



REPARATION

A SOURCEBOOK FOR VICTIMS OF TORTURE AND OTHER VIOLATIONS OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW

THE REDRESS TRUST, 2003

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I. INTRODUCTION

The Redress Trust has a very particular focus – we work with survivors of torture, and we try to assist them in their search for all forms of justice, and to ensure that their rights are recognised before national and international jurisdictions.

Obtaining justice and other forms of reparation for torture and other international crimes is exceedingly difficult. There are many reasons for this. Firstly, these crimes normally imply and often require a certain level of State involvement. To obtain justice and redress implies that the State acknowledges responsibility and makes amends. In many instances, often for the very purpose of avoiding justice, there have been amnesty laws, shielding these crimes from prosecution. Often the perpetrators are supported by the States who should be punishing them; sometimes the perpetrators are even State officials. Sometimes the perpetrators flee their countries, and their country of exile has no interest to bring them to justice.

Despite these difficulties, it has been our experience, in dealing with torture survivors and those that support them around the world, and having worked on the issue for the past 11 years, that justice and other forms of reparation are extremely important. Probably one of the worst aspects of torture and many of the other crimes under international law is that the State – the very body that is designed to protect the rights of individuals – has abused its position of power and itself been responsible for the perpetration of serious crimes. For the victims, this is a disorienting experience, and worst of all, there is usually nowhere for them to go to lodge a complaint or to seek assistance. Those that perpetrated the torture have become ‘untouchable.’ The process of seeking and obtaining reparation can be an empowering experience for survivors – for once, finally, it is the perpetrators who are forced to explain their actions and to make amends.

The right to a remedy and reparation is a basic human right. It is enshrined in every international human rights treaty and has been recognized by an array of international tribunals. There are a variety of purposes that remedies, justice and other forms of reparation play, both at the individual and societal level. In the words of Professor van Boven, reparation for human rights violations has: "the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations."¹ Remedies at domestic level can also be said to "have a preventive effect ... one of the best safeguards against impunity."²

¹ Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report, E/CN.4/SUB.2/1993, at para. 137.

² Para 48, comments of Françoise 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.

For many survivors, it is the act of acknowledgement that is most important – that now, people actually know what has happened, and they know that it was wrong. For others it has more to do with the punishment of individual perpetrators or the restoration of survivors' rights and compensation for the harm they endured.

The international standards on the right to reparation constitute a collective agreement by the community of nations on the criteria to redress the suffering and harm endured by victims of serious violations of human rights and humanitarian law. This Sourcebook is a guide to these standards.

The Purpose of this Sourcebook

This Sourcebook together with its charts contain a review of case law and States' reports on the right to reparation from universal and regional human rights mechanisms up until the year ending 2002. The complete (charts) review can be found on REDRESS' website (www.redress.org). The aim of this Sourcebook is to provide a guide to the relevant international standards on the right to reparation and to be a useful tool for victims, lawyers, organisations or others seeking reparation for victims at the domestic or international level, in criminal and/or civil cases. It will also assist in evaluating whether a country's legal system affords international standards of reparation.

The Sourcebook is also intended to clarify the concept of reparation in international law, and to explore possible avenues of redress for victims of serious violations of human rights and humanitarian law.

How this Sourcebook is Organised

This Sourcebook is divided into several parts. The first part explains the meaning and scope of the right to reparation for victims under international law; the second part deals with the main substantive and procedural issues relating to universal and regional human rights mechanisms, and is followed by several annexes providing summaries of the most relevant reports and cases.

First there is a general explanation of the concept of reparation and the common misconceptions that exist when this term is used in the context of victims' rights. There is then a description of the doctrine of responsibility and the resulting obligation to afford reparation under international law. Next, there is an explanation of the victims' right to reparation under international law. It is the most comprehensive section of this Sourcebook. It analysis when violations of human rights can be considered wrongful acts under international law and the legal consequences that arise from this. It investigates the sources of obligations arising under international human rights and humanitarian law (primary obligations), and the consequence of breaching such obligations. It also addresses the duty of States to provide effective remedies, and how international responsibility operates when such an

obligation is not met. Finally, it explores the opportunities that victims have to submit claims for the violation of their rights before national and international tribunals: both against individuals and against States.

Next there is a review of the main procedural issues relating to individual complaints against States in both universal and regional mechanisms. It is followed in Chapter VI by a series of 'charts' with examples of the jurisprudence on reparation from these bodies. The charts incorporate both case law and States' reports. The jurisprudence is so extensive that only a selection of relevant cases has been included. The complete (charts) review of case law and States' reports from these mechanisms, both universal and regional, can be found on REDRESS' website (www.redress.org).

II. THE CONCEPT OF REPARATION

Reparation is a principle of law that has existed for centuries. It is not an exclusively legal principle; it is also a concept used in ethical and political discourses, and forms part of a religious vocabulary.³ In purely legal terms, reparation refers to the obligation of the wrongdoing party to redress the damage caused to the injured party. The "secondary" obligation to afford reparation arises as a consequence of the breach of a "primary" substantive obligation that caused an injury.

Under international law, "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".⁴

There are common misconceptions as to what the word 'reparation' actually means. The terms 'compensation,' 'damages,' 'restitution,' 'indemnity,' 'injury,' and others are often used interchangeably at the domestic level. Similarly, the application of reparation varies according to the legal systems: between private parties, between States, between the State and the individual(s) or between all of them. Finally, States may use the same terms to refer to reparative measures that they institute locally as part of policies that do not necessarily arise from illegal acts committed by the State. It is therefore not always clear if reparation is a matter of right or simply a matter of policies or political priorities.

Reparation is often identified as a narrow legal concept that is less comprehensive than its meaning under international law. This is perhaps because many modern legal systems focus on the retributive aspects of

³ REDRESS. Torture Survivors Perceptions of Reparation: A Preliminary Survey, 2001.

⁴ See Permanent Court of Arbitration, Chorzow Factory Case (Ger. v. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); International Court of Justice: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits 1986 ICJ Report, 14, 114 (June 27); Corfu Channel Case; (UK v. Albania); Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184 ; *Interpretation des traites de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif*, C.I.J., Recueil, 1950, p. 228. See also Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: "Every internationally wrongful act of a State entails the international responsibility of that State. (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001" (ILC draft Articles on State Responsibility)).

justice rather than on the restorative, and because reparation is usually associated with civil wrongs. Reparation may also be perceived differently, depending on the cultural, social and legal background of those involved. The most common misconception is that reparation is synonymous with “financial compensation.” Although compensation is indeed a very common form of reparation, it is not the only existing form that reparation can take. It is also common to use the term “reparation” in the context of criminal prosecutions. This is a direct consequence of the amnesty laws enacted in the aftermath of mass atrocities (such as those of Latin America and Africa) that aimed to protect the military or public officials involved. Although the amnesties were enacted “to secure a safe transition to democracy”, the survivors and relatives of victims are still claiming “reparation and justice,”⁵ and demand the abolition of amnesties and the criminal prosecution of those responsible.

