that there needs to be a strong prosecution service and judiciary particularly in those countries where torture is routinely used against political opponents and has become institutionalised.

The right to reparation: Perhaps the most important finding is that the overwhelming majority of torture victims and/or their relatives receive no reparation at all. In fact, it is hard to find a case where a victim has received full reparation. This is due mainly to the failure in domestic laws to enact a specific right to reparation for serious human rights violations, including torture. This stands in stark contrast to the widespread legal provision for compensation for unlawful arrest and detention.

Despite the fact that several countries provide for a fundamental rights application to the highest courts, in practice this remedy lacks consistency. However, it can prove effective, as the reports on India and Sri Lanka demonstrate, and is certainly better than in those countries that deny such applications.

There is a similar inconsistency in whether or not the State allows public law remedies for wrongful conduct, in this case torture, on the part of its officials. In those few countries that recognise the right to compensation from the State, the awards do not often match the seriousness of the damage caused. The Philippines stands out in this report as the one State that is not liable for the conduct of its public officials and where the State cannot be sued.

In those countries where the right to some form of reparation is recognised under its domestic law, the most common form is compensation. Many factors including lack of access to the courts, due to a combination of ignorance, fear, lack of resources and ineffective legal systems and the briefness of the period within which claims must be lodged, as well as insufficient evidence and the linking of reparation to criminal convictions, hamper the use of these remedies. Added to this, in some countries enforcement of court decisions against the State depend on its consent and governments have been reluctant to give consent. National human rights commissions, even when empowered to recommend reparation, do often not insist on forms of reparation, in particular compensatory awards, commensurate with the harm inflicted.

The report refers to a traditional form of reparation, *Diya,* i.e. blood money; a remedy recognised in Islamic law that can be demanded by the victim of torture instead of retribution (qesas). While *Diya* is not an effective form of reparation, and it only applies to the infliction of bodily harm, it provides an alternative when other remedies are absent.

Universal Jurisdiction: Few countries have adopted legislation allowing jurisdiction over perpetrators of torture committed abroad. While some of the recently enacted laws to implement the Statute of the International Criminal Court allow universal jurisdiction over crimes against humanity, war crimes and genocide, the Statute does not cover the crime of torture as a specific offence. The laws of some States allow that certain offences committed abroad can be adjudicated on the basis of international treaties such as the Convention against Torture. However, with the lack of implementing legislation, this remedy is all but non-existent.

The inevitable conclusion is that most States are failing in their international obligations by not adopting legislation to bring domestic law into conformity with international law. This is exacerbated by the failure to provide an express right to claim compensation for survivors of torture suffered abroad.

Reparation for past violations: States have developed different mechanisms for dealing with survivors of torture during previous periods of State sponsored violence. The result of the present study again shows that acknowledgement of, let alone, reparation for, such crimes is rare. A common political bargain is the granting of amnesties in return for relinquishing power. These amnesties are either blanket or based on 'truth-telling' or conditional amnesty. The latter is obviously preferable in that the specifics of a given torture case can be publicly acknowledged and in this way the true extent of torture becomes known. However, the lack of subsequent prosecution of offenders is a source of dissatisfaction.

Where no amnesties are agreed, proper investigations into torture allegations are selective if they occur at all. This is sometimes due to the prevailing political influence of former government officials and the usual factors such as lack of resources and inadequate institutional support systems.

While reparation, albeit limited in scope, has been awarded to victims of disappearances, torture and other human rights violations in some countries, the response of most countries to offer justice and reparation to the victims of torture in the past has been woefully inadequate.

GENERAL INTRODUCTION

The Right to Reparation in international law

Torture is one of the most serious violations of human rights and human dignity. The right to be free from torture is one of the few rights under international law from which no derogation is permitted under any circumstances. International law obliges States to refrain from acts of torture and to take measures to prevent the occurrence of torture. It also establishes a duty for States to punish the perpetrators of acts of torture and to provide victims with legal remedies, including access to justice and reparation. These duties correspond to the right of torture survivors to an effective remedy, i.e. a procedure by which they are able to pursue their rights, and to obtain reparation.

Reparation, which encompasses restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, is not confined to the individual case and the need to redress past violations. It is also one of the major means, especially through exposing human rights violations and holding perpetrators accountable, of preventing torture.

The right to reparation for victims of serious human rights violations, in particular torture survivors or relatives of torture victims, is by now firmly established in international law. Complaints procedures that exist at the international and regional level can serve as important catalysts for change in particular countries, though they can never hope to deal with the scale of victims in all countries of the world, nor will they necessarily have the most direct impact on the ground. It is therefore first of all domestic remedies to which a torture survivor will have to turn to seek redress.

Need for audit and role of domestic law

REDRESS initiated the Audit Project in recognition of the importance of domestic law for the protection of human rights and for redressing human rights violations. The need for a collection of national laws and practice on redress for torture has been highlighted by Professor Theo van Boven, former UN Special Rapporteur on the question of the Right to Restitution, Compensation and Rehabilitation for Gross Violations of Human Rights and the current Special Rapporteur on Torture:

> "In all appropriate instances, national and international centres or institutions for the promotion of justice for victims of gross violations of human rights should be established. Such centres or institutions should set up and keep a permanent public record of truth. Furthermore, they should gather and collect information, laws, studies and other materials on relevant national

experiences, promote an exchange of experiences and comparisons, distil relevant lessons, and help build up a store of knowledge."[3]

The Objectives of the Project

It is against this background that the project examines domestic law and practice on the right to reparation for torture to establish to what extent, if at all, torture survivors have been able to exercise their right to reparation and States have implemented their obligations. As the focus is on State responsibility, the scope of analysis is confined to torture as defined in Article 1 of the Convention against Torture, i.e. torture committed by or with the acquiescence of public officials. In examining relevant law and practice, the Project critically evaluates measures taken by governments with the stated objective of complying with international obligations.

The main purposes of the Audit Project are to raise awareness of the need to improve domestic laws and practices on the right to reparation in the countries concerned and to assist torture survivors in pursuing their right to reparation. The Project is therefore part of the process of strengthening the right to reparation, in particular by serving as an enabling tool for torture survivors. In keeping with these objectives, the Project has been carried out through international and national cooperation, involving numerous actors, in particular those working on behalf of torture survivors in the countries concerned. This has not only in itself strengthened the network of individuals and organisations working towards the eradication of torture but has also led to a heightened awareness of the importance of victims' rights to reparation for the violation of human rights and humanitarian law in many of the countries analysed. One of the outcomes of the Project has been a seminar on the right to reparation for torture survivors in India, Nepal and Sri Lanka, held in New Delhi, India, on 14 September 2002, during which human rights activists, academics and government representatives explored strategies to strengthen the right to reparation in the region.[4]

It is hoped that the information collected and analysed will not only induce governments to undertake necessary law reforms but will assist torture survivors, lawyers and other human rights defenders working with them to claim reparation by using comparative experience. For example, the use of jurisprudence and/or measures adopted in one country could well support cases and/or proposals for law reform in another country. We hope that this report will also serve as a model for future country-related research on the right to reparation, and that eventually a comprehensive survey of relevant law and practice, ideally in the form of a continuously updated database could be established.

The Approach

The present document is the result of 18 months research. The collection and analysis of relevant law and practice is the outcome of a collaborative effort by NGOs, lawyers, academics and other concerned individuals and organisations. The countries covered by the study were selected on the basis of the following criteria: Geographical representation, representation of legal systems, and the need for, and prospect of, law reform.

[3] Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final report submitted by Mr.Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, para.136, Nr.14.

[4] See REDRESS/Commonwealth Human Rights Initiative, Responses to Human Rights Violations: The Implementation of the Right to Reparation for Torture in India, Nepal and Sri Lanka, February 2003.

Information on relevant law and practice in the various countries was compiled on the basis of a questionnaire (see Annex). The questionnaire was drafted taking into account current international standards on the right to reparation and States' obligations under international law, be it under the relevant international treaties or under customary international law. This has been done with a view to establishing the effectiveness of existing remedies, if available, from the perspective of a torture survivor, not only in the country where the acts of torture have been committed but also in third countries.

The final version of the questionnaire was the outcome of a consultation process, which involved torture survivors, organisations working towards the eradication of torture and various experts on torture and reparation who commented on the draft. The questionnaire was then sent to a number of counterparts in the respective countries, mainly lawyers and human rights organisations. It also provided the framework for a study by individual country experts who were commissioned with an in-depth analysis of the relevant law and practice of their country of expertise. The information and analysis thus provided formed the major source of information for the project. The resulting data were cross-checked against official reports as well as reports by the major human rights organisations on the state of law and practice in a given country, which included country reports to the various human rights mechanisms, the jurisprudence of the major human rights bodies and country-related information contained in UN Documents on certain aspects of the right to reparation. In some cases, relevant ministries of the government of the country concerned were contacted for further information or verification. The combination of a wide variety of sources and the commissioning of experts ensured the highest possible degree of accuracy. The cut-off date for the information included in this report was March 2003.

Structure of the Report and of Individual Country Studies

The survey is divided into three main parts. The first part contains an analysis of the status and scope of the right to reparation under international law and the mechanisms available to pursue this right. In the second part, the implementation of the right to reparation in the domestic law and practice of the countries selected is examined against the background of the applicable standards of international law as developed by regional and international mechanisms. The individual country studies are available on REDRESS' website: [http://www.redress.org] They follow the same structure but vary depending on the existing law and practice and the information received in the course of the research. The approach taken is largely descriptive with the emphasis on the analysis of existing obstacles to the right to reparation. A critical evaluation of the factual findings is undertaken in the Summary of Findings following the country reports.

The country reports are structured as follows: Following an introduction on the actual practice of torture in the country concerned and the general legal framework, namely the Constitution and the status of international law in the domestic legal system, the studies provide an overview of the prohibition of torture in domestic law. Thereafter, the law and practice relating to criminal accountability, in itself a form of reparation, but also in most cases a precondition for successful reparation claims, is examined. This is followed by an examination of available remedies and their effectiveness, including the forms of reparation recognised in law and in practice. The part on available remedies is supplemented by an overview of government reparation measures, which includes not only existing ones but also those envisaged or proposed that have subsequently not or not yet been implemented. The final part examines the available mechanisms for claiming reparation for torture committed

abroad by using universal jurisdiction in criminal and civil cases, and the actual application of such universal jurisdiction.

The final part of the report contains an analysis of the findings of the country studies and a set of recommendations based on these findings directed at the countries covered by the project.

REPARATION FOR TORTURE IN INTERNATIONAL LAW AND PRACTICE

A. Introduction

While most States have ratified the international instruments and treaties that give effect to the right to reparation for serious violations of human rights and humanitarian law, including torture, there continue to be well-attested reports of violations in many of those countries. Most States have accepted the high principles of international obligations but have done little to ensure their implementation in the domestic context. This is particularly the case in respect of torture; the prohibition of torture is a principle that is universally adhered to, yet States continue to condone the practice behind closed doors. The failure to acknowledge the wrong makes it almost impossible for perpetrators to be brought to justice or for the dignity of victims to be restored.

Yet most survivors of torture will have suffered severe physical and psychological trauma, possible upheaval and drastic change of circumstances. The process of healing will normally require the survivor to come to terms with his/her traumatic past. Obtaining closure for the events of the past may facilitate psychological recovery, instil greater confidence and a sense of the future, thereby contributing to the overall integration process. The wide gaps between principles and practice, and between the needs and rights of survivors and what they actually receive, necessitate detailed examination and concerted remedial action.

This chapter reviews the array of international and regional standards relating to the right to reparation. It sets the normative framework for subsequent chapters, which analyse the implementation of these standards in the domestic context. There is, however, a multiplicity of approaches and a lack of systematisation of the *corpus juris*. Furthermore, the standards are continuing to evolve with the advent of new legal mechanisms and procedures,[5] and bearing in mind new developments at the local level, which continue to impact upon the progressive development of standards at the international level. International bodies have also recognised that States have a degree of flexibility in determining how they give effect to their international obligations,[6] and this too has given rise to a range of approaches and perspectives.

B. The 'Right' to Reparation

It has long been recognised as a rule of international law that a breach of a duty gives rise to reparation. The Permanent Court of International Justice in the *Chorzow Factory* case in

[5] For example, the International Criminal Court is the first international criminal jurisdiction to directly incorporate reparations. See, Article 75 of the Rome Statute.

[6] The Inter-American Court of Human Rights has recognised, however, that the obligation to provide reparations is governed by international law in all of its aspects, i.e., it scope, characteristics, beneficiaries, etc. Consequently, the Court's judgment must be understood to impose international obligations, compliance with which shall not be subject to modification or suspension by the respondent State through invocation of provisions of its own domestic law. (*Velásquez R. Case*, Comp. Damages, para. 30; *Godínez Cruz Case*, Comp. Damages, para. 28).

1928 held that: " … it 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."[7] The main principles set forth in this judgment have been applied in a host of international decisions,[8] and have recently been affirmed by the International Law Commission in its 53rd Session when it adopted its "Draft Articles on the Responsibility of States for International Wrongful Acts."[9]

Any violation of human rights gives rise to a right to reparation on the part of the victim or his or her beneficiaries. This implies a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.[10] This duty is enshrined in international human rights treaties and declarative instruments,[11] and has been recognised by an array of international tribunals. It is also an established principle of international humanitarian law, reflected in the four Geneva Conventions 1949 and the first Additional Protocol.[12] The right to a remedy has been recognized as non-derogable,[13] and has achieved the status of customary international law.

Traditionally, the individual was protected from serious violations under the rules of protection for aliens. The right to reparation was attributed to the State of the injured national, to claim against the offending State at the inter-State level. As stated by Professor van Boven in his 1993 report: "it is a matter of state responsibility if the state causes injury to a national of another state inasmuch as the offending state violates internationally recognised human rights which the state is bound to respect and ensure with respect to all

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[7] *Factory at Chorzów*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, page 29.

[8] See, for example, *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, I.C.J. Reports 1949, page 184; *Velásquez Rodríguez Case, Compensatory Damages (Art. 63(1) of the American Convention on Human Rights),* Judgment of July 21, 1989. Series C No. 7, para. 25; *Godínez Cruz Case, Compensatory Damages (Art. 63(1) of the American Convention on Human Rights),* Judgment of July 21, 1989, Series C No. 8, para. 23; *Aloeboetoe et al. Case, Reparations (Art. 63(1) of the American Convention on Human Rights),* Judgment of September 10, 1993, Series C No. 15, para. 43, and *El Amparo Case. Reparations (Art. 63(1) of the American Convention on Human Rights*), Judgment of September 14, 1996, Series C No. 28, para. 14).

[9] 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)

[10] Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 33, appearing as Annex 2 to Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) Revised Final Report prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119, E/CN.4/sub.2/1997/20/Rev.1, 2 October 1997.

[11] For example, the Universal Declaration of Human Rights (Art. 8); the International Covenant on Civil and Political Rights (art.2 (3), art 9(5) and 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). It has also figured in regional instruments, e.g. the European Convention on Human Rights (art 5(5), 13 and 41); the Inter-American Convention on Human Rights (arts 25, 68 and 63(1)); the African Charter on Human and Peoples' Rights (art. 21(2)). See also, 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; Declaration on the Protection of all Persons from Enforced Disappearance (art 19), General Assembly resolution 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.

[12] Article 3 of the Hague Convention regarding the Laws and Customs of Land Warfare, 1907 Hague Convention IV of 18 October 1907; Articles common to the four Geneva Conventions 1949 (I: Art. 51; II. Art. 52; III: Art. 131; IV: Art. 148); Article 91 of the 1977 Additional Protocol I.

[13] See, for example, General Comment 29 on States of Emergency (Art. 4) if 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."

persons. In traditional international law the subject who has suffered the injury is not the individual person, or for that matter, a group of persons, but the state of which the person or the group of persons is or are national(s). It is in this perspective that states may claim reparation from the offending state but the victims themselves have no standing to bring international claims."[14]

The theory of remedies developed in this context focuses on claims and arbitral proceedings as lodged between belligerent States.[15] A State would in this context take up the claims of its citizens, typically in the form of negotiation, mediation, arbitration, adjudication, and would maintain full control over the claim. In this respect, reparations would be awarded to the State, which would normally then turn it over to the injured national.[16] After World War II, international law became increasingly concerned with the individuals involved in atrocities, both the individual criminal responsibility of perpetrators and the rights of victims (in their own right and not only by extension or through their States) to reparation. The Nuremberg Tribunals recognised that "international wrongs are committed by individuals and not by abstract entities."[17] Of equal importance, the adoption on 10 December 1948 of the Universal Declaration of Human Rights heralded the inherent rights of individuals to dignity and respect. With the progressive development of international human rights law and the growing recognition of the individual as a juridical subject with rights vis-à-vis the State, it was no longer acceptable to retain a purely inter-State model.

> "…Modern human rights treaties in general … are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction."[18]

International courts and treaty mechanisms have recognised that for reparation to be effective, particularly in respect of serious violations of human rights and humanitarian law,

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[14] Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report submitted by Mr. Theo van Boven, Special Rapporteur, E/CN.4/Sub. 2/1993/8 of 2 July 1993, at para. 42.

[15] See, for example, Chorzow Factory Case (Claim for Indemnity) (Merits) P.C.I.J., Series A, No. 17 (1928), Judgment no. 13 where it is stated: "The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State."

[16] 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].

[17] 1 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 1946, 41 Am. J Int'l L 172, p. 223.

[18] The Effect of Reservations of the Entry into Force of the American Convention, Inter-American Court, Advisory Opinion OC-2/82 of 24 September 1982, Inter-American Court of Human Rights, Series A., Judgments and Opinions, No. 2, paragraph 29, cited in Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report submitted by Mr. Theo van Boven, Special Rapporteur, E/CN.4/Sub. 2/1993/8 of 2 July 1993, at para. 45.

remedies must be judicial. This involves both procedural measures regarding the individual's right of access to court[19] to determine whether there has been an infringement of rights as well as that the remedy for the harm suffered itself is judicial, as opposed to purely disciplinary or administrative. The United Nations Human Rights Committee has noted, for example, that purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of Article 2(3) of the International Covenant on Civil and Political Rights, in the event of particularly serious violations of human rights.[20]

C. The Content of the Right to Reparation

The Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms has usefully classified the components of the right into four broad groupings: restitution; compensation; rehabilitation; and satisfaction and guarantees of non-repetition.[21] These groupings take into account the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[22] which refers to access to justice and fair treatment, restitution, compensation, and assistance. They also refer to the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,[23] which outline the victims' right to know, the right to justice, the right to reparations and measures aimed at guaranteeing the non-recurrence of violations. Under the heading of 'reparations,' Mr. Joinet, the Special Rapporteur on the Question of the Impunity of Perpetrators of Human Rights Violations (civil and political), noted that reparation is comprised of both individual measures and general, collective measures. These include both the right to justice and 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."[24] He also cites the initial draft of the Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, drawn up by Professor van Boven, as embracing: restitution, compensation and rehabilitation.

1. Restitution

Restitution is the act of restoring the victim, to the extent possible, to the original situation before the violations of human rights or international humanitarian law occurred. The UN Declaration of Basic Principles of Justice for Victims of Abuse of Power stipulates that, "offenders or third parties should make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm

[19] See, on the inability to derogate from those judicial remedies that protect non-derogable rights, 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.

[20] Bautista de Arellana v. Columbia, Comm. No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993 (1995).

[21] 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. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, E/CN.4/2000/62, 18 January 2000.

[22] Adopted by General Assembly resolution 40/34 of 29 November 1985.

[23] Supra.

[24] Para 42.

or loss suffered, reimbursement of expenses incurred as a result of the victimisation, the provision of services and the restoration of rights."[25] The Inter-American Court of Human Rights has held that "full restitution (*restitutio in integrum*) includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm."[26] Restitution may also include restoration of liberty, legal rights, social status, family life and citizenship, return to one's place of residence, and restoration of employment and return of property. In recognition of the fact that the desired aim of full restitution for the injury suffered is not always possible to achieve, given the irreversible nature of the damages suffered, the Inter-American Court held, in the *Velásquez Rodríguez Case* that "under such circumstances, it is appropriate to fix the payment of 'fair compensation' in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered."[27]

Article 105, common to the rules of procedure and evidence for both the International Criminal Tribunal for the former Yugoslavia and Rwanda provides detailed procedures for the restitution of property. The trial chamber may hold a special hearing to determine the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate. If the Trial Chamber is able to determine the rightful owner on the balance of probabilities, it will order the restitution either of the property or the proceeds or make such other order, as it may deem appropriate.

Restitution has also figured prominently in post-conflict claims settlements and other procedures. For example, Article XI of Annex 7 of the General Framework Agreement for Peace in Bosnia and Herzegovina states that "The Commission shall receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return." Similarly, the Housing and Property Directorate and Claims Commission in Kosovo is mandated to receive and settle three specific categories of restitution claims involving residential property disputes in Kosovo: a) claims by individuals who lost property as a result of discriminatory laws after 23 March 1989 ("Category A"); b) claims by individuals who entered into informal transactions on the basis of free will of the parties between 23 March, 1989 and 10 October, 1999 ("Category B"); c) claims by refugees and displaced persons who have lost possession of their property after 24 March, 1999 and as a result of the recent conflict ("Category C").[28] Similarly, a complex process for the restitution of assets deposited with Swiss Banks before World War II was undertaken by the Claims Resolution Tribunal for Dormant Accounts.

2. Compensation

The right to compensation is recognized in a range of international and regional instruments. Article 9(5) of the International Covenant on Civil and Political Rights and Article 5(5) of the European Convention on Human Rights refer to an 'enforceable right to compensation.' Article 14(1) of the United Nations Convention against Torture, similar to Article 19 of the

[25] Principle 33(c), supra.

[26] Godinez Cruz v. Honduras, Series C No. 8, Compensatory Damages, Judgment of July 21, 1989, para. 24.

[27] *Velásquez Rodríguez Case,* Interpretation Of The Compensatory Damages Judgment, Judgment Of August 17, 1990, Para. 27.

[28] Regulation No. 1999/23 on the Establishment of the Housing and Property Directorate and Claims Commission.

Declaration on the Protection of all Persons from Enforced Disappearances, refers to "an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." Article 9 of the Inter-American Convention to Prevent and Punish Torture provides that "the States Parties undertake to incorporate into their national laws regulations guaranteeing suitable compensation for victims of torture."[29] Article 21(2) of the African Charter on Human and Peoples' Rights, in respect of spoliation of resources, refers to an adequate compensation. Furthermore, Protocol I (additional) to the Geneva Conventions 1949 provides in Article 91 that "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

Compensation should be provided for any economically assessable damage resulting from violations of human rights or international humanitarian law, such as physical or mental harm, including pain, suffering and emotional distress; lost opportunities including education; material damages and loss of earnings, including loss of earning potential; harm to reputation or dignity; costs required for legal or expert assistance, medicines and medical services, and psychological and social services. Professor M. Cherif Bassiouni's final draft principles on the right to reparation, restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms provides that "Compensation should be provided for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as: (a) Physical or mental harm, including pain, suffering and emotional distress; (b) Lost opportunities, including education; (c) Material damages and loss of earnings, including loss of earning potential; (d) Harm to reputation or dignity; and (e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services."[30]

The United Nations Human Rights Committee has made repeated calls for States parties to provide appropriate compensation to victims of violations under the International Covenant on Civil and Political Rights.[31] The European Court of Human Rights has awarded pecuniary and non-pecuniary damages and recovery of costs and expenses, pursuant to Article 50 of the Convention for the Protection of Human Rights and Fundamental Freedoms in a series of decisions.[32] Non-pecuniary damages are determined on an 'equitable basis.'[33] In some instances, the European Court has held that a finding of a violation is sufficient 'just satisfaction,'[34] 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."[35]

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[29] Inter-American Convention to Prevent and Punish Torture, O.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).

[30] Para. 23.

[31] See, for example, Ann Maria Garcia Lanza de Netto v. Uruguay, Comm. No. 8/1977; Eduardo Bleier v. Uruguay, Comm. No. 30/1978; Antonio Viana Acosta v. Uruguay, Comm. No. 110/1981; Tshitenge Muteba v. Zaire, Comm. No. 124/1982; El-Megreisi v. Libyan Arab Jamahiriya, Comm. No.440/1990; Womah Mukong v. Cameroon, Comm. No. 458/1991.

[32] Article 50 of the Convention reads: "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

[33] See, for example, Ribitsch v. Austria, App. No. 18896/91, Judgment of 4 December 1995, paras. 43-50.

[34] 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.

[35] 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 .

Article 63(1) of the American Convention recognizes the duty of the Court to ensure that the injured party enjoys the right or freedom that was violated and to "rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."[36] The right to fair compensation has been interpreted by the Inter-American Court of Human Rights to refer to compensatory and not punitive damages, including reparation to the victim and/or family of the material and moral damages they suffered.[37] In Aloeboetoe, for example, the Court refers to the practice of international arbitration, and the general principle of law that pecuniary compensation is comprised of both indirect damages and loss of earnings, and that compensation should additionally include the moral damages suffered by the victims.[38]

The right to compensation for serious violations of human rights and humanitarian law has also been enshrined in the decisions and treaties establishing international criminal jurisdictions. For instance, Rule 106 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda and for the former Yugoslavia provides that "… (B) Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation. (C) For the purposes of a claim made under Sub-Rule (B) the judgment of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury." A similar provision is located in the Special Court Agreement (Ratification) Act, 2002, the Sierra Leone law on the implementation of the Agreement relating to the establishment of the Special Court. Article 45 of this Act provides that "Any person who has been a victim of a crime within the jurisdiction of the Special Court, or persons claiming through him, may claim compensation in accordance with the Criminal Procedure Act, 1965 if the Special Court has found a person guilty of that crime." The Statute of the International Criminal Court has gone further, by enabling the Court to hear and determine claims for reparation directly. Article 75 of the Rome Statute provides that "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. … Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States…."

The United Nations Compensation Commission has also developed principles relating to compensation for international crimes.[39] Its Governing Council identified six categories of claims comprising four categories of claims of individuals, one for corporations and one for Governments and international organizations, which also includes claims for environmental damage:

A. Claims submitted by individuals who had to depart from Kuwait or Iraq between

[36] American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force 18 July 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

[37] Velásquez Rodríguez Case, Compensatory Damages (Art. 63(1) American Convention on Human Rights), Judgment of 21 July 1989, Inter-Am. Ct. H.R. (Ser. C) No. 7 (1989), at paras. 38, 39.

[38] Aloeboetoe et al. Case, Reparations (art. 63(1) American Convention on Human Rights), Judgment of 10 September 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15 (1993), para. 49.

[39] For more information on the UNCC, see its comprehensive website: http://www.unog.ch/uncc.

the date of Iraq's invasion of Kuwait on 2 August 1990 and the date of the cease-fire, 2 March 1991.[40]

B. Claims submitted by individuals who suffered serious personal injury or whose spouse, child or parent died as a result of Iraq's invasion and occupation of Kuwait.[41]

C. Individual claims for damages up to 100,000 USD each. Category "C" claims can be made for twenty-one different types of losses, including those relating to departure from Kuwait or Iraq; personal injury; mental pain and anguish; loss of personal property; loss of bank accounts, stocks and other securities; loss of income; loss of real property; and individual business losses.[42]

D. Individual claims for damages above 100,000 USD each, including such claims as loss of personal property; the loss of real property; the loss of income and business-related losses.

E. Claims of corporations, other private legal entities and public sector enterprises, including claims for: construction or other contract losses; losses from the non-payment for goods or services; losses relating to the destruction or seizure of business assets; loss of profits; and oil sector losses.[43]

F. Claims filed by Governments and international organizations for losses incurred in evacuating citizens; providing relief to citizens; damage to diplomatic premises and loss of, and damage to, other government property; and damage to the environment.

In 1991, the Governing Council adopted formulations on personal injury and mental pain and anguish.[44] These formulations provided that compensation would be provided for pecuniary losses (including losses of income and medical expenses) and non-pecuniary injuries resulting from such mental pain and anguish as follows: "a spouse, child or parent of the individual suffered death; the individual suffered serious personal injury involving dismemberment, permanent or temporary significant disfigurement, or permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system; the individual suffered a sexual assault or aggravated assault or torture, the individual witnessed the intentional infliction of events described … [above] on his or her spouse, child or parent; the individual was taken hostage or illegally detained for more than three days, or for a shorter period in circumstances indicating an imminent threat to his or her life; on account of a manifestly well-founded fear for one's life or of being taken hostage or illegally detained, the individual was forced to hide for more than three days; or the individual was deprived of all economic resources, such as to threaten seriously his or her survival and that of his or her spouse, children or parents, in cases where assistance from his or her Government or other sources had not been provided."

The jurisdiction of the Eritrea-Ethiopia Claims Commission is extremely broad, providing the Commission with the necessary jurisdiction to decide "all claims for loss, damage or injury by

[40] Compensation for successful claims in this category was set by the Governing Council at the fixed sum of 2,500 USD for individual claimants and 5,000 USD for families. However, if a claimant had filed claims in category "A" only, he or she was eligible to receive a maximum category "A" payment of 4,000 USD for individuals and 8,000 USD for families. Because the UNCC decided to make the processing of individual claims a priority, the processing of this category of claim was fast-tracked, and claims in this category were evaluated by utilizing: "computerized matching of claims and verification information, sampling, (and) individual review."

[41] Compensation for successful claims in this category was set at 2,500 USD for individuals and up to 10,000 USD for families. Since the number of claims in this category were small, the UNCC was able to review these claims on an individual basis.

[42] The claims in this category were evaluated by utilizing: "computerized matching of claims and verification information, sampling, individual review and for some loss elements…statistical modelling.

[43] This category of claim is reviewed individually.

[44] S/AC.26/1991/3 of 23 November 1991.

one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework agreement, the Modalities for its implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law."[45]

In addition to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[46] and the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law,[47] the importance of reparation is confirmed in the Revised Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)[48] where it is held at Paragraph 27 that "Although the decision to prosecute is initially a State responsibility, supplementary procedural rules should allow victims to be admitted as civil plaintiffs in criminal proceedings or, if the public authorities fail to do so, to institute proceedings themselves."[49] Article 14(1) of the Convention against Torture specifically provides for civil compensation, noting that: "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." Equally, the Statutes of the ICTR and ICTY refer to the right to compensation,[50] the Rome Statute contains elaborate provisions on reparations to victims,[51] and a number of instruments regulating the laws and customs of war provide for reparation.[52]

Most civil law jurisdictions allow victims and/or other interested parties to apply for compensation in conjunction with criminal proceedings. In this way, victims are spared the complication and added costs of initiating separate proceedings in a civil court and can take advantage of the evidence already provided by the prosecution to help substantiate the claim. Through the adhesion procedure, the victim is a party to the proceedings insofar as the civil claim is concerned and generally has the right to be informed of significant decisions taken in the case, to inspect the case file, to bring witnesses and experts to support the civil claim, and to be represented by legal counsel. There are a number of benefits to this approach – for example, the intervener may avoid the risk of court fees and the procedure is generally simpler and less time consuming. However, one of the difficulties is that the civil claim is fully subordinate to the criminal process. The collapse of the criminal case will normally result in the collapse of the civil adhesion process. In some cases, the civil component of the case will be transferred to civil courts, for example if the civil claim

[45] Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000. The Agreement is available on the website of the Permanent Court of Arbitration, at: http://www.pca-cpa.org/ENGLISH/RPC/E-E%20Agreement.html.

[46] Adopted by General Assembly resolution 40/34 of 29 November 1985. See specifically, Principles 8-13 and 19.

[47] E/CN.4/2000/62 of 18 January 2000.

[48] E/CN.4/Sub.2/1997/20/Rev.1.

[49] See also paragraphs 40-43 and Principle 36.

[50] Article 106

[51] Article 75.

[52] Under international humanitarian law, the Hague Convention regarding the Laws and Customs of Land Warfare (article 3, 1907 Hague Convention IV) includes specific 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 specifically provides for liability to pay compensation.

requires further investigations.[53] In others, a proceeding in civil courts may be transferred to an adhesion process, provided that the proceeding in civil courts is discontinued.[54]

Crimes under international law can also be characterised as a civil wrong - intentional assault, battery, intentional infliction of mental suffering, or as negligence or breach of fiduciary duty, and can be subject to the jurisdictions of civil courts in accordance with traditional principles of private international law. In contrast to most civil law jurisdictions where adhesion processes are most common, in common law countries, a civil action for loss or damage is usually brought as a separate civil action. The primary difference of a separate civil action is the differing standard of proof, and different rules relating to costs and court fees. Additionally, whereas most States have recognized the inapplicability of statutes of limitations for crimes under international law in respect of criminal proceedings, there is usually a limitation period, which applies in respect of civil claims. This is one clear benefit of the adhesion process, where the mere fact that a civil claim is attached to a criminal proceeding where limitation periods do not apply means that a civil claim will generally be able to proceed.

3. Rehabilitation

Rehabilitation is an important component of reparation. 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.[55] 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 Convention on the Rights of the Child notes in Article 39 the need for "physical and psychological recovery and social reintegration of a child victim." The Convention against Torture and the Declaration on Enforced Disappearances refers to "the means for as full rehabilitation as possible." Rehabilitation also figures in the Declaration on the Elimination of Violence against Women.[56] Article 4 (g) of the Declaration provides for the objective of working "to ensure, to the maximum extent feasible in the light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation."

Article 6(3) of the recently entered into force Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts provides that "States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social

[53] For example, Articles 366, 369(f) of the Austrian Code of Criminal Procedure.

[54] For example, Article 66 of the Greek Code of Criminal Procedure.