Clarification of Terminology: Reference to terms such as "reparation," "satisfaction," "restitution," "compensation," "rehabilitation," "remedy," and "redress" in the context of human rights violations and international humanitarian law appear in a large number of international, regional and domestic instruments and jurisprudence, as well as in United Nations resolutions and reports. The different terms are used to express sometimes identical or similar concepts. Also, in the political and historical literature these terms are generally used without clear distinction.

Although there is agreement among scholars, publicists and judges on the legal meaning of “restitution”, “satisfaction”, “compensation” and “rehabilitation” in international law, there is still some confusion with the terms “reparation”, “reparations”, “remedy” and “remedies”. It is important therefore to clarify how the latter terms will be used in this Sourcebook.

In keeping with the “UN Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law”⁶ (Draft Principles on Reparation), this Sourcebook will use the term "reparation" to refer to the range of measures that may be taken in response to an actual or threatened violation; embracing both the substance of relief as well as the procedure through which it may be obtained. For example, if an individual has been arbitrarily detained, he/she can seek compensation from the State through civil and/or administrative remedies. The obligation to afford adequate compensation and the obligation to afford an effective route to obtain it, are both part of the general obligation to afford reparation. "Remedy" or "remedies" refers to the (procedural) means by which a right is enforced, or the means by which a violation of a right is prevented or redressed. In the previous example, the remedy would be the administrative or civil procedure used to obtain compensation. The term "reparation" refers to the substance of the relief afforded, such as an award for damages or a public apology. And finally, "redress" is the action “to” redress, repair, restore or remedy.

⁵ See for example, the divisions between Madres and Abuelas de Plaza de Mayo in Argentina <http://www.madres.org> and <http://www.abuelas.org.ar>.

⁶ See Annex, E/CN.4/2000/62.

III. THE LAW OF RESPONSIBILITY

This Sourcebook will focus on the responsibility of States to afford reparation to individual victims for human rights violations (individually or collectively). Although it is acknowledged that other subjects may be obliged to afford reparation (such as individual perpetrators), this issue will only be dealt with in the context of the reparation provisions in the United Nations *ad hoc* Tribunals and the International Criminal Court.

a. The Nature and Basis of International Responsibility

The law of responsibility is concerned with the incidence and consequences of illegal acts under international law. In a report on the *Spanish Zone of Morocco Claims*, Judge Hurber noted that: “Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation.”⁷

When a State commits an international wrong it is responsible under international law to a) cease the wrongful conduct and b) afford adequate reparation. As established by the Permanent Court of International Justice: “It is a principle of international law that the breach of an engagement involves and obligation to make reparation in an adequate form”. According to the Court this is not only a principle of international law, but is “even a general conception of law”.⁸

In this context, reparation may be defined as the various forms in which a State can redress an international wrong and in doing so discharge itself from international responsibility towards injured States or individuals.

b. The Relations of the Subject

The doctrine of ‘international responsibility’ is applicable to any subject bearing legal personality in international law. A subject of international law may be held responsible for an act or omission that violates international law. In the same manner, an individual, as a subject of international law,⁹ may claim an injury caused by the breach of that international obligation.

⁷ Translation; French text, RIAA ii 615 at 641. See also *Coenca Bros. v. Germany*, Ann. Digest 4 (1927-8), no. 398.

⁸ See Permanent Court of Arbitration, *Chorzow Factory Case* (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); International Court of Justice: *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.), Merits 1986 ICJ Report, 14, 114 (June 27); *Corfu Channel Case*; (UK v. Albania); *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184 ; *Interpretation des traites de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif*, C.I.J., Recueil, 1950, p. 228. See also Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: “Every internationally wrongful act of a State entails the international responsibility of that State. (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001” (ILC draft Articles on State Responsibility)).

⁹ It is still a problematic theoretical question among writers, whether an individual is or should be a ‘subject’ of international law. In any case, it is now clear that individuals have the capacity to make claims and to bear responsibility internationally.

j) States as Guardians of the Rights of Individuals

“International responsibility” under the rules protecting individuals from official abuses has undergone a significant evolution. Traditionally, a state-centric approach protected individuals only *vis-à-vis* certain conduct by States other than their own - whether enemy nations (under the laws and customs of war) or States where they might reside or exercise commercial activities (under the law of state responsibility for injury to aliens). With this approach, 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 explained by Professor van Boven: “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.”¹⁰

The theory of international remedies originally developed in this context; focusing on claims and arbitral proceedings mostly as lodged between belligerent States.¹¹ A State had the right (but not the obligation) to take up the claims of its nationals before an international body. The claims were determined by negotiation, mediation, arbitration, adjudication, and the State maintained full control over them. Although direct injuries to States and injuries to its nationals were considered differently when estimating damages,¹² the reparation was awarded solely to the State as the injured party. The violation that was redressed was not the injury to the individual victim(s), but the violation (and its consequences) of the international duty to respect certain rights of the nationals of that State. If the State was awarded monetary compensation, it would normally then turn the award over to the injured national.¹³

After World War II, this state-centric approach was dramatically transformed. There was an increasing concern with the individuals involved in atrocities, both the individual criminal responsibility of perpetrators and the rights of victims to reparation (as human being with intrinsic rights under international law and not only by extension of the rights of their States). At Nuremberg, it was recognised that “Crimes against international law are committed by men,

¹⁰ 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.

¹¹ 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.”

¹² See Chorzow Factory Case, *ibid.*; see also Lusitania Cases (US v. Germany), Mixed Claims Commission 1923.

¹³ 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].

not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹⁴ 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.

ii) The Role of the Individual and the Protection of Human Rights

International human rights law has developed rapidly since then.¹⁵ Today there exists an extensive corpus of law designed to protect all individuals from abuses of all governments, including their own. Many international treaties provide individual victims with a forum to seek redress. An individual may appear, for example, as an autonomous actor before the European and Inter-American Courts of Human Rights. Most recently, the Rome Statute of the International Criminal Court (ICC) provides for reparation to victims. Draft principles that have been elaborated on the right to reparation for all victims of serious violations of human rights and humanitarian law are under consideration before the UN Commission on Human Rights.

The “Draft Articles on the Responsibility of States for International Wrongful Acts”,¹⁶ confirm that if a State breaches an obligation predicated on customary law, every other State is considered as having suffered legal injury.¹⁷ This means that every other State can claim cessation of the acts as well as reparation on behalf of the victims.¹⁸

IV. THE VICTIMS’ RIGHT TO REPARATION

The right entitling victims of human rights abuses to a remedy and reparations for their loss and suffering derives from a fundamental principle of general international law (international responsibility) that has been recently reaffirmed by the International Law Commission in its 53rd Session when adopted its Draft Articles on State Responsibility.¹⁹ This right is firmly embodied in international human rights treaties and declarative instruments.²⁰ The

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

¹⁵ For a discussion of the development of human rights law and the right to a remedy, D. Shelton, “Remedies in International Human Rights Law”, (1999), 1-37.

¹⁶ 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).