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

[56] United Nations General Assembly Resolution 48/104 of 20 December 1993, A/RES/48/104, 23 February 1994.

reintegration."[57]

The Special Rapporteur on torture has encouraged States parties to the Convention against Torture to support rehabilitation centres that may exist in their territory to ensure that victims of torture are provided the means for as full a rehabilitation as possible.[58] Elsewhere, referring to a visit to Chile, he underlined that "national non-governmental organizations also play, and have played in the past, an important role in the rehabilitation of torture victims. Whenever they require it, they should receive official support to carry out their activities in this respect."[59]

A number of decisions of international bodies 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;[60] 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."[61] The Committee noted, in its concluding observations in respect of El Salvador's State report, that "the right of torture victims to fair and adequate compensation at the State's expense should be regulated, with the introduction of programmes for as full as possible physical and mental rehabilitation of the victims."[62]

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, hospitalisation, surgeries, labouring, traumatic rehabilitation and mental health." [63] 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.[64]

4. Satisfaction and Guarantees of Non-Repetition

Satisfaction and guarantees of non-repetition refer to the range of other measures, which may contribute to the broader and longer-term restorative aims of reparations. A central component is the role of public acknowledgment of the violation, which has been recognized by the Commission on Human Rights in a recent resolution on impunity.[65] The Special

[57] Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 12 February 2002.

[58] Report on torture and other cruel, inhuman or degrading treatment or punishment, submitted by Sir Nigel Rodley, Special Rapporteur of the Commission on Human Rights, in accordance with General Assembly resolution 53/139, Report A/54/426, 1 October 1999, Para 50.

[59] Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37, Addendum, Visit by the Special Rapporteur to Chile, E/CN.4/1996/35/Add.2, 4 January 1996, at para. 76(r).

[60] CAT/C/XXVII/Concl.4, 23 November 2001.

[61] CAT/C/XXVII/Concl.3, 22 November 2001.

[62] A/55/44, 12 May 2000.

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

[64] 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.

[65] E/CN.4/RES/2001/70, 25 April 2001, 8: " *[The Commission on Human Rights] Recognizes* that, for the victims of human rights violations, public knowledge of their suffering and the truth about the perpetrators, including their accomplices, of these

Rapporteur on the right to restitution, compensation and rehabilitation, M. Cherif Bassiouni, and Mr. Joinet in his final report on the question of impunity have both highlighted the importance of the victims' right to know the truth and hold the perpetrators of torture accountable.

> "This is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a "duty to remember", which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right.
>
> Two series of measures are proposed for this purpose. The first is to establish, preferably as soon as possible, extrajudicial commissions of inquiry, on the grounds that, unless they are handing down summary justice, which has too often been the case in history, the courts cannot mete out swift punishment to torturers and their masters. The second is aimed at preserving archives relating to human rights violations."[66]

The Special Rapporteur on the right to restitution, compensation and rehabilitation, Mr. M. Cherif Bassiouni, established the following list of measures that would constitute satisfaction and guarantees of non-repetition:

- Cessation of continuing violations;
- Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;
- The search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities;
- An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim;
- 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;[67]
- Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels;
- Preventing the recurrence of violations by such means as: Ensuring effective civilian

violations are essential steps towards rehabilitation and reconciliation, and urges States to intensify their efforts to provide victims of human rights violations with a fair and equitable process through which these violations can be investigated and made public and to encourage victims to encourage victims to participate in such a process."

[66] 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.

[67] 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."

> control of military and security forces; Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces; Strengthening the independence of the judiciary; Protecting persons in the legal, media and other related professions and human rights defenders; Conducting and strengthening, on a priority and continued basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials; Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises; and Creating mechanisms for monitoring conflict resolution and preventive intervention.

The African Commission on Human and Peoples' Rights and the Inter-American Court on Human Rights have both applied this aspect of reparation in their decisions as, to a lesser extent, have others.[68] For instance, the African Commission, in its decision regarding *Various communications v. Mauritania*, recommended that the Government:

> "Arrange for the commencement of an independent enquiry in order to clarify the fate of persons considered as disappeared, identify and bring to book the authors of the violations perpetrated; Take diligent measures to replace the national ID documents of those Mauritanian citizens which were taken from them when they were expulsed, as well as the restitution of the belongings looted from them, and to take all necessary measures for the reparation of the deprivations of the victims of these expulsions and lootings; Take appropriate measures to ensure payment of a compensatory benefit to widows and beneficiaries of the victims; Reinstate the rights due to the unduly dismissed and/or forcibly retired workers; As regards the victims of degrading practices, carry out an assessment of the status of such practices with a view to identifying with precision the deep rooted causes for their persistence and to put in place a strategy aimed at their eradication; and Take appropriate administrative measures to enforce the abolition of slavery.[69]

In other decisions, the African Commission has recommended that States Parties free complainants[70] and annul decrees.[71] In the *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* case,[72] Communication 155/96, the Commission appealed to the Nigerian government to: "Stop all attacks on Ogoni communities and permit citizens and independent investigators free access to the territory; conduct an investigation into the violations and prosecute officials of the security forces and relevant agencies; ensure adequate compensation to victims, including relief and resettlement assistance to victims of government sponsored raids, and undertake a comprehensive clean up of land and rivers; Ensure that appropriate environmental and social impact assessments are prepared for future oil developments; and provide information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations."

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[68] The Human Rights Committee, in its jurisprudence, has repeatedly called on States Parties to "take steps to ensure that similar violations do not occur in future."

[69] Communications 54/91, 61/91, 96/93, 98/93, 164/97-196/97, 210/98 *Various communications v. Mauritania.*

[70] Communication 87/93 *Constitutional Rights Project (in respect of Zamani Lekwot and six others) v. Nigeria.*

[71] Communication 101/93 *Civil Liberties Organisation (on behalf of the Nigerian Bar Association) v. Nigeria.*

[72] Communication 155/96.

The Inter-American Court has taken a series of decisions obligating States Parties to conduct full investigations and to locate and identify the remains of the victims and to deliver them to their next of kin.[73] It has, on occasion, particularly in response to requests for public apologies, decided that the judgment on the merits coupled with the State Parties' recognition of that responsibility would constitute adequate reparation.[74] Amongst its decisions, it has ordered the removal of names from criminal records;[75] that the State "name a school with a name that resembles the children who were victims of the present case, and [to] place a commemorative inscription with the name of the victims;"[76] and that the State publish the operative paragraphs of the merits of the decision in its official journal and a well-known newspaper.[77]

D. Prevention and Punishment of Torture

1. Preventive Measures

> "Where there was an effectively functioning investigative system and an independent judiciary, it was most unlikely that violations of human rights would be systematic and widespread. An effectively functioning domestic system for providing redress normally appeared to have a preventive effect and was one of the best safeguards against impunity."[78]

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."[79] The positive obligation to prevent violations is present in the Convention against Torture and the Inter-American Convention to Prevent and Punish Torture,[80] both of which specify the obligation to prevent and punish torture. The vital role of prevention, as one means of reparation, has been enshrined by the European Convention on the Prevention of Torture,[81] as well as the newly adopted Optional Protocol to the Convention against Torture[82] and the Robben Island guidelines.[83] Prevention is also cited in the Istanbul

[73] Neira Alegría et al vs Peru, Series C No. 29, Reparations, Judgment of 19 September 1996, para 58; Caballero Delgado and Santana vs Colombia, Series C No. 31 Reparations, Judgment of 29 January 1997; Garrido y Baigorria Case vs Argentina, Series C No. 39 Reparations, Judgment of 27 August 1998.

[74] Caballero Delgado and Santana vs Colombia, Series C No. 31 Reparations, Judgment of 29 January 1997; Castillo Páez vs Peru, Series C No. 43 Reparations, Judgment of 27 November 1998.

[75] Suárez Rosero vs Ecuador, Series C No. 44 Reparations, Judgment of 20 January 1999; Cantoral Benavides Case vs Peru, Series C No. 88 Reparations, Judgment of 3 December 2001.

[76] Villagrán Morales et. Al. Case (The Street Children Case) vs Guatemala, Series C No. 77 Reparations, Judgment of 26 May 2001.

[77] Cantoral Benavides Case vs Peru, Series C No. 88 Reparations, Judgment of 3 December 2001.

[78] Para 48, comments of Francoise Hampson, THE ADMINISTRATION OF JUSTICE AND HUMAN RIGHTS, Report of the sessional working group on the administration of Justice; E/CN.4/Sub.2/2000/44, 15 August 2000.

[79] para 174. Judgment, Inter-American Court of Human Rights, Series C, No. 4 (1988).

[80] 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).

[81] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Council of Europe, European Treaties Series, ETS No. 126.

[82] 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.

[83] 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

Protocol[84] as the first legal obligation that States must respect to ensure protection from torture.

The European Committee for the Prevention of Torture "attaches particular importance to three rights for persons detained by the police: the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate), the right of access to a lawyer, and the right to request a medical examination by a doctor of his choice (in addition to any medical examination carried out by a doctor called by the police authorities)."[85] They are, in the Committee's opinion, three fundamental safeguards against the ill treatment of detained persons, which should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned.[86]

a) Incommunicado Detention

Incommunicado detention has been recognized to facilitate the perpetration of torture, by creating the ideal conditions for torturers, and may constitute a form of torture or ill treatment in its own right. Article 11 of the Convention against Torture provides that "Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture." The Special Rapporteur has noted that "Far too often … [he] receives information that persons have been kept in so-called "safe-houses", that they were hooded or blindfolded before being interrogated in order to make it impossible for them to identify their interrogators, that they have been held incommunicado for a considerable period, that they had no access to their lawyers and to doctors of their own choice, that their relatives were not informed about their whereabouts…."[87] In his 1988 report to the Commission on Human Rights at its fifty-fourth session, the Special Rapporteur recommended, *inter alia*, that incommunicado detention should be declared illegal.[88] More recently, the 1992 General Comment of the Human Rights Committee relating to the prohibition of torture states: "To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings.

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."

[84] 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…"

[85] This right has subsequently been reformulated as follows: the right of access to a doctor, including the right to be examined, if the person detained so wishes, by a doctor of his own choice (in addition to any medical examination carried out by a doctor called by the police authorities).

[86] 2nd General Report of the CPT (cf. CPT/Inf (92) 3, paragraphs 36 to 43).

[87] Report of the Special Rapporteur, Mr. P. Kooijmans, pursuant to Commission on Human Rights resolution 1992/32, E/CN.4/1993/26, 15 December 1992.

[88] E/CN.4/1988/17.

Provisions should also be made against incommunicado detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members."[89]

b) Training

The Convention against Torture has also recognized the importance of trained officials. Article 10 of the Convention notes that "Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person." Training also figures in Article 6 of the Inter-American Convention to Prevent and Punish torture, which stipulates that "States Parties shall take measures so that, in the training of police officers and other public officials responsible for the custody of persons temporarily or definitively deprived of their freedom, special emphasis shall be put on the prohibition of the use of torture in interrogation, detention, or arrest."[90]

c) Medical Evidence

One of the most difficult aspects relating to a claim of reparation is the absence of forensic evidence to prove torture. Even when doctors are in the vicinity, it may be days or weeks before torture survivors are examined. Medical practitioners may feel pressure not to report signs of torture. If medical examinations were more routine, arguably this would curb the prevalence of torture and enhance the transparency of the detention process. A number of standards and safeguards have been adopted to deal with these particular issues. For instance, Principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment notes that "A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge."[91] Law enforcement officials are obliged to ensure the health of those under their care and control, and to take immediate steps to secure medical attention whenever required.[92] The European Court of Human Rights has held that "The requirement of a thorough and effective investigation into an allegation of rape in custody at the hand of a State official also implies that the victim be examined, with all appropriate sensitivity, by medical professionals with particular competence in this area and whose independence is not circumscribed by instructions given by the prosecuting authority as to the scope of the examination."[93]

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[89] General Comment 20, 10/03/92, para. 11.

[90] See also, Article 5 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975; the recommendations of the European Committee for the Prevention of Torture on Training of Law Enforcement Personnel, Extract from the 2nd General Report [CPT/Inf (92) 3].

[91] Adopted by General Assembly resolution 43/173 of 9 December 1988.

[92] Article 6, Code of Conduct for Law Enforcement Officials, Adopted by General Assembly resolution 34/169 of 17 December 1979.

[93] Aydin v. Turkey, App. No. 23178/94, Judgment of 25 September 1997, para 107.

In December 2000, the United Nations General Assembly adopted the Principles on the Effective Investigation and Documentation of Torture (Istanbul Protocol).[94] The Principles highlight the important role of medical professionals in the documentation of torture and ill treatment, underline the need for the highest ethical standards and set out the recommended content of medical reports. The principles build upon the *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[95] and other texts.

The *Principles of Medical Ethics* specify that "It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment," and furthermore that there may be no derogation from the foregoing principles on any grounds whatsoever.[96]

d) Challenging the Legality of Detention

The right to challenge the legality of detention is a fundamental right of international law and an important tool in combating torture and ill treatment. Often the judge confirming the charges will be the first official unrelated to the prison establishment that the detainee sees, and consequently it may be the first opportunity for many to raise allegations of torture. The importance of the role of judicial and prosecuting authorities as regards combating ill treatment cannot be overstated. Detainees have the right to be given an effective opportunity to be heard promptly by a judicial or other authority.[97] This right has been recognised by a number of international bodies as non-derogable.[98]

2. The Right of Complaint and the Duty of Investigation

Given what survivors of torture will have suffered, they may not have natural confidence in the justice system and may not be prepared to reveal the full details of the horror they endured. Many will have suffered from severe trauma, possibly making it more difficult for them to recount traumatic events, particularly when there is stigma attached.

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[94] Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by UN General Assembly resolution 55/89 Annex, 4 December 2000.

[95] Adopted by General Assembly resolution 37/194 of 18 December 1982.

[96] Principles 2, 6.

[97] Principle 11, Body of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by General Assembly resolution 43/173 of 9 December 1988.

[98] See, for example, Joinet, Principle 43(2); General Comment 29 on States of Emergency (Art. 4) if the UN Human Rights Committee, CCPR/C/21/Rev.1/Add.11, 31 August 2001, at para. 15: "… 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." Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, 30 January 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987). The President of the Inter-American Commission on the hearing of the request was cited at para. 36 as saying: "The Commission is convinced that thousands of forced disappearances could have been avoided in the recent past if the writ of habeas corpus had been effective and if the judges had investigated the detention by personally going to the places that had been denounced as those of detention. This writ is the best instrument available to correct promptly abuses of authority involving arbitrary deprivation of freedom. It is also an effective means of preventing torture and other physical and psychological abuses, such as exile, perhaps the worst punishment, which has been so abused in our hemisphere, where thousands of exiles make up a true exodus. As the Commission has painfully recalled in its last Annual Report, these tortures and constraints tend to occur during long periods of incommunication, during which the prisoner lacks the legal means and remedies to assert his rights. It is precisely under these circumstances that the writ of habeas corpus is of greatest importance."

Increasingly, it has been recognised that special measures must be in place to facilitate the participation of victims, to encourage them to come forward, while at the same time preventing any further traumatisation.

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides that "The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (1) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information; (2) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system; (3) Providing proper assistance to victims throughout the legal process; (4) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation and (5) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims."[99]

More recently, the Statute of the International Criminal Court, which at the time of writing 87 countries had ratified, set out broad guarantees to facilitate the participation of victims. Article 43(6) of the Statute establishes a "… Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence."[100]

Article 13 of the Convention against Torture provides that States parties shall ensure that individuals who allege that they have been subjected to torture have "the right to complain to, and to have [his] case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given." Complaint mechanisms should be effective and accessible, and independent from detention enforcement officials.[101] Complaints about torture should be dealt with immediately.[102] Principle 2 of the Istanbul Protocol stipulates that States shall ensure that complaints and reports of torture or ill treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission investigations by, impartial medical or other experts. The methods used to carry out such investigations shall meet the highest professional standards and the findings shall be made public." The Protocol goes further to provide that those conducting the investigations should have all the necessary resources as well as the ability to compel those acting in an official capacity to

[99] 1985, General Assembly Resolution 40/34.

[100] Rome Statute of the International Criminal Court, 17 July 1998, (U.N. Doc. A/CONF.183/9*).

[101] Robben Island guidelines, supra., para. 40.

[102] Interim report on the question of torture and other cruel, inhuman or degrading treatment or punishment, submitted by Sir Nigel Rodley, Special Rapporteur of the Commission on Human Rights, in accordance with paragraph 30 of General Assembly resolution 55/89, Interim Report A/56/156 of 3 July 2001, para. 39 (j).

testify.[103]

The Inter-American Court held in the *Velásquez Rodríguez* case that "the State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction."[104] In *Encarnación Blanco Abad v Spain*,[105] the Committee against Torture found that the lack of investigation of the author's allegations, which were made first to the forensic physician after the first examination and during the subsequent examinations she underwent, and then repeated before the judge of the National High Court, and the amount of time which passed between the reporting of the facts and the initiation of court proceedings are incompatible with the obligation to proceed to a prompt investigation, as provided for in article 12 of the Convention. Furthermore, under article 12 of the Convention, the authorities are obliged to proceed to an investigation *ex officio*, wherever there are reasonable grounds to believe that acts of torture or ill-treatment have been committed and whatever the origin of the suspicion.

Similarly, in a number of cases before the European Court of Human Rights, Article 13 was interpreted as imposing an obligation on States to carry out a thorough and effective investigation into incidents of torture. Particularly, the notion of effective remedy encompasses, *inter alia* "…a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure." [106]

Judges have particular responsibilities to follow up allegations of torture. The European Committee on the Prevention of Torture has stipulated that "whenever criminal suspects brought before a judge at the end of police custody allege ill-treatment, the judge should record the allegations in writing, order immediately a forensic medical examination and take the necessary steps to ensure that the allegations are properly investigated. Such an approach should be followed whether or not the person concerned bears visible external injuries. Further, even in the absence of an express allegation of ill-treatment, the judge should request a forensic medical examination whenever there are other grounds to believe that a person brought before him could have been the victim of ill-treatment."[107] Furthermore, the Committee has noted that "The diligent examination by judicial and other relevant authorities of all complaints of ill-treatment by law enforcement officials and, where appropriate, the imposition of a suitable penalty will have a strong deterrent effect. Conversely, if those authorities do not take effective action upon complaints referred to them, law enforcement officials minded to ill-treat persons in their custody will quickly come to believe that they can do so with impunity."[108]

3. Criminal Prosecution

[103] Principle 3(a).

[104] Velásquez Rodríguez Case, Judgment of July 29, 1988. Series C No. 4, para. 176.

[105] Committee against Torture, *Comm. No. 59/1996, 12 Feb 1996.*

[106] European Court of Human Rights, Aksoy v. Turkey, App. No. 21987/93. See, also, Veznedaroglu v. Turkey App. No. 32357/96.

[107] Para 45, Extract from the 12th General Report [CPT/Inf (2002) 15].

[108] Para 46, ibid.

a) Torture as a specific offence

Torture has been recognized around the world as one of the most serious crimes, and its prohibition as a fundamental standard of the international community.[109] Moreover, as a peremptory norm, the prohibition of torture is placed at the highest level of international law and takes precedent over conflicting rules of treaty law or customary international law.[110] Conventions and treaty texts setting out the prohibition of torture have stipulated that torture must be characterized as a crime in domestic law.[111]

Further, the Committee against Torture has repeatedly called on States to list torture as a specific offence in domestic criminal codes,[112] and/or to ensure that the offence of torture is consistent with Article 1 of the Convention against Torture.[113] The Committee's concluding observations in respect of Sweden's latest report were that "While the specific arrangements for giving effect to the Convention in the domestic legal system are left to the discretion of each State party, the means used must be appropriate, that is, they should produce results which indicate that the State party has fully discharged its obligations. Sweden has opted for the dualistic system as regards incorporation of international treaties into domestic law, and should therefore adopt appropriate legislation for the incorporation of the Convention against Torture. The Committee notes that Swedish domestic law does not contain a definition of torture in keeping with article 1 of the Convention. Above all, neither torture nor cruel, inhuman and degrading treatment are identified as specific crimes and offences in domestic criminal law."[114] France was also criticised by the UN Committee against Torture for failing to adopt a definition of torture in line with Article 1 of the Convention,[115] and for its "system of 'appropriateness of prosecution', leaving public prosecutors free to decide not to prosecute perpetrators of acts of torture, or even to order an inquiry, which is clearly in conflict with the provisions of article 12 of the Convention."[116]

The CAT definition provides that torture is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when

[109] Prosecutor v. Anto Furundzija, 38 I.L.M. 317 (Int'l Crim. Trib. For Former Yugoslavia 1999).

[110] Article 53 of the Vienna Conventions on the Law of Treaties 1969.

[111] See, for example, Article 5 of the Convention against Torture; Article 7 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 6(2) of the Inter-American Convention to Prevent and Punish Torture.

[112] See, for example, the Concluding Observations of the Committee against Torture in respect of: Denmark, CAT/C/CR/28/1 28 May 2002; Russian Federation, CAT/C/CR/28/4 28 May 2002; *Saudi Arabia*, CAT/C/CR/28/5, 28 May 2002; Sweden, CAT/C/CR/28/6, 28 May 2002; Zambia, CAT/C/XXVII/Concl.4, 23 November 2001; Kazakhstan, A/56/44, paras. 121-129, 17 May 2001; Costa Rica A/56/44, paras.130-136, 17 May 2001; Belarus, A/56/44, 20 November 2000; Paraguay, A/55/44, 10 May 2000; Poland, A/55/44, 5 May 2000; Kyrgystan, A/55/44, 18 November 1999; Azerbaijan, A/55/44, 17 November 1999; Austria, A/55/44, 12 November 1999; Finland, A/55/44, 12 November 1999; Bulgaria, A/54/44, 7 May 1999.

[113] See, for example, the Concluding Observations of the Committee against Torture in respect of: Israel, CAT/C/XXVII/Concl.5, 23 November 2001; Indonesia, CAT/C/XXVII/Concl.3, 22 November 2001; Slovakia, A/56/44, paras.99-105, 11 May 2001; Bolivia, A/56/44, paras. 89-98, 10 May 2001; Uzbekistan, A/55/44, 19 November 1999; Canada, A/56/44, paras.54-59, 6 December 2002; Armenia, A/56/44, 17 November 2000; Slovenia, A/55/44, 16 May 2000; USA, A/55/44, 15 May 2000; El Salvador, A/55/44, 12 May 2000; China, A/55/44, 9 May 2000;Morocco, A/54/44, 17 May 1999.

[114] CAT/C/CR/28/6 28 May 2002.

[115] Conclusions and recommendations of the Committee against Torture on the second periodic report of France, May 1998, UN doc CAT/C/17/Add.18.

[116] Para 143(b).

such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions." This definition has been held to constitute customary international law.[117]

The definition of torture has been analysed by the European Court of Human Rights, who found that torture is deliberate inhuman treatment causing very serious and cruel suffering.[118] The level of pain and suffering was said to be the distinguishing factor between torture and cruel, inhuman or degrading treatment: "[T]he Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering". In the *Greek Case*, the Commission held that torture has a purpose, such as the obtaining of information or confessions or the infliction of punishment and it is generally an aggravated form of inhuman treatment.[119]

The Inter-American Convention to Prevent and Punish Torture has defined torture more broadly than the UN Convention. It includes as torture "the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish".[120] Also, the Rome Statute for an International Criminal Court has slightly extended the definition in the UN Convention against Torture, in that it does not explicitly require the consent or acquiescence of a public official or any other person acting in an official capacity. It defines torture as: "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."[121]

Several treaties and international texts provide that torture does "not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."[122] In 1992, the Human Rights Committee, in its General Comment, stated that the prohibition of torture and ill-treatment "must extend to corporal punishment,"[123] and may amount to cruel, inhuman or degrading punishment or even to torture".[124]

b) Lawful sanctions, immunities and amnesties

International law provides few, if any exceptions for the prosecution of alleged perpetrators of torture. It is generally agreed that there should be no immunity for nationals who are

[117] Prosecutor v. Anto Furundzija, Judgment of the International Criminal Tribunal for the former Yugoslavia, 10 December 1998, para 160.

[118] *Ireland v. United Kingdom*, Eur. Ct. H.R., *Series A*, No. 25, para. 167.

[119] *Greek Case*, 1969 Y.B. Eur. Conv. on H.R. 12, p. 186.

[120] Inter-American Convention to Prevent and Punish Torture, O.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), Article 2.

[121] Article 7(2)(e) of the Rome Statute.

[122] Article 1, Convention against Torture; Article 2(2) of the Inter-American Convention to Prevent and Punish Torture, which provides that "The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article."

[123] Human Rights Committee, General Comment 20, 1992, para. 5.

[124] UN Commission on Human Rights Resolution 2000/43, adopted 20 April 2000; Report of the UN Special Rapporteur on torture, UN Doc. E/CN.4/1997/7, para. 6.

accused of perpetrating torture,[125] and that general/blanket amnesties cannot be accorded to perpetrators of torture or otherwise prevent victims from obtaining an effective remedy.[126] The Human Rights Committee, in its General Comment 20 relating to the prohibition of torture and ill-treatment has stated that amnesties in respect of acts of torture are generally incompatible with the duty of States to investigate such acts, to guarantee freedom from such acts within their jurisdiction and to ensure that they do not occur in the future.[127] Further, in the case of *Hugo Rodríguez v. Uruguay*, the Committee reaffirmed its position that amnesties for gross violations of human rights are incompatible with the obligations of the State Party under the Covenant and expressed concern that in adopting the amnesty law in question, the State Party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further human rights violations.[128]

The Inter-American Commission and Court of human rights have repeatedly criticized amnesty laws for their incompatibility with the obligation to investigate and punish serious violations of human rights.[129] Furthermore, the prohibition of torture is understood to be a non-derogable right, even in states of emergency,[130] and the defence of superior orders may not apply.[131]

c) Statutes of limitation

In his 1993 study, Professor van Boven noted that: "the application of statutory limitations often deprives victims of gross violations of human rights of the reparations that are due to them. The principle should prevail that claims relating to reparations for gross violations of human rights shall not be subject to a statute of limitations. In this connection, it should be taken into account that the effects of gross violations of human rights are linked to the most serious crimes to which, according to authoritative legal opinion, statutory limitations shall not apply. Moreover, it is well established that for many victims of gross violations of human rights, the passage of time has no attenuating effect; on the contrary, there is an increase in post-traumatic stress, requiring all necessary material, psychological and social assistance and support over a long time."[132]

There is wide recognition of the inapplicability of statutes of limitations to certain crimes under international law. In 1968, the UN General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,[133]

[125] See, for example, Article 5 of the Convention against Torture; Article 4 of the Genocide Convention; Article 27 of the Rome Statute for an International Criminal Court; Robben Island guidelines, 16(b). The scope of immunity for foreign nationals is discussed infra.

[126] Joinet, principle 32.

[127] HRI/GEN/1, Part 1, General Comment 20 (Art. 7), para 15.

[128] Rodríguez v. Uruguay, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994).

[129] See, for example, *Caso Barrios Altos, Chumbipuma Aguirre y otros v. Perú* (14 March 2001), and a detailed explication of the prohibition of amnesties in the interim report of the Special Rapporteur on Torture,A/56/156 of 3 July 2001.

[130] Article 2(2) Convention against Torture; Articles 9 and 10, Robben Island guidelines.

[131] Article 2(3) Convention against Torture; Article 5 of the Code of Conduct for Law Enforcement Officials, Adopted by General Assembly resolution 34/169 of 17 December 1979, provides that: "No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment." See also, Article 11 of the Robben Island guidelines.

[132] Van Boven, 1993, supra, para. 135.

[133] Adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968, *entry into force* 11 November 1970, in accordance with article VIII.

followed by the 1974 Convention on lack of applicability of statutes of limitation in war crimes and crimes against humanity of the Council of Europe.[134] The draft basic principles and guidelines on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms[135] provide in Section 4 that "Statutes of limitations shall not apply for prosecuting violations of international human rights and humanitarian law norms that constitute crimes under international law. Statutes of limitations for prosecuting other violations or pursuing civil claims should not unduly restrict the ability of a victim to pursue a claim against the perpetrator, and should not apply with respect to periods during which no effective remedies exist for violations of human rights and international humanitarian law norms." Similarly, Principle 24(2) of the set of Principles for the Protection and Promotion of Human Rights through action to combat impunity prepared by Mr. Louis Joinet and attached to his Final Report on the Question of Impunity of Perpetrators of Human Rights Violations (civil and political), provides that "prescription shall not apply to serious crimes under international law, which are by their nature imprescriptible."[136] A number of other conventions, resolutions and declarations provide for the non-applicability of statutes of limitations to crimes under international law, for example, Article 29 of the Rome Statute of the ICC and the UN General Assembly Declaration on forced disappearance of persons.[137] The lack of prescription for the crime of torture was also recognised by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Furundzija decision, where the Trial Chamber held, in relation to the prohibition of torture as a *jus cogens* norm, that "It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption."[138]

d) Evidentiary principles

Evidence of torture is often difficult to locate, given that torture is often perpetrated without witnesses, and torture methods are designed to avoid visible scars. International principles and treaty texts have, to a certain degree, reflected the difficulties in substantiating allegations of torture and ill treatment in custody. In respect of the burden of proof, the Special Rapporteur on torture has recommended that when allegations of torture and ill treatment are raised by a defendant during trial, "the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill treatment."[139] The European Court of Human Rights has taken this one step further in *Aksoy v. Turkey*, where it held that "where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3."[140] Principle 16(d) of the Robben Island Guidelines requires that parties ensure that rules of evidence properly reflect the difficulties of substantiating allegations of ill treatment in custody.

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[134] Strasbourg, 25 January 1974.

[135] Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, 18 January 2000. [E/CN.4/2000/62],

[136] E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997.

[137] Approved by consensus on 18.XII.1992 (A/Res. 47/133). Also, the Princeton Principles confirm in Principle 6: "Statutes of limitations or other forms of prescription shall not apply to serious crimes under international law as specified in Principle 2(1)."

[138] Judgment of 10 December 1998, IT-95-17/1 at para. 157.

[139] Interim Report A/56/156 of 3 July 2001, para. 39(j).

[140] Aksoy v. Turkey, App. No. 21987/93, Judgment of 18 December 1996, para 61, referring to *Tomasi v. France* App. No. 12850/87 Judgment of 27 August 1992 and Ribitsch v. Austria, App. No. 18896/91, Judgment of 4 December 1995.

Article 15 of the Convention against Torture provides that: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." In its recommendations to the Russian Federation, the Committee against Torture requested the government to "Ensure in practice absolute respect for the principle of the inadmissibility of evidence obtained by torture and review cases of convictions based solely on confessions, recognizing that many of them may have been obtained through torture or ill-treatment, and, as appropriate, provide compensation to and release persons presenting credible evidence of having been tortured or ill-treated."[141]

4. Issues relating to Third Countries

In the *Prosecutor v. Anto Furundzija,* the International Criminal Tribunal for the Former Yugoslavia endorsed the principle of universal jurisdiction in the case of torture:

> "It would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes. As stated in general terms by the Supreme Court of Israel in *Eichmann,*[142] and echoed by the USA court in *Demjanjuk,*[143] "it is the universal character of the crimes in question *i.e.,* international crimes which vest in every State the authority to try and punish those who participate in their commission."[144]

Article 7.1 of the Convention against Torture provides: "The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

There have been a number of investigations of torture on the basis of universal jurisdiction. For instance, the Spanish extradition request[145] relating to Pinochet led to a number of judicial investigations and proceedings throughout Europe. On 25 November 1998, the judiciary committee of the British House of Lords concluded, "international law has made it plain that certain types of conduct…are not acceptable conduct on the part of anyone." The

[141] Russian Federation, CAT/C/CR/28/4 28 May 2002.

[142] Attorney-General of Israel v. Eichmann, 36 I.L.R. 277 (S. Ct. of Isr. 1962).

[143] Demjanjuk v. Petrovsky, 776 F. 2d 571 (6th Cir. 1985).

[144] Prosecutor v. Anto Furundzija, 38 I.L.M. 317 (1999) (Int'l Crim. Trib. For Former Yugoslavia 1999).

[145] The Audiencia Nacional held on 5 November 1998 that it was able to exercise jurisdiction over Pinochet and other Chilean military officers in accordance with Article 23.4 of the Organic Law of the Judicial Branch.

judgment in the House of Lords recognized that the "*jus cogens*" nature of torture justifies the exercise of universal jurisdiction over crimes of torture, nevertheless, the Court did not accept that acts of torture could be prosecuted, prior to the enactment of Section 134(1) of the Criminal Justice Act of 1988 which provided the basis for the exercise of universal jurisdiction in the United Kingdom. The European Court of Human Rights has confirmed the *jus cogens* status of the prohibition of torture in the *Al-Adsani* judgment.[146]

a) Immunities from prosecution

Immunity rests on the principles of sovereign equality and non-intervention in the affairs of other States. Immunity from the criminal jurisdiction of the receiving State has long been recognised as central to interstate relations. Under traditional international law, diplomats,[147] heads of State[148] and other foreign ministers[149] are immune from criminal proceedings in third countries unless their immunity is waived by their State. Diplomatic agents and acting heads of State and foreign ministers enjoy personal immunity (*ratione personae*) whereas other officials only enjoy subject matter immunity (immunity *ratione materiae*).[150] Personal immunity (*ratione personae*) applies for personal and official acts for as long as they are in office. On the other hand, subject matter immunity is only granted for acts carried out in an official capacity.

While it is generally accepted that acting heads of States and foreign ministers and diplomats enjoy absolute immunity while in office from criminal proceedings in third countries, there are growing demands to refuse to recognise such immunity for international crimes. It is a well-established principle that in respect of serious crimes under international law, particularly those that constitute *jus cogens* norms, the official position of a defendant cannot be used as a defence.

Article 7 of the Nuremberg Charter recognised that: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."[151] Article 4 of the

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[146] Al-Adsani v United Kingdom, European Court of Human Rights, application no 35763/97.

[147] The Vienna Convention on diplomatic relations, 1961 that provides for the inviolability of diplomatic agents and their immunity from criminal jurisdiction of the receiving state.

[148] Immunity accorded to heads of state is regulated by customary international law. This general rule was stated by Lord Browne-Wilkinson in Pinochet (3) and Satow, ***Guide to diplomatic practice*** (5th Ed. 1979) para 2.1, cited in Hazel Fox QC, in ***The law of State immunity***, Oxford University Press, 2002 p. 424. See also p. 422 on the definition of Head of State.