¹⁷ According to the Barcelona Traction Judgment of the International Court of Justice, when a State breaches an obligation *erga omnes*, it injures the international legal and public order as a whole and consequently every State may have a right and an interest to bring an action against the offending State. See Case concerning the Barcelona Traction Light and Power Company, Ltd. (Second Phase, Belgium v. Spain), ICJ Reports 1970, p.32.

¹⁸ See art 40 of the ILC Articles on State Responsibility, *infra*. n. 44.

¹⁹ 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).

²⁰ 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

obligation on States to provide reparation to victims of human rights and humanitarian law violations has been further refined by the jurisprudence of a large number of international and regional courts, as well as other treaty bodies and complaints mechanisms.²¹

a. Human Rights Violations as International Wrongful Acts

According to the Draft Articles on State Responsibility, every act of a State invokes State responsibility, when the conduct (an act or omission) is a) attributable to the State; and b) constitutes a breach of an international obligation. These Draft Articles were drawn up in the context of inter-State relations and not focused on the relationship between States and individuals, though there are still important parallels to draw.²²

i) Attribution of Conduct to a State

Regarding the first requisite, whether the act or omission is attributable to the State, it is important to recall that the conduct of any State organ is considered to be an act of that State, whether the organs exercises legislative, executive, judicial or any other functions, whatever position the State holds and whatever its character as an organ of the Government.²³ It should also be kept in mind that successor governments remain bound by the acts incurred by the predecessor governments.²⁴

States are also responsible for the *ultra vires* acts of officials committed within their apparent or general scope of authority. If a person is arbitrarily detained or tortured by a police officer not under official duty, but seeming to act in the role of police officer to the average observer, the torture can still be attributed to a wrongful act of the State.²⁵ In the same manner, when the authorities of a State, irrespective of whether they are acting pursuant to an official policy, fail to protect individuals from human rights abuses, they are also in violation of international law and therefore incur State responsibility. Finally, acts or omissions committed by a person or group are considered to be the acts of a State if the person or group is in fact acting on the instruction of, or under the direction or control of that State.

The responsibility of a State for the conduct of its agents does not preclude or prevent the individual criminal responsibility of the perpetrators for these same acts. For example, Article 25 (1) of the Rome Statute specifies that no

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.

²¹ See, e.g. ruling of the Inter-American Court of Human Rights in the Velásquez Rodríguez Case, Serial C, No 4 (1989), par. 174. See also Papamichalopoulos vs. Greece (Art. 50) E.C.H.R. Serial A, No 330-B (1995), pg 36.

²² See Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, supra. n. 10.

²³ ILC Articles on State Responsibility, supra. n. 16.

²⁴ See Draft Basic Principles and Guidelines on Reparation, supra., n. 10; see also Garrido y Baigorria v. Argentina (Reparations), Judgment of 27 August 1998 39 Inter-Am. Ct.H.R.

²⁵ Meron, 33 BY (1957), 85-114; Jimenez de Arechega, in Sorensen p. 548.

provision “relating to individual criminal responsibility shall affect the responsibility of States under international law”.

ii) Breach of an International Obligation

According to the Draft Articles on State Responsibility, a State breaches its international obligations when its actions do not conform to what is required of it by that obligation. As explained by Professor van Boven: “the issue of State responsibility comes into play when a State is in breach of the obligation to respect internationally recognised human rights. Such an obligation has its legal basis in international agreements, in particular international human rights treaties, and/or in customary international law, in particular those norms of customary international law which have a peremptory character (*jus cogens*)”.²⁶ Similarly, the violation of the norms of international humanitarian law gives rise to a duty to make reparation.²⁷

iii) The International Obligation to provide Remedies

If States fail to diligently prevent and/or respond to human rights violations they are legally responsible.²⁸ It is significant in this respect that all of the present-day human rights treaties, inasmuch as they mention reparations, require that the State party enact domestic legislation for this purpose.²⁹ In fact, the right to a remedy is itself guaranteed and has been recognized as non-derogable.³⁰ Accordingly, there is an independent and continuing obligation to provide effective domestic remedies for victims of human rights violations at all times: during times of peace and war, and even in times of emergency.

Domestic legislation will necessarily deal with preventive measures (legal or administrative), the investigation and criminal prosecution of suspected perpetrators, the right to compensation for victims and so on. If the remedies

²⁶ United Nations document E/CN.4/Sub.2/1993/8; 2 July 1993, par. 41.

²⁷ 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 (Art.91) specifically provides for liability to pay compensation. The Rome Statute of the International Criminal Court used the Draft Principles as a reference A/CONF.183/C.1/WGPM/L.2/Add.7, 13/07/1998, p.5.

²⁸ E/CN.4/Sub.2/1993/8 page 61.

²⁹ At the Universal level it is possible to find among others: the Universal Declaration of Human Rights (Art. 8), the International Covenant on Civil and Political Rights (art. 2.), the International Convention on the Elimination of All Forms of Racial Discrimination (art 6), the Convention against Torture and other Cruel Inhuman and Degrading Treatment, (art. 13) Declaration on the Protection of all Persons from Enforced Disappearance (art 19), General Assembly resolution 47/133 of 18 December 1992 (Arts. 9 and 13), the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 4 and 16), at the regional level it is important to highlight. The European Convention on Human Rights (art 13) The Charter of Fundamental Rights of the European Union (art. 47); the Inter-American Convention on Human Rights (arts 24 and 25); American Declaration of the Rights and Duties of Man (art XVIII), Inter-American Convention on Forced Disappearance of persons (art X), Inter-American Convention to Prevent and Punish Torture (Art. 8) and the African Charter of Human and Peoples' Rights (art. 3 and 7) and the Arab Charter on Human Rights (Art. 9).

³⁰ 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.”

are non-existent or fail to provide prompt and adequate reparation, States commit a new and independent violation under international law.

In short, a State is responsible to afford reparation when: a) it breaches an international human rights obligation; b) it fails to provide complete or adequate reparation; and c) there is material and/ or moral damage. In addition, particular weight should be given to the procedural requirements of expeditiousness and effectiveness.

Most human rights instruments guarantee both the procedural right to an effective access to a fair hearing (through judicial and/or non-judicial remedies)³¹ and the substantive right to reparations (such as restitution, compensation and rehabilitation).³² The nature of the remedy varies according to the rights protected: the type of the violation and the conditions of the victims.³³

iv) The Nature of Effective Remedies

Judicial remedies are considered more and more necessary to ensure respect for human rights. The African Charter on Human and Peoples' Rights for example, provides that all remedies should be judicial.³⁴ The Charter of Fundamental Rights of the European Union refers to an effective remedy before a tribunal in the case of violations of rights and freedoms guaranteed by the law of the Union. The Court of Justice of the European Communities considered that a person's capacity, when his/her rights have been violated, to appeal to a judicial procedure to enforce his/her rights "is the expression of a general principle of law, which has its basis in the constitutional traditions of the member States".³⁵ In the same way, the European Court of Human Rights stated that the basic principle underlying Article 6.1 of the Convention - regarding the individuals' right of access to court for the determination of his civil rights and obligations or of any criminal charge against him - is consistent with the rule of law in any democratic society.³⁶

In the case of serious human rights violations, which implicitly constitute crimes, the jurisprudence consistently stipulates the need for judicial

³¹ Some instruments explicitly call for judicial remedies for the breach of guaranteed right, although non-judicial remedies may still be considered to be effective (Article 2(3)(b), International Covenant on Civil and Political Rights).