[149] The principle of individual criminal responsibility for acting heads of state was affirmed by the 22 May 1999 decision of the ICTY Prosecutor to issue an arrest warrant against the then President Milosevic. In the Yerodia case, the ICJ found that "a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognised under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence" and as a result was immunity from criminal jurisdiction of another state. The Court has left the category open as to which other officials will be afforded such immunity. Arrest Warrant of 11 April 2000 (Democratic Republic of Congo/Belgium) Judgment, Preliminary Objections and Merits, 14 February 2002, para 53. However, Amnesty International has noted that "several of the international instruments adopted over the past half century were expressly intended to apply to national courts, including the 1945 Allied Control Council Law No. 10, the 1946 General Assembly resolution on the affirmation of the principles of international law recognized by the Charter of the Nuremberg Tribunal, the 1950 Nuremberg Principles prepared by the International Law Commission, the Draft Code of Offences against the Peace and Security of Mankind of 1954 and the 1991 and 1996 Draft Codes of Crimes against the Peace and Security of Mankind. Moreover, even the international instruments establishing international criminal courts envisaged that the same rules of international law reiterated in those instruments applied with equal force to prosecutions by national courts." Amnesty International. UNIVERSAL JURISDICTION: Belgian court has jurisdiction in *Sharon* case to investigate 1982 Sabra and Chatila killings. [IOR 53/001/2002 of 01/05/2002]

[150] Article 39(2) of the Vienna Convention of 1961.

[151] See also, UN General Assembly Res. 1/95 (1946); UN General Assembly Res. 1/96 (1946).

Genocide Convention provides that "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Evidence that the absence of immunity for serious violations of international law has reached the status of customary international law can be found in the specific inclusion of this principle in the Statutes of the ICTR and ICTR[152] and most recently in Article 27 of the Statute of the International Criminal Court, which provides that: "1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." The trial chamber of the ICTY in a decision on preliminary motions in the Milosevic case, noted at paragraph 28, in relation to Mr. Milosevic' status as former President (President at the time of issuance of the arrest warrant) that "There is absolutely no basis for challenging the validity of Article 7, paragraph 2, which at this time reflects a rule of customary international law."[153]

In recent years it has become recognised that at least former diplomats and former heads of State do not enjoy immunity for international crimes, including torture, since their functional immunity does not encompass acts that are crimes under international law. In the first UK House of Lords decision in the Pinochet case, Lord Nicholls expressed the majority opinion as follows: "And it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of State. All States disavow the use of torture as abhorrent, although from time to time some still resort to it. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence. International law recognises, of course, that the functions of a head of State may include activities, which are wrongful, even illegal, by the law of his own State or by the laws of other States. But international law has made plain that certain types of conduct, including torture and hostage taking, are not acceptable conduct on the part of anyone. This applies as much to heads of State, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law." [154]

This position was confirmed in the second decision of the House of Lords, where it was stated that while acts of torture may be carried out under colour of Pinochet's position as head of State, "they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime."[155] The

[152] Article 7 and Article 6 of the Statutes respectively.

[153] **Decision on Preliminary Motions** ("Kosovo"), 8 November 2001. See also, Principle 5 of the 'Princeton Principles on Universal Jurisdiction.'

[154] Regina v. Bartle and the Commissioner of Police for the Metropolis and others (appellants) ex parte Pinochet (respondent)(on appeal from a Divisional Court of the Queen's Bench division); Regina v. Evans and another and the Commissioner of Police for the Metropolis and others (appellants) ex parte Pinochet (respondent) (on appeal from a Divisional Court of the Queen's Bench division) of 25 November 1998.

[155] Decision of the HL of 14 March 1999, Lord Craighead. See also the reasons of Lord Saville, who holds that: "So far as the states that are parties to the Convention are concerned, I cannot see how, so far as torture is concerned, this immunity can exist consistently with the terms of that Convention. Each state party has agreed that the other state parties can exercise jurisdiction over alleged official torturers found within their territories, by extraditing them or referring them to their own appropriate authorities for prosecution; and thus to my mind can hardly simultaneously claim an immunity from extradition or prosecution that is necessarily based on the official nature of the alleged torture."

decision of the Belgian investigating magistrate in the Pinochet case had come to the conclusion that the acts alleged (torture, murder…) could not possibly come within the ambit of official acts performed in the normal exercise of official functions. Pinochet was not immune from personal jurisdiction.[156] The *Institut de Droit International* has also confirmed by resolution that immunity will not apply to former heads of State "in respect of proceedings relating to acts which amount to his participation in the commission of a serious crime in international law."[157]

b) Immunity from civil suits

The International Law Commission, in its background report to the draft articles[158] noted that there had been new developments since their adoption: "This development concerns the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition on torture." Firstly, the Commission refers to the amendment of the US of its Foreign Sovereign Immunities Act to introduce section 221 of the Anti-Terrorism and Effective Death Penalty Act of 1996, which provides that immunity will not be available in any case: "in which money damages are sought against a foreign State (designated as a State sponsor of terrorism) for personal injury or death that was caused by an act of torture, extra-judicial killing, aircraft sabotage, hostage-taking...". Second, it refers to the decision of the House of Lords in the Pinochet case, which importantly emphasizes the limits of immunity. The Commission further notes that:

> "Although the judgment of the House of Lords in that case only holds that a former head of State is not entitled to immunity in respect of acts of torture committed in his own State and expressly states that it does not affect the correctness of decisions upholding the plea of sovereign immunity in respect of civil claims, as it was concerned with a criminal prosecution, there can be no doubt that this case, and the widespread publicity it received, has generated support for the view that State officials should not be entitled to plead immunity for acts of torture committed in their own territories in both civil and criminal actions."[159]

There have been few civil suits where claims were filed against foreign governments for violations of crimes under international law. This may be due to the preference for and availability of civil adhesion processes in many countries, or may also relate to the difficulties of proving command and control or other traditional barriers to civil claims such as limitation periods. The two most relevant cases are the recent decision of the European Court of Human Rights in *Al Adsani v the United Kingdom*,[160] and the decision of the Greek Supreme Court in *Voiota*.[161]

The *Al Adsani* decision related to a civil suit lodged in the UK courts by Suleiman Al Adsani, a

[156] See Reydams, L. Criminal Law Forum, Vol XI, I 2000, citing the decision of 6 November 1999.

[157] Cited by Hazel Fox QC, in Law on State Immunity, supra page 448.

[158] The report is available on the website of the International Law Commission at: **http://www.un.org/law/ilc/reports/1999/english/99repfra.htm**. See specifically, paras. 129 (3) – (13).

[159] Ibid., para 129(12).

[160] Al Adsani v. the United Kingdom. European Court of Human Rights, 21 November 2001 (*Application no. 35763/97).*

[161] Prefecture Of Voiota v. Federal Republic of Germany, case no. 11/2000. Areios Pagos (Hellenic Supreme Court), 4 May 2000, quoted in 95 A.J.I.L. 198, January 2001.

dual UK/Kuwaiti citizen who suffered torture in Kuwait. On 29 August 1992 Mr Al Adsani instituted civil proceedings in England for compensation against the Sheikh and the Government of Kuwait in respect of injury to his physical and mental health caused by torture in Kuwait in May 1991 and threats against his life and well being made after his return to the United Kingdom on 17 May 1991. On 15 December 1992 he obtained a default judgment against the Sheikh, but he was not, however, granted leave to serve the writ on the Kuwaiti Government. In his application to the European Court, Mr Al Adsani alleged, among other arguments, that the UK courts, by granting immunity from suit to the Government of Kuwait, denied him access to court contrary to Article 6(1) of the Convention. In paragraph 61 of the judgment, the majority (9 to 8) held that:

> "While the Court accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law, it observes that the present case concerns not, as in the *Furundzija* and *Pinochet* decisions, the criminal liability of an individual for alleged acts of torture, but the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of that State. Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged. In particular, the Court observes that none of the primary international instruments referred to (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Articles 2 and 4 of the United Nations Convention against Torture) relates to civil proceedings or to State immunity."

Judges Rozakis and Caflisch, joined by judges Wildhaber, Costa, Cabral Barreto and Vajić for the minority stresses that the finding of the majority that the prohibition of torture is a peremptory norm (*jus cogens*) would necessarily mean that it would override other rules of a lower status such as State immunity which had not attained such a status under international law.

> "The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions. In the circumstances of this case, Kuwait cannot validly hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction; and the courts of that jurisdiction (the United Kingdom) cannot accept a plea of immunity, or invoke it *ex officio*, to refuse an applicant adjudication of a torture case."[162]

They argue further that the majority opinion is flawed in that it imposes a hierarchical distinction between criminal and civil claims, which was not in the minds of the Court of Appeal, who merely denied that torture had achieved the status of a peremptory norm.[163] Judge Loucaides, in his separate dissenting opinion holds that "In view of the absolute nature of the prohibition of torture it would be a travesty of law to allow exceptions in

[162] Minority opinion of Judges Rozakis and Caflisch, joined by judges Wildhaber, Costa, Cabral Barreto and Vajć, para. 3.

[163] Ibid., para. 4.

respect of civil liability by permitting the concept of State immunity to be relied on successfully against a claim for compensation by any victim of torture. The rationale behind the principle of international law that those responsible for atrocious acts of torture must be accountable is not based solely on the objectives of criminal law. It is equally valid in relation to any legal liability whatsoever."

The *Voiota* decision arose out of a decision of the district court to award damages of approximately 30 million USD as indemnity for atrocities, including wilful murder and destruction of private property committed by the German occupation forces in the village of Distomo on 10 June 1944. Germany petitioned the Court to quash the order and the court, in denying the request concluded that there is a customary rule of international law restricting sovereign immunity in the case of torts committed in the territory of the forum by persons present in the same territory even if these were acta jure imperii. "In deciding to deny immunity to Germany for acts *jure imperii* in breach of *jus cogens* obligations, and thus to uphold the Leivadias district court (*Polymeles Protodikeio Leivadias*) decision to the same effect, *Areios Pagos* (Hellenic Supreme Court) may have followed a well established tradition of innovation, perhaps actively contributing to the consolidation of an emerging rule of customary international law."[164] Greek courts ordered provisional measures to be taken against the Goethe Cultural Institute in Greece to ensure the enforcement of the judgement.[165]

c) 'Non-refoulement'

The principle of *non-refoulement* is specifically prohibited by Article 3 of the Convention against Torture. Non-refoulement provisions are also found in article 33 of the 1951 Convention relating to the Status of Refugees and some of the regional instruments relating to the protection of refugees.[166]

Article 3 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment provides that "[n]o State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." The Human Rights Committee has also stated, in its general comment 20 (44) of 3 April 1992, that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end." The Special Rapporteur has also utilized the urgent appeal mechanisms to intervene in cases where an individual is to be deported, extradited, expelled or returned to another country where he or she is thought to be at risk of torture or ill treatment.

The landmark decision of the European Court of Human Rights in *Soering v. United Kingdom*

[164] P 198.

[165] The Court cited article 12 of the 1991 draft articles on jurisdictional immunities of states and their properties; and article 2(2)(e) of the draft articles attached to the resolution on contemporary problems concerning the immunity of states in relation to questions of jurisdiction and enforcement (IDI Resolution) adopted by the Institut de droit international at its 1991 Basel session as evidence of a growing customary norm.

[166] See article 1 (3) of the Organisation of African Unity: 1969 Convention on the Specific Aspects of Refugee Problems in Africa and conclusion 5 of the 1984 Cartagena Declaration on Refugees, article III(3) of the Principles concerning Treatment of Refugees, adopted by the Asian-African legal Consultative Committee in Bankok in 1966, Resolution 67(14(on Asylum to Persons in danger of Persecution adopted by The Committee of Ministerson 29th June 1967, and Recommendation No R 84 on the Protection of Persons satisfying the Criteria in the Geneva Conveiotn who are not formally Recognised as Refugees adopted in 1984, article 3(1) of the 1967 Declaration on Territorial Asylum.

found that "Extradition [when facing the death penalty], while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article 3"[167] The Committee against Torture issued a General Comment on the implementation of Article 3 of the Convention, and in the Comment noted that "the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable. The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present."[168] The European Court of Human Rights use a similar test: "where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country."[169]

[167] Soering v. United Kingdom, App. No. 14038/88, para. 88.

[168] *Implementation of article 3 of the Convention in the context of article 22: 21/11/97, CAT General comment 1. (General Comments*), paras. 6, 7.

[169] Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 35, paras. 90-91, the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 28, paras. 69-70, and Others judgment. The Committee against Torture uses the threshold of "substantial grounds for believing" that a person would be in danger of torture. See for example CAT/C/29/D/204/2002 28/11/2002 Communication No. 204/2002.

OVERALL FINDINGS OF THE AUDIT REPORT

A. Summary Analysis

The Audit Project includes a survey of law and practice on reparation for torture victims in thirty countries.[170] The overall findings indicate that laws are inadequate and/or lacking in most of the countries under scrutiny and, even where present, rarely implemented. The absence of safeguards and the impunity afforded to perpetrators of torture contribute greatly to the prevalence of torture. Impunity is the result of a lack of political will and/or the failure to overcome severe institutional deficiencies to combat torture. The outcome is that torture remains unacknowledged, victims suffer in silence and there is little, if any, official support for survivors. This is especially true for those, for example minorities, who suffer torture more frequently than other groups.

Overall the report notes the lack of mechanisms for recording the incidence of torture in most countries. The setting up of systematic monitoring and documentation of torture would allow an analysis of the torture cases investigated, prosecuted and recompensed as compared to the total number of torture cases. The majority of the authorities charged with reporting to the Committee against Torture do not give an adequate breakdown as to how many of the complaints addressed to officials relate to torture and ill treatment and the outcome of such cases in terms of prosecution and reparation. The combination of the lack of political will and the absence of a specific offence of torture in domestic law is an important barrier to proper documentation.

In this context it is concluded that the introduction of well managed data collection systems on all aspects of torture and reparation would not only demonstrate a given country's commitment to its legal obligations to investigate and prevent torture, but would also provide the factual basis for identifying and tackling the occurrence and prevalence of torture, and inadequate responses thereto, to counteract impunity and gain reparation for survivors.

B. Region Specific Conclusions

1. Latin America (Argentina, Brazil, Chile, Mexico and Peru)

All these countries have experienced systematic state-sponsored torture mainly under military dictatorships or authoritarian regimes. Torture and ill treatment continue to be practised. Impunity, namely the absence of prosecution for torture, with a few well-known exceptions, are common features. Amnesty laws in Argentina, Brazil, Chile and Peru shield perpetrators of previous serious human rights violations. These laws have been repeatedly challenged in Argentina and Chile, and exceptions have been recognised in Argentina. It remains to be seen whether Peru, having recently emerged from periods during which

[170] The countries covered are listed in FN 1.

torture was practised systematically, will muster sufficient political will to prosecute the perpetrators of past abuses. The challenge is likewise for Mexico, where its new democratically elected government will have to undergo deep structural changes to combat the prevalence of torture in the country.

The record of all countries in relation to torture in the present context is equally dismal. While all States have recently enacted laws recognising the specific offence of torture, albeit not wholly in line with the definition of the Convention against Torture and the Inter-American Convention on the Prevention of Torture, none of the countries have effective systems for prompt and impartial investigations that ensure prosecution. The judiciary has also failed to take a pro-active stance in calling for, or investigating and prosecuting torture cases, especially in Brazil where the burden of proof is placed on defendants.

Another common feature is the lack of effective mechanisms to claim reparation for torture. In the absence of the courts recognising constitutional remedies for torture and specific laws allowing claims for reparation for wrongful State conduct or human rights violations, victims have to resort to bringing claims before civil and, where possible, criminal courts. Since claims will in most countries only be successful, either as a matter of law or in practice, if the alleged perpetrator is found guilty by a criminal court, prevailing impunity has rendered such remedies largely ineffective, and leaves torture victims without reparation.

Argentina, Brazil, Chile and Peru have put reparation measures in place for past human rights violations, ranging from public acknowledgement, compensation, financial assistance and rehabilitation to commemoration. However, most of these measures have not been torture specific; even though some of these measures benefited survivors and relatives of victims when falling within the categories of eligible victims. However, most programmes have not provided comprehensive reparation.

Jurisdiction over crimes committed abroad may be exercised on the basis of international treaties. However, in the few cases where extradition requests have been made for perpetrators of human rights violations, the countries concerned have been reluctant to comply and have subsequently failed to punish adequately the persons in question.

2. Africa (Kenya, Morocco, Nigeria, Rwanda, South Africa, Sudan and Zimbabwe)

An analysis of regionally specific findings illustrates that many African countries with a history of military dictatorships, gross human rights violations and institutionalised torture have a backlog of complaints. In all the countries, even where a degree of reparation is allowed in law or by more traditional systems, (for example, 'blood' money) the effects are negated by a combination of factors including lack of investigation, lack of evidence, intimidation of survivors, defenders, witnesses, the difficulties in accessing justice and the failure to provide an independent judiciary. These are powerful structural barriers to the right to reparation as well as to developing mechanisms to deal with gross human rights violations.