³² See Jeremy McBride, "Access to Justice and Human Rights Treaties" (1998) 17 Civil Justice Q.235.

³³ Article 13 of the European Convention requires "the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief" although State have some discretion as to how to comply (para 69) D v. United Kingdom App. No. 30240/96 Judgment of 2 May 1997 (referring to Soering v. United Kingdom App. No. 14038/88 Judgment of 7 July 1989 and Vilvarajah v. United Kingdom App. No. 13163/87 Judgment of 30 October 1991). The UN Human Rights Committee commented on Finland's report (CCPR/C/95/Add.6) regarding the obligation under Art 2(b) of the ICCPR that "while noting that a recent reform of the Penal Code makes punishable the violation of several rights and freedoms, including those protected by articles 21 and 22 of the Covenant, the Committee is concerned that criminal law may not alone be appropriate to determine appropriate remedies for violations of certain rights and freedoms (Concluding Observations of the Human Rights Committee, Finland: 08/04/98).

³⁴ See Art. 7 of the African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

³⁵ Decision of 15 May 1986, *Case Johnston*, N° 222/84, quoted in Guy Braibant, *La Charte des droits fondamentaux de l'Union européenne*, Edition du Seuil, Paris, 2001, page. 236.

³⁶ European Court of Human Rights, Judgment 21 December 2001, *Case Al-Adsani v. the United Kingdom*, para. 47, Application no. 35763/97.

remedies. The Human Rights Committee has explained that "purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life".³⁷ In the case of forced disappearances, extrajudicial executions or torture, the remedy must also be of a judicial nature.³⁸ Article 27(2) of the American Convention explicitly states that "the judicial guarantees essential for the protection of such [non-derogable] rights" are non-derogable. This means that not only the rights protecting individuals from grave human rights violations are non-derogable but also the judicial methods for safeguarding those rights cannot be suspended at any time and under any circumstance.³⁹ Finally, common Article 3 of the Geneva Conventions prohibits the passing of sentences without previous judgments pronounced by a regularly constituted court affording all indispensable *judicial guarantees*.⁴⁰ This implies that even in times of war where derogation is permitted for certain [peacetime] human rights, there can be no derogation from effective judicial remedies.

b. Forms of Reparation

According to Article 42 of the International Law Commission's Draft Articles on State Responsibility, an injured State is entitled to reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination. The UN Draft Basic Principles and Guidelines on Reparation for Victims very similarly provide for restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition.⁴¹

i) Restitution

Restitution consists of re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. However, it is generally not possible to restore victims to their original situation before the violations occurred since it is not possible to 'undo' the pain and suffering caused by the violations; though certain aspects of restitution might be possible – such as restoring an individual's liberty, legal rights, social status, family life and citizenship; return to one's place of residence; restoration of employment and return of property.⁴²

³⁷ Decision of 13 November 1995, Communication 563/1993, Case *Nydia Erika Bautista* (Colombia), United Nations document CCPR/C/55/D/563/1993, paragraph 8(2). See also Decision of 29 July 1997, Communication 612/1995, Case José Vicente and Amado Villafaña Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres (Colombia), United Nations document CCPR/C/60/D/612/1995, paragraph 8(2).

³⁸ See Decision of admissibility of 13 October 2000, Communication N° 778/1997, Case *Coronel et al* (Colombia), United Nations document CCPR/C/70/D/778/1997, paragraph 6(4).

³⁹ 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.

⁴⁰ Art 3 I(d) Geneva Conventions.

⁴¹ *Supra.*, n. 6.

⁴² E/CN.4/2000/62, para 22. See also, Principles 8 - 10 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985.

The term “juridical restitution” is sometime used where restitution requires or involves the modification of a legal situation within the legal system of the responsible State. Such cases include revocation, annulment or amendment of a constitutional or legislative provision enacted in violation or a rule of international (human rights) law. In some cases, both material and juridical restitution may be sought. For example, the return of exiled persons to their country and the restoration of their rights, including property rights and if possible, the return of their property or the compensation of its value at the time of the indemnification.

What will be required in terms of restitution will often depend on the content of the primary obligation that has been breached. Restitution, as the first of the forms of reparation⁴³, is of particular importance where the obligation breached is of a continuing character. In the case of unlawful detention or disappearance, for example, the State will be required to put an end to the situation either as a matter of cessation or restitution.

ii) Compensation

The role of compensation is to fill in any gaps so as to ensure full reparation for the damage suffered (as long as the damage is financially assessable).⁴⁴ The Inter-American Court held, in the *Velásquez Rodríguez Case* that “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.”⁴⁵

An international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.⁴⁶ Compensation is for any damage caused by the act, whether material or moral.⁴⁷ “Moral damage” to an injured State and “moral damage” to the injured individuals receive different treatment from the point of view of international law.⁴⁸

⁴³ Because restitution most closely conforms to the general principles that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by the Permanent Court in the *Factory Chorzow* case when it said that the responsible State was under “the obligation to restore the undertaking and, if this not possible, to pay its value at the time of the indemnification, which value is designated to take the place of restitution which has become impossible”. See n.8. For this reason the terms “restitution” or “restitution in integrum” are many times used as a synonymous to “full reparation”. According to Inter-American Court of Human Rights for example, “compensation under Article 63(1) of the [American] Convention must attempt to provide restitution in integrum for the damages caused by the measure or situation that constituted a violation of human rights”. See *Velásquez Rodríguez Case*, Annex D.

⁴⁴ Commentary to the Draft Articles on State Responsibility for Internationally Wrongful Acts; Report of the International Law Commission on its Fifty-three Session, GA, Supplement No. 10 (A/56/10); cph. IV.E.”).

⁴⁵ *Velásquez Rodríguez Case*, Interpretation Of The Compensatory Damages Judgment, Judgment Of August 17, 1990, Para. 27.

⁴⁶ See *Factory at Chorzow* note 8; *Fisheries Jurisdiction*, (Federal Republic of Germany v. Iceland), Merits, ICJ Reports 1974, p. 175; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v/. United States)*, Merits ICJ Reports 1986, p. 14.

⁴⁷ The applicable principles of international law for moral damage caused to individuals are reflected in the *Lusitania* opinion. See Reports of International Arbitral Awards, Vol. 7, p. 32,40 (1923).

⁴⁸ Non-material and moral damage to States may in certain cases be redressed by satisfaction. However, moral damage caused to individuals should be redressed by an award of compensation as long as it is assessable in economic terms. See commentary to the Draft Articles on State Responsibility; supra., n. 44.