Even in those African countries that have taken first steps towards a reparation mechanism (Nigeria, Morocco, South Africa), there are serious concerns about the limited scope of such mechanisms and/or the chances of them being implemented in the immediate future. Regional protection mechanisms remain weak and very few countries have individual complaint mechanisms resulting in an environment inimical to reparation for torture survivors.

3. Middle East (Bahrain, Egypt, Iran, Israel and Lebanon)

Nor are provisions in Middle Eastern countries any better: in fact, all the countries continue to be characterised by widespread if not complete impunity. In many instances impunity is institutionalised as for example in Israel prior to 1999 where certain forms of torture routinely practised were considered to be lawful. In Lebanon and Bahrain amnesty laws shield perpetrators of torture committed in the past from criminal prosecution. And in all the countries examined there is an absence of any express statutory right to reparation for government misconduct, including torture whereby particularly the laws of Iran do not appear to provide for an effective remedy. While tort damages have been allowed in Egypt and Israel, compensation has been relatively low. Several other factors such as the absence of civil society institutions, the lack of an independent judiciary together with the failure to set up National Human Rights Commissions, make the Middle East the region most intransigent on the issues of protection and reparation for torture victims.

4. South Asia (India, Nepal and Sri Lanka)

Despite the fact that impunity is institutionalised (at least until recently in Sri Lanka) in the three South Asian Countries investigated, surprisingly, victims of torture have sometimes been successful in obtaining reparation. In India and Sri Lanka this is due to an impressive jurisprudence that has been developed by the Supreme Courts. However, time limits for submitting complaints are still woefully short and the compensation awarded low. Steps are being taken in all three countries, with varying degrees of success, to introduce safeguards against torture but these are seen as less than radical. While Nepal has enacted specific legislation allowing survivors to claim compensation, the act has serious shortcomings: few claimants have been successful and compensation has been inadequate. Although the domestic judiciary has been largely responsible for the reparation rights that exist, the region, particularly India, continues to suffer from the absence of access to regional or international complaints mechanisms.

5. East and South East Asia (China, Indonesia, Japan and Philippines)

The countries in East and South East Asia differ widely from one another in their provisions for reparation. Impunity remains widespread, although some reparation cases have been successfully fought in China and the Philippines. In none of the four countries included in the study have the highest courts interpreted their respective constitutions as empowering them to provide reparation for torture. In those countries with statutory legislation on the right to compensation, the acts are deficient and in the case of the Philippines, the absence of State liability for official human rights violations and the requirement for the State's consent for any legal action is in contravention of international obligations to grant an effective remedy. In Indonesia, despite new laws, there has been an almost complete absence of reparation for the large number of survivors of past and more recent torture.

Perhaps the one common feature of this region is the large discrepancy between law and practice. Again the lack of regional human rights mechanisms and the refusal, in practice, to submit to individual complaints mechanisms, leaves survivors with extreme difficulties in gaining any reparation.

6. Europe and Central Asia (Romania, Russia, UK – Scotland, Serbia Montenegro, Switzerland, Turkey and Uzbekistan)

UK/Scotland and Switzerland remain largely free from torture and have by and large a legal system that provides reparation for torture committed within its territory. . However, there has been a marked reluctance in Switzerland to hold officials accountable for incidents of violence, especially in the course of deportations.

Serbia and Montenegro as well as Romania have recently emerged from systems where torture was State sponsored and ill treatment, often directed against minorities, continues to be reported. While there have been some prosecutions of perpetrators of torture and a few cases where torture survivors have been awarded reparation, especially in Serbia and Montenegro, Romania has failed to provide full reparation for victims of torture committed during the Communist regime and its present system of investigations provides no effective remedies for victims of torture and ill-treatment. Serbia and Montenegro has yet to pursue a coherent policy of holding perpetrators of torture committed during the Milosevic regime to account and to provide adequate reparation for the victims of such acts.

In Russia and Uzbekistan there is almost complete impunity for the perpetrators of torture. In both States investigation and prosecution procedures are marked by a lack of independence from the authorities and a weak judiciary albeit to a lesser degree in Russia. While the necessary laws exist in Russia there have been few successful reparation cases. In Russia, generally and in Uzbekistan rehabilitation for survivors on torture during the Communist regime is limited. Both countries suffer from the enduring political philosophy of individual weakness vis-a-vis the State. Thus deficiencies in law are compounded by the lack of a human rights culture that would enable the individual to insist on effective mechanisms for reparation. This culture is gradually developing in Russia but remains a distant reality for Uzbekistan.

In Turkey, impunity has been facilitated by legislation, which resulted in the virtually complete lack of reparation for victims. While recent legislative changes in this respect are a welcome first step, Turkey will have to live up to the task of implementing these changes effectively and provide the long overdue justice to the large number of victims. Despite the many judgements by the European Court of Human Rights against Turkey, impunity prevails and there continues to be a complete absence of reparation awards, be it for torture committed during the past conflict or in the course of police investigations.

C. Substantive Conclusions

a) International Law: The right to reparation for victims of torture is clearly established in international law; it includes restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition. States are therefore not only obliged to refrain from acts of torture and to take measures to prevent its occurrence, but also have a duty to punish the perpetrators. The right to reparation also entails the obligation of States to afford effective remedies for victims of torture to obtain reparation, including access to justice. However, courts are generally reluctant to use international law as a basis for their decisions in the absence of implementing legislation.

It is equally clear that there is a general and worrying failure on the part of most States to implement international obligations through their incorporation into domestic law. In the case of the Convention against Torture very few States have enacted specific laws to

incorporate parts, or indeed all, of the Convention. This gap often results in weak reparation and, in the absence of a legal framework, a failure to ensure reparation for torture.

b) Domestic Law: The gap defined above is particularly serious because in most countries torture is not specifically defined in domestic law in line with Article 1 of the Convention.[171] Consequently torture is usually prosecuted as other common crimes, not giving adequate emphasis to the severity of the crime of torture and failing to cover all the prohibited conduct. This in turn leads to further omissions such as a lack of public acknowledgement of the reality of torture, the failure to meet the special needs of survivors including reparation and the impact of torture on the relatives of victims.

c) Criminal Accountability of Perpetrators of Torture: Existing systems of investigating acts of torture as well as prosecuting and punishing the perpetrators is seriously flawed in most States. Several States have enacted amnesty laws shielding perpetrators of torture and other serious human rights violations from prosecution.[172] Other States provide legal immunity that might be invoked by perpetrators of torture.[173] In several other States, investigation into allegations of torture and subsequent prosecution are subject to prior consent by the authorities, which constitutes a serious obstacle to prompt, impartial and effective investigations.[174]

There are significant differences in the systems of investigations and prosecutions. In countries following the French civil law model, judges play a more prominent role in investigations, which are conducted by the judicial police and examining magistrates.[175] In countries following the common law model, the police conduct investigations under the supervision of the Attorney General who retains ultimate control over any prosecution.[176] Private prosecutions are often possible but commonly, the right to pursue a complaint in the criminal courts is not unrestricted: it is either confined to specific, usually less serious crimes or subject to prior permission of the Prosecution Authority.[177] The latter has the power to take over and even terminate private prosecutions.[178] Moreover, victims who institute private prosecutions bear the risk of carrying the costs incurred by the defendant if the latter is not convicted.

Investigation into acts of torture is in most countries carried out by bodies that lack sufficient independence or face conflicts of interest. Thus those agencies responsible for torture, i.e. the police or the prosecution services are often also responsible for proceedings against torture survivors who are suspects in a criminal case. Hardly any of the States scrutinised have established independent complaints and investigation mechanisms.[179] However, in some countries, special departments have been set up within the prosecution services.[180]

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[171] Brazil, Mexico, Peru, Romania, Sri Lanka, and the UK being the only countries that have adopted a definition of torture in their legislation that corresponds fully or partially to the one found in Article 1 of the Convention against Torture.

[172] Amnesty laws have been passed in Argentina, Bahrain, Brazil, Chile, Lebanon, Peru, South Africa and Zimbabwe.

[173] This is for example the case in India.

[174] See e.g. India, Lebanon, Sudan and, until recently, Turkey.

[175] So for example Egypt, Lebanon and Morocco.

[176] This is e.g. the case in Nigeria, Kenya and Zimbabwe.

[177] In the Sudan.

[178] E.g., in Kenya, Nigeria, South Africa and Zimbabwe.

[179] South Africa is a notable exception.

[180] E.g., in Sri Lanka.

In the majority of cases torture survivors have no access to independent bodies that have the power to carry out investigations leading to a prosecution. Survivors, in particular those still in detention, and relatives of torture victims often refrain from lodging complaints out of fear of retribution, because only a few countries offer victims, witnesses and human rights defenders sufficient protection and procedural rights during criminal proceedings. Therefore the establishment of protection programmes for victims and witnesses in several countries is an important recent development.[181] In the absence of such programmes, complaints tend to be made to national human rights commissions or similar bodies that commonly only have the power to recommend prosecutions and normally cannot successfully challenge a decision to drop charges.[182] In several instances, national human rights commissions have refrained from calling for prosecutions or their recommendations have not been put into practice.[183] Nevertheless, these bodies can play an important role in investigating human rights violations, the effectiveness of which depends on the mandate and the degree of independence, capacity and determination of the commission in question.

Investigations by the police or prosecution service, if carried out at all, are often inadequate and rarely result in prosecutions. Most investigations are closed on the grounds of insufficient evidence, itself often due to the lack of prompt access to independent and impartial medical examinations.[184]

In several countries, the judiciary lacks genuine independence[185] and judges often fail to take a pro-active stance on torture allegations. Where judges have called for action to be taken relevant government bodies have in several instances failed to follow up and take the required action.[186]

In some countries, the burden of proof is placed on the defendant, thereby stacking the odds against torture survivors and pre-empting proper investigation into allegations. This also provides an indirect encouragement for future torture.[187] Trials against perpetrators of torture frequently fail, hampered by a lack of collaboration from the police and the difficulty of securing witnesses. In many States, torture survivors have only limited procedural rights during trial. Even where a court has been specifically tasked with trying human rights violations, such as the Human Rights Court in Indonesia, the limited scope of mandates prevent charging all of those responsible with criminal accountability. In the few instances where there have been convictions sentences have been lenient and/or inadequate.[188] The same obstacles apply to internal disciplinary punishment, whether in lieu or in addition to criminal punishment. The inconsistent practice followed in many countries and the light sanctions imposed, if any, amount to condoning torture.

[181] E.g., Israel, Japan, South Africa and Switzerland.

[182] E.g., in India, Indonesia, Nepal, Nigeria and the Philippines.

[183] Ibid.

[184] So for example in Brazil, China, Egypt, Kenya, Morocco, Indonesia, Turkey and Uzbekistan.

[185] E.g., in China, Indonesia, Iran, Morocco and Uzbekistan.

[186] So for example in India, Lebanon, Sri Lanka and Zimbabwe.

[187] See e.g. Brazil.

[188] This has for instance been the case in Argentina, Egypt, Indonesia, Turkey, the FR Yugoslavia and Uzbekistan. In Turkey, for example, adjournment of cases and suspension of sentences in relation to ill-treatment are enabled by a specific act, Law 4616 of 1999 but has also been used in relation to cases of torture.

The constraints on proper redress for victims of torture are surprisingly similar in most of the countries included in the survey. This conclusion holds true for different legal systems and for different regions. The discernible differences lie in political will and independence of both the prosecution service and the judiciary. In those countries where torture is used systematically against political opponents, there is no expectation of investigation, trial or conviction. In countries where torture is institutionalised and there is a protective police culture, it has proved difficult to hold perpetrators of torture accountable. This is particularly the case where the prosecution and judiciary are weak and defer to the executive, but is also true even when the judiciary has repeatedly called for investigation and prosecution.[189]

d) Effective Remedies for Reparation: The overwhelming majority of torture survivors and relatives of torture victims go without any reparation. While a few may have received some form of reparation, hardly any have gained full reparation.

The laws of most States do not provide an express right to any form of reparation for serious human rights violations, including torture. Nepal is the only country having an act expressly providing compensation for torture; but while constituting a first step towards reparation, it has major flaws.[190]

Several States provide for constitutional remedies by way of a fundamental rights application to the highest courts. Such applications have proved effective in countries such as India and Sri Lanka, although time restrictions and the lack of standing for relatives of victims curtail the remedy in Sri Lanka and the award of compensation for breach of fundamental rights has lacked consistency. In other countries, such as Kenya, Sudan and South Africa, the High Courts have failed to utilise constitutional provisions to allow torture survivors to seek reparation for a breach of fundamental rights. The possibility of claiming relief for a breach of fundamental rights before the highest courts is an important remedy, be it in the form of a separate application or as a means of last resort where all other remedies have failed. As developments in India and Sri Lanka have demonstrated, such remedies often emerge in response to the failure of the legal system, in particular the lower courts and/or the authorities to provide accessible and effective remedies.

Several States have adopted statutes that allow torture survivors to claim compensation against the State for wrongful conduct of their officials, normally as a matter of public law, e.g. in China, Japan and Switzerland. These laws provide a clear right to compensation for official wrongdoing and normally offer affordable procedures. However, the procedures are often cumbersome, reparation is confined to specific types of violations and limited as to the scope of reparation awarded, which will typically be in the form of compensation only. Compensation awards that have been made often do not reflect the seriousness of torture and have, in several countries, been viewed as insufficient to repair damages suffered.[191]

The legal systems of most countries, be it civil law, common law or mixed law countries, provide in their respective tort (delict) law that the wrongful infliction of personal injury carries a liability for reparation, particularly by paying compensation. In the majority of countries, both the individual offender and the State are liable. The State is in most countries vicariously liable for torts committed by its officials, either expressly or on the basis of employers' liability. The Philippines provides an exception to this rule where the State is not

[189] So in the case of India and Sri Lanka.

[190] See Nepal Country Report, IV, 1.1.

[191] See for e.g. China.

liable for the wrongs of its public officials.[192] In India, the State enjoys sovereign immunity under civil law. In some States, public officials are either not liable at all or only liable for serious breaches, e.g. criminal offences.[193] However, in most countries the State has the right to have recourse against its officials in cases of intentional wrongdoing after having paid compensation to the claimant.

Compensation commonly includes damages for pecuniary and non-pecuniary harm. In some common law countries, exemplary and punitive damages can also be awarded.[194] In civil law countries, exemplary and punitive damages are generally not awarded being viewed as at variance with the distinction between civil and criminal law.[195] Dependants of a victim who has died as a result of torture are generally entitled to compensation that covers lost support depending on the expected life span of the victim and can claim burial costs. While most courts have the power to award other forms of reparation, they usually confine themselves to compensation.

Using civil law remedies is hampered by several factors. These include ignorance of rights, lack of access to courts, short time limits for suits against officials or the State, high legal costs and a lack of legal aid to support such claims as well as the difficulty of proving the claim in the absence of sufficient evidence.

In several countries, the outcome of a civil case is linked to the verdict in a criminal case, which makes claims for damages illusory those countries where impunity prevails.[196] In these latter countries, the idea of bringing a suit against the perpetrators or the State appears inconceivable for all but the brave or influential torture survivor. In the countries where compensation has been awarded in torture cases, the awards have been comparatively low.[197] Enforcement of any awards against the State in countries such as Kenya and Nigeria depends on consent and the two Governments have been reluctant to comply with the Courts' decisions. This has undermined the effectiveness of remedies.

The option of filing a supplementary lawsuit as part of criminal proceedings offers torture survivors an affordable and accessible remedy, but its effectiveness is limited for several reasons. Success depends on an effective investigation leading to prosecution, a procedure usually absent. Furthermore, reparation is often confined to compensation awarded against the individual perpetrators responsible. The filing of supplementary lawsuits in the course of criminal proceedings while constituting an important complementary remedy is therefore in itself insufficient to constitute an effective remedy.

In several countries, compensation can be awarded as part of the punishment in criminal cases. However, the victim cannot demand such compensation by way of right but it is at the discretion of the court to impose punishment. In practice, this option has only been utilised in few countries.

[192] The state cannot be sued without its consent, and although there are exceptional cases in which the state is liable, this does, however, not apply to liability for torture committed by public officials.

[193] See e.g. Switzerland.

[194] See e.g. India, Kenya, Nigeria, South Africa, Zimbabwe but also the Philippines.

[195] See e.g. Lebanon, Morocco, Switzerland.

[196] See e.g. Argentina, Romania and Turkey.

[197] See e.g. Nigeria and South Africa.

The Shari'a law concept of *Diya* (blood money), a private criminal right constitutes a specific remedy in that it allows the victim or his/her relatives to choose compensation instead of retribution (qesas).[198] While *Diya* can be claimed as part of the criminal proceedings, albeit only in cases of infliction of bodily harm, it may not be invoked to claim reparation directly from the State. *Diya* is also confined to a fixed amount of money and does not include other forms of reparation. If the victim(s) choose *Diya*, the punishment of the defendant can only be a relatively light one. It would therefore be inadequate in the light of the seriousness of the crime of torture. Moreover, non-Muslims are being discriminated against in Iran since they are not entitled to the same amount of *Diya* as Muslims. For these reasons, *Diya* does in itself not constitute an effective remedy allowing adequate compensation but may provide an alternative where no other remedies are available.