The distinction between payment of moneys by way of compensation and payment of moneys for other purposes is commonly emphasized in relevant literature; explicit indications in the same sense are also to be found in jurisprudence.⁴⁹ The function of compensation, as its title indicates, is purely compensatory. Compensation corresponds to the financially assessable damage suffered by the injured party (whether a State or an individual). It is not concerned with the punishment of the responsible State, nor does compensation have an expressive or exemplary character. In this regard, the Inter-American Court of Human Rights held that international law did not recognise the concept of punitive or exemplary damages.⁵⁰

Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured party as a result of the breach. The scope of this obligation is delimited by the capacity that the damage has to be evaluated in financial terms. The appropriate heads of compensable damage and the principles of assessment to be applied in quantification can vary in accordance with the content of the primary obligations and the evaluation of the respective behaviour of the parties and more generally, in order to reach an acceptable outcome.⁵¹

Compensation for personal injury has been dealt with extensively by arbitral, regional and international tribunals, including human rights bodies, in particular the European and Inter-American Courts of Human Rights. The decisions of these human rights bodies on compensation draw on principles of reparation under general international law.⁵² Awards of compensation encompass material losses (loss of earnings, pension, medical expenses, etc) and non-material or moral (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium) suffering, the latter usually quantified on the basis of an equitable assessment. The United Nations Compensation Commission has also developed principles relating to compensation for international crimes.⁵³ Its Governing Council identified six categories of claims comprising four categories of claims of individuals, one for corporations and one for Governments and international organisations, which also includes claims for environmental damage.⁵⁴

⁴⁹ This difference is generally addressed in the context of compensatory or exemplary damages. The second is not considered part of reparation. See for example the *Lusitania Case*, supra., n. 47.

⁵⁰ Velásquez Rodríguez, supra., n. 21.

⁵¹ Cf. GH Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), p. 242.

⁵² See e.g. the decision of the Inter-American Court in the *Velasquez Rodriguez*, note 21. Cf. also *Papamichalopoulos v. Greece* (Article 50), ECHR, Series A. No. 330-B (1995)

⁵³ For more information on the UNCC, see its comprehensive website: <http://www.unog.ch/uncc>.

⁵⁴ The categories were as follows: A. Claims submitted by individuals who had to depart from Kuwait or Iraq between the date of Iraq's invasion of Kuwait on 2 August 1990 and the date of the cease-fire, 2 March 1991. 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. 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. 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. 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.

The right to compensation for human rights violations is explicitly recognised in a range of international and regional human right instruments.⁵⁵ The UN draft Principles and Guidelines on the Right to Reparation for Victims provide 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.”⁵⁶

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power⁵⁷ also confirm the importance of compensation, as does the Revised Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)⁵⁸ where it is held that “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.”⁵⁹ Article 14(1) of the Convention against Torture specifically provides for 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;⁶⁰ the Rome Statute contains elaborate provisions on reparations to victims, including compensation⁶¹ as do a number of instruments regulating the laws and customs of war.⁶²

iii) Rehabilitation

⁵⁵ 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 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.”⁵⁵ 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.”

⁵⁶ Para. 23.

⁵⁷ Adopted by General Assembly resolution 40/34 of 29 November 1985. See specifically, Principles 8-13 and 19.

⁵⁸ E/CN.4/Sub.2/1997/20/Rev.1.

⁵⁹ Para 27, see also, paragraphs 40-43 and Principle 36.

⁶⁰ Article 106.

⁶¹ Article 75.

⁶² 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.

Rehabilitation is an important component of reparation and it is a right specifically recognised in international instruments.⁶³ The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power stipulates that: “victims should receive the necessary material, medical, psychological and social assistance and support.” The Special Rapporteur on 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.⁶⁴

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.⁶⁵ These services may be provided “in kind” or the costs may form part of a monetary award. It is important to distinguish in this sense, between indemnity paid as way of compensation and money provided for rehabilitation purposes.

A number of decisions have specifically included rehabilitation in reparations awards. The Committee against Torture, for instance, recommended that the Government of Zambia establish rehabilitation centres for victims of torture,⁶⁶ 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.”⁶⁷ 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.”⁶⁸ 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.⁶⁹

iv) Satisfaction and Guarantees of Non-repetition

Satisfaction and guarantees of non-repetition refer to the range of measures that may contribute to the broader and longer-term restorative aims of reparation. A central component is the role of public acknowledgment of the violation, which has been recognized by the Commission on Human Rights in

⁶³ See for example the UN Convention on the Rights of the Child and its Optional Protocol; UN Convention against Torture; Declaration on Enforced Disappearances; Declaration on the Elimination of Violence against Women.

⁶⁴ 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.

⁶⁵ 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.

⁶⁶ CAT/C/XXVII/Concl.4, 23 November 2001.

⁶⁷ CAT/C/XXVII/Concl.3, 22 November 2001.

⁶⁸ *Chumbipuma Aguirre et al. vs Peru (Barrios Altos Case)*, Series C No. 87, Reparations, Judgment of 30 November 2001, para 40.

⁶⁹ 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.

a recent resolution on impunity.⁷⁰ The Special Rapporteur on the right to restitution, compensation and rehabilitation, M. Cherif Bassiouni, and the Special Rapporteur on the question of impunity, Mr. Joinet, have both highlighted the importance of the victims' right to know the truth and to hold the perpetrators accountable.⁷¹ The Draft Basic Principles on Reparation list certain measures that constitute both guarantees of non-repetition and satisfaction to victims. The following are some examples:

- Cessation of continuing violations;
- Apology, including public acknowledgement of the facts and acceptance of responsibility;
- Judicial or administrative sanctions against persons responsible for the violations;
- Commemorations and tributes to the victims;⁷²
- Preventing the recurrence of violations by such means as:
 - Ensuring effective civilian 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 Tribunal in the Rainbow Warrior arbitration pointed out that: "There is a long established practice of States and International Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach on an international obligation..."⁷³ Satisfaction may consist of an acknowledgement of the breach, an expression of regret, a formal apology, a declaratory judgment or another appropriate modality. The appropriate form of

⁷⁰ 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 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."

⁷¹ 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.

⁷² 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."

⁷³ Rainbow Warrior (New Zealand/France) UNRIIAA, vol. XX, p. 217 (1990) at pp. 272-273, para. 122.

satisfaction will depend on the circumstances and cannot be prescribed in advance.⁷⁴

One of the most common forms of satisfaction is a declaration of the wrongfulness of the act by a competent court or tribunal. Given that any court or tribunal which has jurisdiction over a dispute has the authority to make a declaration of its findings, as a necessary part of the judicial process, a declaration may sometimes act as a precondition to other forms of reparation, or it may be the only remedy sought. In some instances, the European Court of Human Rights has held that a finding of a violation is sufficient 'just satisfaction', even when the petitioner has specifically sought compensation,⁷⁵ 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."⁷⁶

Although assurances or guarantees of non-repetition, may also amount to a form of satisfaction, the ILC Draft Articles on Responsibility of States deal with them in the context of Article 30 ('Cessation and non-repetition'). The Commentary to this Article asserts that: "Both are aspects of...restoration and repair... Cessation is, as it were, the negative aspect of future performance, concerned with securing an end to the continuing wrongful conduct, whereas assurances and guarantees serve a preventive function and may be described as a positive reinforcement of future performances."⁷⁷

Human rights instruments generally include positive obligations to prevent violations. For example, the specific obligation to prevent torture is present in the Convention against Torture and the Inter-American Convention to Prevent and Punish Torture.⁷⁸ The vital role of prevention, as one means of reparation, has been enshrined by the European Convention on the Prevention of Torture,⁷⁹ as well as the newly adopted Optional Protocol to the Convention against Torture⁸⁰ and the Robben Island guidelines.⁸¹ Prevention is also cited in the Istanbul Protocol⁸² as the first legal obligation that States must respect

⁷⁴ Ibid.