Most national human rights commissions are empowered to recommend reparation for human rights violations. The option of lodging a complaint with a commission is an important alternative avenue in those countries where the national commission recommends that compensation be awarded and where recommendations are implemented by the State. The Indian human rights commission demonstrates a noteworthy example.[199] In other countries, commissions rarely recommend reparation and more usually refrain from such a step altogether.[200] In general, the amount of compensation recommended by commissions tends to be low and few commissions have developed a coherent policy of recommending a wide range of reparation measures that go beyond compensation.

One country to set up a compensation board for victims of unjust imprisonment or detention and victims of violent crimes is the Philippines. Although it may cover cases of torture the reparation is symbolic rather than substantive. In a limited number of other countries, mainly those in the Western Hemisphere, torture victims can claim reparation through schemes aimed at assisting victims of crimes.[201] A politicised example of such a scheme can be found in Israel, where there is a compensation board for victims of "terrorist" acts but not for victims of human rights violations. Some schemes might simply award a fixed amount of compensation to victims of violent crimes, as in Japan. More comprehensive schemes, as for example in Switzerland, include rehabilitation measures and other forms of assistance. However, most of these schemes fail to provide adequate torture specific reparation to survivors.

e) Reparation for Torture in Third Countries: Universal Jurisdiction A few countries have adopted legislation expressly providing for the exercise of universal jurisdiction in criminal cases against perpetrators of acts of torture committed abroad.[202] Recently enacted laws to implement the Statute of the International Criminal Court, such as in South Africa, allow the exercise of universal jurisdiction over international crimes as defined in the Statute, which only covers systematic or widespread torture. Some States allow jurisdiction over certain offences committed abroad on the basis of international agreements such as the Convention against Torture.[203] However, the lack of implementing legislation negates this

[198] This is the case in Iran, Northern Nigeria and Sudan.

[199] India Report, IV, 1.4 and 2.2. The Human Rights Commission in the Philippines has also awarded financial assistance to victims of human rights violations, including torture and "disappearances".

[200] See e.g. Nepal; Nigeria and Sri Lanka.

[201] This is for example the case in the Japan, Switzerland and the UK.

[202] See e.g. UK and Sri Lanka.

[203] E.g. in Brazil, Chile, China, Israel, Japan, Mexico, Peru and Uzbekistan.

opportunity. In Kenya, Nigeria and Zimbabwe, the exercise of universal jurisdiction is limited to violations of the Geneva Conventions.

Most countries allow the exercise of extraterritorial jurisdiction on the basis of the active, passive or protective principle only. Such jurisdiction is based on traditional approaches to extraterritorial jurisdiction and mainly provide for circumstances where there is a connection with the State in question. While the active personality and the passive personality principle allow for the prosecution of torture committed abroad, its scope is limited to the nationality of the victim or the perpetrator, falling short of the obligation to prosecute and punish perpetrators of torture regardless of the territory where it was committed or the nationality of the perpetrator or victim. Consequently, the majority of States have no domestic laws allowing them to exercise universal jurisdiction for torture cases or to comply with the obligation to prosecute allege perpetrators of torture in those cases where the latter are not extradited (*aut dedere aut judicare)*.

The main finding is the lack of consistency and the failure to bring domestic criminal law in line with international standards. A considerable number of States have therefore failed to comply with their obligations under international law to amend their laws in order to be able to exercise jurisdiction over cases of torture committed abroad. With the exception of Switzerland and some prosecutions in other countries relating to international crimes committed during the Second World War, none of the States examined has exercised jurisdiction over foreign nationals responsible for torture who were present on their territory. Japan has to date failed to prosecute the former Peruvian President Fujimori who has been accused of serious human rights violations, including torture while maintaining its position that it will not extradite him.

None of the countries examined grants an express right to claim compensation through its courts to torture survivors for acts of torture suffered abroad from those responsible. In most countries foreign perpetrators of torture can be sued only if they are residents of the country or have some property in the same.[204] However, even in these cases the courts may, and this applies mainly to common law countries, decline to exercise jurisdiction on the grounds of *forum non conveniens*.

In domestic law, diplomatic personnel are usually granted immunity in line with the provisions of the Vienna Convention on Diplomatic Relations, 1961. Foreign States are commonly accorded restrictive immunity for acts of a sovereign nature, either on the basis of State Immunity Acts or on the basis of customary international law. There has been no jurisprudence in the countries examined as to whether such immunity will also be granted in respect of torture.

On a general note, the exercise of universal jurisdiction, both in criminal and civil cases, has not figured prominently in most of the countries examined. Thus, while States have failed to implement fully their international obligations and to provide remedies for torture committed abroad, torture survivors and their relatives have hardly tested legal avenues in those States where there is an opportunity to ensure criminal accountability of perpetrators and to obtain reparation.

[204] Courts normally supplement the territorial principle by criteria relating to the concepts of allegiance or domicile and doctrines of prior express submission to the jurisdiction and of tacit submission, for example on the basis of the ownership of property in the state of the forum.

f) Reparation for Past Human Rights Violations: Countries that have suffered a period of State-sponsored human rights violations have a large number of victims, many of whom may be aged. States have adopted varying approaches to providing reparation for these victims, depending on the historical and specific circumstances of the country. However, there have been instances of complete inaction or grossly inadequate measures of reparation.

It is not unusual for a given government to deny or not fully acknowledge the human rights violations of the past.[205] The greater majority of those responsible for torture committed in the past, particularly high ranking officials, have not been held responsible for their crimes, in either their own or in third countries. Many emerging governments agree to grant amnesties to responsible officials, usually as part of a deal with members of the old regime in return for giving up power. These are more usually blanket amnesties, i.e. no prosecution of perpetrators is possible under any circumstances during a certain period of time, and/or amnesties conditioned on truth telling, i.e. perpetrators are exempt from prosecution for past human rights violations amounting to criminal offences only if they fully disclose what happened.[206] Blanket amnesties clearly violate the obligation to prosecute and punish perpetrators of torture. Arguably, so do conditional amnesties. However, amnesties contingent on full disclosure of the truth may form an important part of the reparation process where it is difficult to prove crimes and the true extent of past human rights violations would otherwise have remained hidden. While this rationale has been invoked in the South African context, many apartheid victims remain unsatisfied with the process, which was for this reason challenged, albeit unsuccessfully, before the South African Constitutional Court. The most obvious failure of the South African Government to date has been the lack of vigorous prosecution of those who were denied amnesty by the Truth and Reconciliation Commission or who did not apply for amnesty in the first place.

In countries where no legal amnesties have been granted, investigations into and prosecutions for torture committed by officials of former regimes are only rarely, or selectively, carried out.[207] This is mainly due to a lack of political will in those countries where members of the previous regimes remain influential. In other countries, it is often a combination of factors, which make investigations and prosecution of perpetrators of secondary importance on the political scale.

The measures adopted by the States examined in the present study have all failed to provide full reparation to victims of torture. In South Africa, arguably the most well known example and sometimes used as a model by other countries, the Truth and Reconciliation Commission has developed a comprehensive reparation policy but to date the Government has failed to implement it and award compensation to the around 20,000 victims identified by the Commission. In Nigeria, the Government has yet to act upon the recommendations by the Oputa panel to award compensation to the victims of human rights violations committed in the period from 1966 to 1999. In Morocco, the number of victims of prolonged arbitrary detention and enforced disappearances eligible for compensation under the arbitration commission has been limited from the outset, excluding numerous victims from the scheme.

[205] This has to varying degrees been the case in many of the countries examined, such as China; Indonesia; Iran; Japan; Lebanon; Morocco; the Philippines; Serbia and Montenegro; Sudan; Turkey and Zimbabwe. Sri Lanka and Kenya have yet to do so.

[206] The former has been the case in Argentina, Bahrain, Brazil, Chile, Peru, Zimbabwe and for certain offences in Lebanon, the latter has been followed in South Africa.

[207] So for e.g. in Indonesia, the Philippines, Morocco, Romania and Serbia and Montenegro.

In the Latin American countries, States have provided reparation for specific groups of victims of human rights violations. While most of these are not torture specific, with the exception of State legislation in Brazil, many if not most victims falling within such groups, such as "the disappeared" and their families in Argentina and Chile and *Indultados* (pardoned, i.e. those that were unjustly detained and wrongfully imprisoned on charges of terrorism) in Peru, were tortured. The countries have provided a wide range of reparation, ranging from public apologies, financial assistance, and rehabilitation to commemoration but some schemes have been criticised for their narrow scope, particularly for the absence of reparation for torture survivors.

In Romania, the Russian Federation and Uzbekistan, some form of reparation, normally referred to as rehabilitation, has been provided for victims of human rights violations at the hands of the previous Communist regimes, which includes a considerable number of torture survivors. However, the amount of financial assistance and other benefits provided has been small and the implementation of the schemes has been hampered by lack of finance and bureaucratic delays.

RECOMMENDATIONS*

Reaffirming that torture, being one of the most serious and repugnant violations of human rights, is morally unacceptable in all parts of the world;

Emphasizing that the absolute prohibition of torture is universally accepted and that each State has clear obligations to take all possible measures to ensure freedom from torture;

Recognising that torture is endemic in many countries including many of those covered in this study;

Aware that torture will only be eradicated if the perpetrators of torture are brought to justice and the institutions which have allowed the practice of torture to continue unabated be substantially reformed;

Concerned that too little has been done to deal with the multiple causes and consequences of torture and the needs of survivors to justice and reparation;

Conscious that a multi-tiered and multi-disciplinary approach is needed to ultimately eradicate torture that takes into account the needs of survivors to restitution, compensation, psychological and physical rehabilitation, satisfaction and guarantees of non-repetition;

Adopts the following RECOMMENDATIONS:

All Governments are urged to:

- **Ensure the Eradication of Torture by:**

Legal Reform and Treaty Compliance: Taking all necessary steps to ratify the Convention against Torture immediately[208] and to recognise the full competence of the Committee against Torture to receive and consider individual communications;

Enacting legislation to implement the provisions of the Convention against Torture, especially by making torture a specific offence in line with Article 1 of the Convention and by providing for an effective right to reparation for torture;

Ratifying the Optional Protocol to the Convention against Torture, which was adopted by the UN General Assembly on 18 December 2002;

* These recommendations were first drafted with reference to India, Nepal and Sri Lanka at a conference on the lack of adequate measures in these countries to deal with torture and its consequences and held in December 2002 in India. The conference brought together a large number of medical, psychosocial experts as well as judges, lawyers, academics and NGO representatives.

[208] India, Iran, Rwanda, Sudan and Zimbabwe.

Adhering to the decisions and recommendations of United Nations treaty-monitoring and charter-based bodies as well as the relevant regional commissions and courts;

Issuing Standing Invitations to the Thematic Special Procedures of the United Nations Commission on Human Rights, including the Special Rapporteur on Torture.

Institutional Reform: Prioritising reform within the law enforcement system that emphasises the prohibition against torture and consequences, which flow from it. Carrying out institutional reforms, particularly relating to the operation of the police and army, including the development and dissemination of detailed guidelines and training modules for the eradication of torture focusing on acceptable investigative techniques, establishing independent complaint bodies to receive complaints of torture and to carry out prompt investigations;

Ensuring that all substantiated allegations of torture lead to criminal investigations and ultimately, to prosecutions;

Making the fact that torture is prohibited and that there is no context in which it can be condoned a central component of the Constitution and of the training curricula of police armed forces academies and of medical officers;

Prioritising reform within the law enforcement system by strengthening investigative and forensic techniques through practical training and re-education at all levels; and

Developing mechanisms of positive reinforcement for law enforcement and security forces personnel who promote and respect human rights, and refrain from exercising torture. Initiating an annual review of actions taken by law enforcement officials on allegations of torture and ensuring that the review is in the public domain;

- **Recognise torture survivors' rights and needs for reparation by:**

Formulating and implementing clear policies committed to recognising and enforcing the right to reparation for serious human rights violations, and specifically for torture.

Ensuring through adequate legislation that victims have an effective and enforceable right to reparation;

Ensuring that adequately funded State compensation/ reparation schemes are in place to provide accessible remedies in cases of mass crime or where individual perpetrators have impunity. Such schemes should enable torture victims to claim reparation in an affordable, simple and accessible manner;

Enabling and encouraging national human rights commissions to play a stronger role in respect of the investigation of acts of torture, the monitoring of internal police and/or security force complaints mechanisms and the bringing to justice of alleged perpetrators; and

Enabling and encouraging national human rights commissions to play a stronger role in monitoring the extent to which survivors of torture are able to claim and receive reparation through existing mechanisms.

- **Ensure the Individual Criminal Responsibility of Perpetrators of Torture and those who Order or Condone Acts of Torture by:**

Making the punishment of all perpetrators of torture a policy goal and supporting this policy by directing official investigations into each and every allegation of torture. Equally, ensuring that the results of these inquiries are fully and publicly disseminated;

Ensuring an environment that enables victims of torture to raise allegations of torture in confidence. This recommendation will require substantial changes to the many institutions dealing with victims, including the police, prosecution, the judiciary and the medical profession. In order to assess how best to implement such changes, an independent audit should be undertaken to expose the difficulties faced by victims when approaching and dealing with these institutions;

Conducting investigations more efficiently and transparently by ensuring the independence and protection of investigating and prosecuting bodies; and

Eliminating any immunities, amnesties and defences in relation to torture; particularly those provided for members of armed forces in general or in specific areas of conflict or for security forces by means of emergency laws or prevention of terrorism acts. This would include revoking any legislation that requires permission from the authorities for prosecution of the armed forces in so-called 'sensitive' regions.

- **Strengthen Awareness of the Plight of Torture Survivors by:**

Taking steps to increase dialogue within the police and security forces on the need to eradicate torture, its causes and consequences, and on the severe impact torture has on individual victims, their families and society at large;

Undertaking confidence-building measures between the police and other law enforcement officials and civil society, such as using community liaison officers, setting up victim and witness protection and support units, holding open days or public meetings in which the public has the opportunity to highlight concerns, with the aim of encouraging victims of torture to speak out, to name alleged perpetrators and to seek reparation;

Highlighting a culture of respect, tolerance and non-violence by including training modules in school curricula, civic education campaigns, and by using the mass media; and

Using June 26, the International Day for Victims of Torture, to organise activities aimed at publicising the plight of torture survivors in different communities and to encourage local initiatives to improve their conditions.

- **Improve Procedures for Claiming Reparation for Torture by:**

Improving access to justice for survivors of torture by ensuring greater access to legal aid, obliging the legal community to provide free legal services to torture victims, and simplifying and streamlining procedures for invoking legal remedies;

Ensuring that those subjected to pre-trial detention or imprisonment are provided with written guidelines or are otherwise informed, by the agency in the criminal justice process they come into contact with, be it police officers in the course of arrest and detention, the

magistrate, the public prosecutor, prison directors, or others, on their right to be free from torture and the steps they may take if those rights are violated; and

Enabling victims to have a more active role in civil, criminal and administrative processes by streamlining procedures and removing bureaucratic impediments. This should be accomplished by ensuring that victims may initiate private prosecutions in a simple and affordable manner; by removing the structural and financial impediments to the lodging of civil claims; and by facilitating access to the judicial review of administrative decisions. Equally, this may be accomplished by ensuring torture victims' access to non-judicial remedies such as medical treatment and support and by adopting legislation to protect victims, their lawyers and other witnesses from intimidation and harassment and ensuring that allegations of intimidation and harassment are taken seriously and dealt with expeditiously.

The Judiciary, in particular the Supreme Courts, are urged to:

- **Develop a consistent jurisprudence on reparation for torture, by:**

Taking into account the gravity of torture as one of the worst violations of human rights and the severe impact it has on individual victims, their families and society at large when making determinations as to the appropriate nature and scope of reparation;

Incorporating the wide array of domestic and comparative constitutional jurisprudence, and as appropriate, taking into account international human rights law in their judgments;

Not confining the scope of reparation to compensation but awarding measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition when ruling on reparation for torture victims, taking into account the particular needs and circumstances of torture survivors;

Refusing to admit statements and confessions elicited through torture and ordering investigations into allegations of torture when they arise in the course of judicial proceedings;

Ensuring a mandatory judicial enquiry into all deaths in custody;

Ensuring that magistrates and lower courts carry out appropriate investigations into allegations of torture by improving judicial education and training and sanctioning those judges who fail to carry out the necessary investigations;

Retaining a primary role in overseeing the enforcement of awards for reparation issued by their Courts;

Ordering wide scale institutional reforms when systematic practices of torture are uncovered through judicial proceedings; and

Removing any time bound restrictions on any allegations of or investigations into torture.

Civil Society, in particular NGOs, academics, lawyers, the media and others are urged to:

Develop a holistic and interdisciplinary approach to the culture of violence, particularly torture, and to take into account in their daily work the importance of redressing violations as a component in rebuilding victims' lives;

Increase public awareness by undertaking programmes, projects, studies and documentaries addressing the needs and rights of torture survivors and the families of torture victims to reparation as well as exploring strategies to further the realisation of such rights;

Take a more proactive stance in demanding accountability of perpetrators by supporting victims in lodging complaints, initiating legal challenges and providing *pro bono* legal services to torture victims;

Provide information and guidance through professional associations, directives and/or other actions to those most likely to come into contact with victims of torture (medical professionals, lawyers, prison officials, non-governmental organisations, citizen advice centres) on preliminary advice and assistance and on specialist referral agencies. This should include the publication and dissemination of a human rights handbook incorporating international human rights standards; and

Initiate and support rehabilitation programmes for torture survivors that provide counselling, psychosocial and other kinds of medical intervention.