⁷⁵ 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.

⁷⁶ 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 .

⁷⁷ See commentary to art 30, ILC Articles on State Responsibility. For the text of the Articles and commentaries see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, chap. V.

⁷⁸ 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).

⁷⁹ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Council of Europe, European Treaties Series, ETS No. 126.

⁸⁰ 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.

⁸¹ Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia. Significantly, Article 14 of the Guidelines notes that "States should prohibit and prevent the use, production and trade of equipment or substances designed to inflict torture or ill-treatment and the abuse of any other equipment or substance to these ends."

⁸² 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):

to ensure protection from torture. The *Velasquez Rodriguez* decision importantly recognised the legal duty of a State: “to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim compensation.”⁸³

c. Individual Claims before National and International tribunals

i) Individuals Claiming State Responsibility

If the State is in breach of an obligation contained in a treaty to which the State is a signatory and, the treaty provides for an individual complaint mechanism to which the State has specifically agreed to be bound (which is not always the case), the victim(s) will be able to bring a direct claim against the State under such a mechanism. This is the case of the Inter-American and European Courts of Human Rights, or the United Nations Human Rights Committee and Committee Against Torture. The role of these international bodies is subsidiary and only becomes possible and necessary when the State has failed to afford the required relief.

On the other hand, if the State is in breach of a human right obligation embodied in international customary law (in particular a *jus cogens* norm), the injured victim(s) have in principle, a right to claim international responsibility for that violation against the State - and the individual perpetrator - directly under international law.⁸⁴ However, at the international level, there is no general mechanism to bring such claims. Individuals still have no standing before the International Court of Justice, and the International Criminal Court (in which individuals do have a degree of standing) is concerned only with the criminal responsibility of individual perpetrators, not the responsibility of the State.

Consequently, if the offending State is not party to a treaty establishing an individual complaint mechanism, the victim(s) will have no international recourse to bring a claim against the State.

ii) Claims against States before International Bodies

At the universal level, UN treaty bodies monitor State compliance with specific human rights conventions. In addition, the UN Commission on Human Rights (UNCHR) has created various monitoring mechanisms dealing with particular human rights violations outside the context of specific human rights treaties.

The “extra-conventional” or “general” monitoring mechanisms, such as the Special Rapporteur on Torture or the Working Group on Arbitrary Detention,

⁸³ Taking effective legislative, administrative, judicial or other measures to prevent acts of torture. No exceptions, including war, may be invoked as justification for torture...

⁸³ para 174. Judgment, Inter-American Court of Human Rights, Series C, No. 4 (1988).

⁸⁴ See Tomuschat, Christian; “Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law”; State Responsibility and the Individual; Kluwer Law International (1999).

do not have any jurisdictional limitations. However, these mechanisms have no power to rule on individual complaints, and can only offer recommendations to States and draw attention to such complaints. The treaty monitoring mechanisms can only entertain allegations from countries that have ratified the conventions and that have accepted the specific jurisdiction of these complaints mechanisms. The Human Rights Committee for example, is the monitoring body of the International Covenant on Civil and Political Rights (ICCPR); States need to become Parties to the First Optional Protocol for the Committee to exercise jurisdiction. These bodies have not been vested with the powers of binding decision-making. Thus, the Human Rights Committee is confined to formulating 'views' when ruling on individual communications.⁸⁵ At the same time, these mechanisms may issue reports on States' compliance with their obligations.

At the regional level, international mechanisms have been established by the Organization of American States (OAS), the Council of Europe and the Organization of African Unity (OAU, now the African Union). The three systems provide for individual complaints mechanisms, however, the African Commission of Human and Peoples' Rights has no power of binding decision-making. In the same way as the universal mechanisms, States must be parties to the regional conventions for the mechanisms to exercise jurisdiction. There is currently no Asian human rights system.

iii) Claims against States in Foreign Courts

Sovereign immunity usually prevents claims against foreign governments from being brought successfully in the courts of other States. It is widely accepted that no State can invoke sovereign immunity as a defence against commercial activities (*acta jure gestionis*).⁸⁶ However, it is debatable whether the defence can be invoked in respect of serious human rights violations.

The International Law Commission, in its background report to the draft articles on immunity⁸⁷ noted several developments, including the amendment of the US 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 [...]". It also refers to the decision of the House of Lords in the Pinochet case, which emphasizes the limits of immunity.⁸⁸

⁸⁵ Article 5(4) of the First Optional Protocol to the International Covenant on Civil and Political Rights.

⁸⁶ 28 U.S.C. §1605 (a) (2); ILC draft articles on jurisdictional immunities of States and their property, YILC 1991 II, Part Two, 13 Art. 10.

⁸⁷ 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).

⁸⁸ 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.

In a limited number of cases, U.S. courts have relied on the Alien Tort Claims Act and other legal arguments to allow such reparation cases. In *Von Dardel v. USSR* for example, the U.S. District Court for the District of Columbia held that sovereign immunity must be discarded ‘where the foreign state defendant has acted in clear violation of international law’.⁸⁹ US courts have relied on the Foreign Sovereign Immunity Act as the basis for US jurisdiction over foreign States, without addressing the plaintiffs’ arguments that a State that breaches international obligations forfeits its immunity.⁹⁰ Although *Princz v Germany*⁹¹ was dismissed by the Court of Appeals for the District of Columbia, in a dissenting opinion, Judge Wald held that: ‘Germany waived its sovereign immunity by violating the *jus cogens* norms of international law condemning enslavement and genocide’.⁹²

In *Al Adsani v the United Kingdom*,⁹³ the majority (9 to 8) noted that: “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.” The minority stressed that the finding of 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.⁹⁴

In the Distomo case, a Greek district court enabled a claim against Germany and granted a 9.4 billion drachma award for damages resulting from the atrocities, including willful murder and destruction of private property committed by the German occupation forces in the village of Distomo on 10 June 1944. The court 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*. Greek courts ordered provisional measures to be taken against the Goethe Cultural Institute in Greece to ensure the enforcement of the judgment.⁹⁵ Germany sought and obtained an injunction and the decision on the damages award was eventually reversed. Greek lawyers brought their compensation claim to German courts and on 26 June 2003, the Federal Supreme Court of Justice in Karlsruhe ruled that Germany was not liable to pay compensation because only States, not private citizens, could claim reparations for war crimes.

⁸⁹ 623 F. Supp at 246, 253 (1985) = 77 I.L.R. 258, at 265 cited in Tomuschat, *supra.*, n. 80.

⁹⁰ *Amerada Hess v Argentine Republic*, 102 L. Ed. 2d 818 (1989) 81 ILR 658.

⁹¹ 26 F. 3d 1166, 1176 (D.C. Cir 1994).

⁹² *Ibid.*, at 1179.

⁹³ *Al Adsani v. the United Kingdom*. European Court of Human Rights, 21 November 2001 (*Application no. 35763/97*).

⁹⁴ Minority opinion of Judges Rozakis and Cafisch, joined by judges Wildhaber, Costa, Cabral Barreto and Vajić, para. 3.

⁹⁵ 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.

iv) Claims against Individuals before International Criminal Tribunals

Following the examples of the Nuremberg and Tokyo trials, the United Nations Security Council created two *ad hoc* International Criminal Tribunals⁹⁶ to try those responsible of committing war crimes, genocide and crimes against humanity in the territory of Rwanda (ICTR) and the Former Yugoslavia (ICTY).

According to Rule 106, common to both of the *ad hoc* tribunals, a victim may bring an action in a national court or other competent body to obtain compensation. The Rule does not, however, specify where such compensation may be claimed. The tribunals have no power to award damages directly (except for restitution of property in some cases)⁹⁷ and although a claims commission for victims was part of the earliest discussions on the mandate of the ICTY,⁹⁸ this never materialised. As a result, there is no other forum to bring compensation claims than domestic courts. Up to the present, there has not been any judicial consideration of Rule 106 by either the ICTY or ICTR.⁹⁹

This was followed by the adoption of the Rome Statute on 17 July 1998 and the coming into force of the International Criminal Court on 1 July 2002. The Rome Statute goes much further by acknowledging the rights of victims to participate in the proceedings as interested parties (not only as witnesses of the crimes), and to obtain reparations.

The basic provisions regarding reparations before the Court appear in Article 75 of the Statute and rules 94-98 of the Rules of Procedure and Evidence. Article 75 (1) provides that the Court shall "establish principles relating to reparations to, or in respect of, victims" and, based on these principles, the Court may "determine the scope and extent of any damage, loss and injury to, or in respect of, victims" and paragraph (2) authorizes the Court either to "make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation" or, where appropriate, to "order that the award for reparations be made through the Trust Fund provided for in article 79".

Rule 97 specifies how reparations are to be assessed. Paragraph 1 provides that "Taking into account the scope and extent of any damage, loss or injury,

⁹⁶ Statute of the International Tribunal for the Former Yugoslavia; UN Doc. S/25704, annex (1993) and the Statute of the International Tribunal for Rwanda; UN Doc. S/RES/995, annex (1994).

⁹⁷ Rule 105 of the Rules of Procedure and Evidence for both Tribunals, provides that the Trial Chamber may determine the matter of restitution of property taken unlawfully by the convicted person.

⁹⁸ Security Council Resolution 827 addresses compensation: "The work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law." [Para 7] Michael Scharf, who was involved in the negotiations, comments that: "What we had in mind was a procedure similar to that devised for the victims of the Iraqi invasion of Kuwait, in which frozen Iraqi assets and proceeds from Iraq oil sales would be dispersed to victims through a UN Compensation Commission." [Michael P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Tribunal Since Nuremberg*, (Durham, North Carolina: Carolina Academic Press), 1997, p63.]

⁹⁹ A brief mention of Rule 106 arose during the Bagosora trial [Case no ICTR-96-7-T (Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium)], though it there was no discussion as to how Rule 106 was to be applied.

the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both," and Paragraph 2 allows for the appointment of "appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. Paragraph (1) of Rule 98 provides that "individual awards for reparations shall be made directly against a convicted person", and paragraphs (2) - (4) detail modalities for using the Trust Fund for Victims to allocate or distribute the reparations awards made by the Court to victims.

v) Claims against Individuals in Foreign Courts

Criminal jurisdiction is traditionally territorial, which means that the courts that are competent to hear a case are those of the State where the crimes were committed.¹⁰⁰ There are other possible grounds to exercise jurisdiction, such as the nationality of the perpetrator or the victim (passive and active personality principles)¹⁰¹ and the 'effects' or 'impact' of acts (effects doctrine)¹⁰². Additionally, certain crimes give rise to universal jurisdiction—where crimes are so heinous that all courts are competent to hear the case. The jurisdiction is based on the nature of the act rather than on connections to the State like nationality or territoriality. States have the ability, and possibly the obligation¹⁰³ to exercise jurisdiction, regardless of any traditional links.¹⁰⁴

The general rule on jurisdiction in civil cases is not as strict as in criminal law; however, domestic courts are often reluctant to assume jurisdiction in cases concerning a foreign element and adhere to the territorial principle. But concepts of domicile, residence, or doctrines of tacit submission to the jurisdiction (for example, on the basis of the ownership of property) can serve as grounds for a plaintiff to bring an action in a third country regardless of the nature of the violation.¹⁰⁵ Additionally, the doctrine of *forum non conveniens* may allow other courts to exercise jurisdiction so long as there is no forum that is more appropriate. Courts will consider the location of witnesses and availability of documentary evidence, the applicable law and any juridical

¹⁰⁰ Lotus Case, P.C.I.J., Series A, No. 10.

¹⁰¹ The passive personality jurisdiction, has long being regarded as controversial, however it is now reflected in the legislation of various countries (the United States, CH. 113A, 1986 Omnibus Diplomatic and Antiterrorism Act; France, Art. 689, Code of Criminal Procedure, 1975), and today meets with relatively little opposition, at least so far a particular category of offences is concerned. See Yerodia Case, footnote 107

¹⁰² Effects or impact jurisdiction is embraced both by the United State and, with certain qualifications , by the European Union. Idem.

¹⁰³ Several international conventions contain the duty to prosecute or extradite (*aut dedere aut prosequi*) individuals accused of international crimes such as genocide, high jacking or torture, by "exercising a jurisdiction based on the nature of the crime rather than on links of territoriality or nationality (whether the perpetrator or the victim)". See Separate Opinion, Yerodia Case, footnote. The 1949 Geneva Conventions lend support to this possibility, and are widely regarded as today reflecting customary international law. See, e.g. Cherif Bassiouni, *International Criminal Law, Volume III: Enforcement*, 2nd Edition, (1999), p.228; Theodore Meron "Internationalization of Internal Atrocities" 89 AJIL (1995), art 576. Finally, Article 7.1 of the Convention against Torture provides for example, that: "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."