ANNEX

Questionnaire

I. The Practice of Torture

- How would you characterise the practice of torture in your country: endemic, frequent, occasional, rare?

- Has your country gone through a period during which the practice of torture could be considered to be state sponsored?
- Who are the typical perpetrators (police forces, army personnel, paramilitary, prison administration etc.) and victims of acts of torture (any type of detainee, specific minority groups, political opponents of the regime, people charged with specific offences etc.)?

II. Prohibition of torture under domestic law

Prohibition and definition:
- Is torture and/or ill treatment specifically prohibited under domestic law?
- If not, is there any other basis upon which acts of torture/ill-treatment would be covered by constitutional or statutory provisions (e.g. right to life, physical integrity)?
- If torture/ill-treatment is prohibited: What are the sources of the prohibition (e.g. Constitution or equivalent document, legislation, case law or other?
- How is torture/ill-treatment defined or interpreted?
- Is there any provision for exceptional circumstances when torture/ill-treatment is not prohibited (emergency legislation etc.)?

Implementation of international law:
- If the State has ratified international human rights treaties, what status do these have in national law?
- Can these instruments, in particular the UN Convention against Torture, be directly invoked or enforced through the courts and the administration, or must they be transformed into domestic law before the courts or competent authorities can apply them?
    - Has the State adopted specific implementing legislation relating to the treaties it ratified which prohibit torture (i.e. Geneva Conventions, Torture Convention etc.)?

III. Criminal accountability of perpetrators of torture as part of the reparation process

THE SUBSTANTIVE LAW:
Is torture a crime and what sanctions apply to acts of torture?

Torture as Crime:
- Are acts of torture, as well as participation in, complicity in, incitement to or the attempt to commit torture punishable under criminal law?
- If there is no express crime of torture, what other criminal offences can be invoked in instances of torture and how are they defined?
- What are the defences, if any, against charges of torture or related crimes?

Criminal and other sanctions:
- What criminal sanctions are prescribed for torture (or other offences such as assault etc. if there is no express offence of torture stipulated) under domestic law?
- What are the disciplinary and other sanctions, if any, which may be applied to persons found guilty of torture? Can disciplinary sanctions be applied in lieu of criminal sanctions?
May such persons be barred or suspended from the public service or from certain other professions involved in the treatment of prisoners, such as physicians?

THE PROCEDURAL LAW:
- How can alleged perpetrators of torture, if at all, be held responsible under criminal law and what rights do torture victims and their relatives have in such proceedings?

Immunities:
- Are there any amnesty laws for the crime of torture?
- Can public officials (police, military personnel etc.) be prosecuted or are there instances when they can be immune from prosecution (e.g. through amnesty laws)?
- Is there any statute of limitations for the crime of torture?

Lodging a complaint:
- How and to whom can a torture survivor or relatives of a torture victim lodge a complaint about alleged acts of torture?
- Will legal representation and legal aid be available for pursuing a complaint?
- Is there any right of private prosecution (being brought by an individual instead of the public prosecution service), and if so, how does it work?
- When a complaint of torture is made, does the person making the complaint have a right of access to a doctor and/or to have a medical report drawn up?
- Are there any limitations placed on which medical professionals will prepare a medical report for the purposes of court proceedings (e.g. only a state appointed institution) or may the torture survivor appoint them?
- Do victims, their families and witnesses have a right to specific protection during the proceedings?

Competent agencies:
- Which agency is responsible for the investigation and which agency responsible for the prosecution of an alleged torturer and on what grounds?
- Are there any special official bodies responsible for examining and investigating alleged violations of human rights?
- Are there special procedures for investigating and/or prosecuting lawbreaking, when the lawbreaking involves members of the institution that would normally conduct an investigation?

Investigation proceedings:
- Is the initiating of a prosecution, i.e. opening investigations, obligatory or discretionary?
- What steps are involved in opening an investigation (in particular, what is the required level of substantiation)?
- What is the usual basis for a decision not to proceed with an investigation (e.g. lack of evidence, other considerations)?
- To what extent can such a decision be reviewed and by whom?
- What steps are to be taken when an allegation is made?
(Is an alleged torturer to be taken into custody or what other measures are to be taken to ensure his/her presence at trial? If he/she is a public official, is there a possible suspension of that position pending outcome?)
- Upon conclusion of an investigation, is the decision of the prosecuting agency not to indict the alleged torturer subject to independent/judicial review and if so, by whom?

Trial stage:
What court(s) (criminal courts, special courts, such as military courts etc.) is/are competent for trying individuals (police officers, military personnel etc.) charged with torture?
- What are the main aspects of the procedure applicable to such trials?
- What are the rules on evidence (burden of proof, standard of proof, relevance and weight of various types of evidence, also in particular are victims able to produce evidence and can evidence be excluded/withheld on grounds of public security)?
- What are the penalties incurred; may sentences be suspended, and if so, under what conditions; may convicted persons benefit from pardon, commutation of sentences or amnesties?
- Does your law allow for the participation of the victim or (in the case of the death of the victim) his or her relatives or NGOs in a criminal trial?
- What rights of intervention does a torture survivor have in a trial?

THE PRACTICE:
- Have perpetrators of torture been held responsible under criminal law and what are the obstacles that torture survivors face in pursuing complaints?

Investigations:
- Do torture survivors make allegations against their torturers? (To whom? In what circumstances? If not, why? Are there any gender differences?)

- Are allegations of torture generally investigated promptly, adequately and impartially?
- Will a medical report be produced and are these impartial?
- How long do investigations generally take?
- What types of repercussions, if any, have torture survivors encountered for coming forward?

Bringing charges:
- Have perpetrators of acts of torture been charged and brought to trial (How many torture allegations, how many charges, with what result)?
- Have the allegations been made public and if so was there any public reaction if the individual was not brought to trial, or conversely, if they were brought to trial?

Trial practice:
- How long does a trial generally take (hours, days, weeks or months)?
- What are the most typical defences in these cases?
- Have appropriate punishments (i.e. proportionate to the gravity of the offence as compared to similar cases) been ordered and carried out?
- Has there been any improper outside interference in trials against alleged torturers (e.g. intimidation of judges or witnesses, in particular by government officials or military personnel warning judges not to convict the accused)?
- Is the judiciary independent and impartial (in particular what are the procedures and the practice relating to the appointment, transfer and dismissal of judges)?
- Are confessions elicited through torture admissible in court?
- What happens if a defendant makes an allegation of torture in the course of a trial?

Law Reform:
- Are there currently any initiatives to reform the law relating to the prohibition of torture and/or prosecution of torturers?
- If so, what are the proposals and what stage are they in?

I. Claiming reparation for torture

THE SUBSTANTIVE LAW:
- What right to reparation do torture survivors have under domestic law?

Constitutional Law: Does the Constitution or an equivalent document stipulate an express right to reparation? If not, has the Constitutional Court or any equivalent court construed the provisions of the Constitution as containing such a right?
Criminal Law: Can reparation, in particular damages, be obtained through criminal proceedings (adhesion laws)?
Civil/Common Law: Can reparation be claimed for acts of torture as a matter of statutory or case law?
Public Law: Can reparation be claimed for government misconduct, especially acts of torture, as a matter of statutory law or according to the jurisprudence of the competent court(s)/tribunal(s)?

Forms of Reparations:
- What is the scope of reparation available under the respective laws?
- What types and what amount of damages can be awarded (pecuniary (tangible loss), non-pecuniary (moral), punitive damages etc.)?
- What other forms of reparation can be awarded (e.g. rehabilitation, satisfaction, guarantees of non-repetition)?

THE PROCEDURAL LAW:
- How can torture survivors claim reparation?

Immunity:
- Are public officials/ b) is the State immune from legal action relating to acts of torture?

Procedures to be followed in order to (successfully) claim reparation for torture:
- How can reparation be claimed as part of criminal proceedings (adhesion proceedings)?
- Which of the civil/common/public law courts/tribunals would be the competent forum for bringing legal action against an individual or against the State for reparation?
- Can legal action, in particular in the sphere of civil law, be taken against the individuals, in particular public official(s) responsible or the State or other public entities (in particular when the perpetrator (s) have not been identified)? Both? (Is there vicarious liability of the State or other public entities for the conduct of its officials (i.e.

does the State take responsibility for actions of officials who carry out torture)? Is there joint responsibility or is the public official primarily liable?)

What further requirements are there, in particular:
- Is there a time limit within which legal proceedings must be initiated?
- Is the award of reparation linked to the outcome of the criminal procedure?
- What are the rules of evidence (e.g. causality and burden of proof etc.)?
- What are the rules regarding the award of costs in these types of cases?

THE PRACTICE:
- Have torture survivors actually obtained reparation?

Cases:
- Have there been any cases of torture survivors or relatives of torture victims suing for reparation for torture?
- What was the outcome:
How many cases, against whom (the State and/or the individual perpetrators, others etc.), did they get to trial, what were the rulings, were the rulings enforced?
- What forms of reparation have been awarded?
- What are the obstacles facing torture survivors or the relatives of torture victims in taking legal action to vindicate their right to reparation?

Enforcement:
- How can a creditor enforce a judgement?
- What are the steps to be taken by the creditor and/or the competent Court regarding the attachment of assets and seizure of goods?
- What assets of the debtor are liable to enforcement?
- Do people actually receive compensation if it is awarded?
- If not, what are the obstacles in practice?
- Does the legal system adequately secure enforcement and, if not, what are the reasons?

Law Reform:
-Are there currently any moves to reform the law on the right to reparation?
- If so, what are the proposals and what stage is the reform in?

GOVERNMENT REPARATION MEASURES:

Satisfaction and Prevention:
- Has the government officially acknowledged and condemned the existence and scale of human rights violations, in particular torture (past or present)?
- Has the government adopted measures of satisfaction for torture survivors, such as public apologies, commemorations etc.?
- Has the government adopted any measures to prevent acts of torture from taking place, such as training law enforcement officials and staff in the prohibition of torture, warning law enforcement officials that they will be prosecuted if they are found to have participated in acts of torture or given order to their staff to perform such acts?
- Has the government actively encouraged public prosecutors or investigating authorities to apply the Istanbul Protocol in investigating suspected incidents of torture?

Rehabilitation:
- Are there any rehabilitation programmes (counselling, psychosocial or various types of medical intervention) in support of torture survivors? - Does the government provide any financial or other support for these programmes?
- In countries where widespread or institutionalised torture has previously taken place, does the government's public health policy and plan of action include a component designed to address the health needs of survivors and of their family members?

Reparation schemes:
- Are there any governmental reparation schemes or other mechanisms in place through which torture survivors can obtain reparation (truth commissions, national human rights commissions or compensation boards)?
- What substantive and procedural rights do torture survivors or relatives of torture victims have in the respective mechanisms?
- Does the scheme apply to all victims of torture, or are some categories excluded, such as those accused of armed opposition?

- What is the place of these schemes or mechanisms in the legal system, i.e. does their existence exclude recourse to the courts for claiming reparation?
- What kind of reparation can be and has been awarded through reparation schemes or similar mechanisms?
- What are the obstacles in obtaining reparation through these schemes or mechanisms?

Law Reform:
- Are there currently any initiatives to set up a reparation scheme or a similar mechanism?
- If so, what are the proposals and what stage are they in?

I. Legal remedies for torture survivors where the torture was committed in third countries

PROSECUTION OVER ACTS OF TORTURE COMMITTED IN A THIRD COUNTRY:
- Can perpetrators of torture be held criminally responsible in countries different from the place where the acts of torture have been committed?

THE LAW
- On what legal basis can alleged perpetrators of acts of torture committed in a third country be prosecuted and brought to trial?

Grounds for prosecution:
- Does the criminal procedural law allow for the prosecution over acts of torture committed outside a country's territory?
- What are the grounds for such a prosecution (active and/or passive personality principle, i.e. nationality of perpetrator or victim; universal jurisdiction, i.e. ability of states to hold perpetrators of torture accountable under their criminal law, irrespective of the place of the crime, the nationality of the victim and the nationality of the perpetrator)?
- What specific criminal acts can result in the exercise of universal jurisdiction (torture, crimes against humanity etc.), how are these crimes defined and what are their constituent elements?
- What other factors (if any) must be present to exercise universal jurisdiction in these cases (presence of accused in jurisdiction, connection with victim, time period of offence, retrospectivity etc.)?

Immunities:
- What is the applicable legislation regarding immunities from prosecution- who (if anyone) is immune, for which crimes and in what circumstances?
- How have immunities been interpreted in cases, pending or concluded?

Discretion:
- Is there any political or executive discretion with respect to the decision to exercise universal jurisdiction?
- If so, what are the criteria for the exercise of discretion, and who exercises the discretion- what guarantees are in place to ensure that discretion is not unfettered?

THE PRACTICE
- Have perpetrators of acts of torture allegedly committed in a third country been prosecuted, brought to trial and convicted?

Cases:
- If a prosecution is possible, have there actually been any cases in which perpetrators of acts of torture allegedly committed in a third countries were prosecuted?
- If they failed, what were the reasons?
- Is there an agency specialising in the prosecution of international crimes committed abroad?
- What are the main obstacles to a successful prosecution in such cases?
- Are there examples of known persons suspected of having committed crimes subject to universal jurisdiction who are present in your country where there has never been a serious investigation?
- What are the circumstances?

Proceedings in cases of rejected asylum seekers:
- What happens to asylum seekers denied protection under Article 1F of the Refugee Convention (applies to person to whom there are serious reasons for considering that they have committed war crimes, crimes against humanity etc.)?
- Are they automatically referred to the public prosecutor for possible prosecution?

Extradition laws:

- What are the relevant extradition laws in respect of torture committed abroad?
- Does there have to be an extradition treaty between your State and the State requesting extradition?
- If not, on what other legal basis can extraditions be carried out?
- Are torture or acts amounting to torture extraditable crimes?
- Does torture have to be a crime under the law of your country as well as under the law of the requesting State?
- What are the grounds on which extradition may be refused?
- Can a national of your country be extradited?
- Has your country ever extradited/refused to extradite an alleged torturer on the request of a foreign State or an international tribunal?
- In a case where your State did not extradite an alleged torturer, did it actually prosecute him/her under the domestic system?

Law Reform:
- If the law allows for prosecution over acts of torture committed abroad, are there at present any moves to expand or limit the scope of the existing law?
- If the law does not allow the exercise of universal jurisdiction, are there any initiatives to change the existing law so as to allow for the prosecution of foreign torturers?

I. Legal Action for reparation against individuals for acts of torture committed in third countries

- Can torture survivors take legal action against individuals for such acts under the law of your country?
- Can an individual who has been tortured in another country sue an individual for reparation in the courts in your country?
- If yes, what are the applicable laws, especially concerning jurisdiction?
- Does there have to be a certain connection with the State in order to have standing (capacity to bring a claim) (i.e. citizenship, residency, actual presence etc.)?
- What degree of presence (if any) does the defendant need to have within the jurisdiction?
- What are the applicable rules of service for defendants who are outside of the jurisdiction?
- If the defendant was a public official of the state where the act of torture took place, would he/she be shielded by any immunity of the state, or could he/she be sued separately?
- Is there a discretion exercisable by the Court to prevent the action from going forward (e.g. forum non conveniens)?
- What substantive law would be applied to the determination of the claim according to the private international law rules of your country?
- What is the law and practice relating to enforcement of judgements, especially concerning extraterritorial assets?
- Have there been any cases?

II. Legal action for reparation against foreign States for acts of torture committed in third countries

- Can torture survivors take legal action against foreign States for such acts under the law of your country?
- Can an individual bring an action for personal injury (in particular if it amounts to torture as defined in the Convention against Torture) against a foreign state?
- If yes, what are the applicable laws?
- What kind, if any, of immunity does apply?
- Are there any applicable limitation periods?
- Is a foreign state liable to pay damages for acts of torture committed by its public officials (police and military personnel etc.)?
- Can damages for acts of torture be enforced against a foreign state?
- Have there been any cases where individuals have attempted to bring actions against a foreign state for personal injury amounting to torture?
- Have there been any claims that have been settled without a court hearing in which a State has agreed to pay damages to a torture survivor in your country (e.g. following the espousal of their claim by the Government)?
- Are there any other ways in which survivors of acts of torture committed outside the territory of your country can obtain redress in your country?

II. Personal Views

- What are in your view the major difficulties for torture survivors in obtaining reparation?
- Are these difficulties due to a discrepancy between law and practice?

- Is there a lack of commitment of the government to address shortcomings; in particular is there a prevailing "climate of torture"?
- What do you regard as the most important steps that can and need to be taken by NGOs to strengthen the right to reparation for torture survivors?
- What do you regard as the most important measures that need to be taken by the government to strengthen the right to reparation for torture survivors?