¹⁰⁴ The question of 'custody' of the accused however, as a precondition to exercising universal jurisdiction, is still a matter of debate today. This issue ('universal jurisdiction in absentia') was not addressed by the ICJ in the Yerodia decision, however on their separate opinions Judges Higgins, Kooijmas and Burgenthal concluded that its exercise is not precluded under international law. See footnote 107. For more information on the exercise of universal jurisdiction, see www.u-j.info

¹⁰⁵ See BROWNIE Ian, *Principles of Public International Law*, Oxford, 1998

advantage that the plaintiff receives by bringing its action in the forum he or she has chosen. In the US, the Alien Tort Claims Act has been used to enable US courts to assert jurisdiction in respect of human rights violations perpetrated by non-nationals overseas.¹⁰⁶

It is important to highlight that even if a third country court ‘exercises’ or ‘seizes’ jurisdiction—based on links such as nationality or as a result of the universal character of the acts—questions of immunity may arise.¹⁰⁷ Furthermore, it is not clear whether rules of immunity for serious violations of human rights (like torture) apply to a tort claim in the same way as in criminal cases.¹⁰⁸

¹⁰⁶ Under the Alien Torts Claim Act, the United States has asserted jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas. Such jurisdiction, with the possibility of ordering payment of damages, has been exercised with respect to torture committed in a variety of countries (Paraguay, Chile, Argentina, Guatemala), and with respect to other major human rights violations in yet other countries. See footnote 89

¹⁰⁷ Principles of immunity apply differently in international and national trials. In international tribunals, it is well established that the official position of a defendant cannot be used as a defence in respect of serious crimes under international law, particularly those that constitute *jus cogens* norms. This principle was first recognised in Article 7 of the Nuremberg Charter. See also UN General Assembly Res. 1/95 (1946); UN General Assembly Res. 1/96 (1946); Article 4 of the Genocide Convention; the Statutes of the ICTY and ICTR (Article 7 and Article 6 of the statutes respectively); Article 27 of the Statute of the International Criminal Court. Further, 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’s 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.” Decision on Preliminary Motions (“Kosovo”), 8 November 2001. This principle is also included in the ‘Princeton Principles on Universal Jurisdiction’, Principle 5. In recent years it has become recognised that at least *former* diplomats and *former* heads of State do not enjoy immunity in third-countries criminal trials for international crimes, since their functional immunity does not encompass acts that are crimes under international law. See 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. The 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. See Reydams, L. Criminal Law Forum, Vol XI, I 2000, citing the decision of 6 November 1999. 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.” Cited by Hazel Fox QC, in Law on State Immunity. See generally the ICJ Yerodia decision for limits to the exercise criminal jurisdiction over individuals enjoying full sovereign immunity, Arrest Warrant of 11 April 2000 (Democratic Republic of Congo/Belgium) Judgment, Preliminary Objections and Merits, 14 February 2002, para 53.

¹⁰⁸ The European Court in the Al’Adsani decision made a distinction between civil and criminal proceedings in relation to State immunity. The Court, while noting the growing recognition of the *jus cogens* character of the prohibition of torture, did “not find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State”. However, the minority, eight of the nine judges, stressed 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. See Al’Adsani v. the United Kingdom. European Court of Human Rights (Appl. No. 35763/97, Judgement of 21 November 2001).

V. INDIVIDUAL COMPLAINT MECHANISMS

a. Universal Mechanisms

At the universal level, UN treaty bodies monitor State compliance with specific human rights conventions. In addition, the UN Commission on Human Rights (UNCHR) has created various monitoring mechanisms dealing with particular human rights violations outside the context of specific human rights treaties.

j) Procedures and Mechanisms of the Commission on Human Rights

The United Nations Commission on Human Rights, composed of 53 States, meets each year in regular session in March/April for six weeks in Geneva. Over 3,000 delegates from member and observer States and from non-governmental organizations participate.

The Commission can also meet exceptionally between its regular sessions in special session, provided that a majority of States members of the Commission so agree, mindful of the need for the Commission on Human Rights to deal with urgent and acute human rights situations in the most expeditious way.

During its regular annual session, the Commission adopts about a hundred resolutions, decisions and Chairperson's statements on matters of relevance to individuals in all regions and circumstances. It is assisted in this work by the Sub-Commission on the Promotion and Protection of Human Rights, a number of working groups and a network of individual experts, representatives and rapporteurs mandated to report to it on specific issues.

Commission on Human Rights procedures and mechanisms are mandated to examine, monitor and publicly report either on human rights situations in specific countries or territories (known as country mechanisms or mandates) or on major phenomena of human rights violations worldwide (known as thematic mechanisms or mandates). These procedures and mechanisms are collectively referred to as the Special Procedures of the Commission on Human Rights.

Special Rapporteur on the Question of Torture¹⁰⁹

The Special Rapporteur on torture was established by mandate in 1985. There have been three holders of the post to date: Pieter Kooijmans, Netherlands (1985-1993); Nigel Rodley, United Kingdom (1993-2001); and Theo van Boven, Netherlands (2001-). The Special Rapporteur's remit is to provide the Commission with information on State parties' legislative and administrative actions in relation to torture, and the extent to which State

¹⁰⁹ The Annexes in this Sourcebook do not include reports from the Special Rapporteur on Torture. However, a complete review (charts) can be found in REDRESS' webpage (www.redress.org)

parties are, or are not, fulfilling their duties under the Convention. Annual and Interim Reports are prepared based on information gathered in the field and by correspondence with governments.

Information on torture should be transmitted to the Special Rapporteur in written form and sent c/o Office of the High Commissioner for Human Rights, United Nations Office at Geneva, CH-1211 Geneva 10, Switzerland; E-mail: urgent-action@ohchr.org. Although it is important to provide as much detail as possible, the lack of a comprehensive accounting should not necessarily preclude the submission of reports.

ii) Treaty Monitoring Mechanisms

The implementation of core UN human rights treaties is monitored by committees, or "treaty monitoring bodies". The legal basis for the establishment of most treaty bodies can be found in the treaties themselves. Treaty bodies are composed of independent experts of recognized competence in the field of human rights who are elected by States parties.

In addition to the Committee on Economic, Social and Cultural Rights, there are currently five other treaty bodies functioning today: the Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights; the Committee against Torture; the Committee on the Elimination of All Forms of Racial Discrimination; the Committee on the Rights of the Child; and the Committee on the Elimination of Discrimination against Women. All treaty bodies are serviced by the Office of the High Commissioner for Human Rights in Geneva, with the exception of the Committee on the Elimination of Discrimination against Women, which is serviced by the Division for the Advancement of Women in New York.

The Human Rights Committee

The Human Rights Committee is a body that monitors the implementation of the International Covenant on Civil and Political Rights and its Protocols. It is composed of 18 independent experts who are persons of high moral character and recognized competence in the field of human rights.

State Reports: Under article 40 of the Covenant, States parties must submit reports every five years on the measures they have adopted which give effect to the rights recognized in the Covenant and on the progress made in the enjoyment of those rights. The reports are subsequently examined by the Committee in public meetings, through a dialogue with representatives of each State party whose report is under consideration. On the final day of the session, the Committee adopts concluding observations summarizing its main concerns and making appropriate suggestions and recommendations to the State party. Among the views adopted by it, the Committee has called on States Parties to ensure that independent mechanisms are established to investigate all violations of the right to life and security of the person, and for dealing with complaints of police violence. It has specified the importance of ensuring that offenders are brought to justice. It has also called for credible

systems to be put in place to monitor the treatment of detainees so as to ensure that they are not subject to torture and ill-treatment. It has also recommended that victims be provided with proper compensation. Importantly, the Committee has also recommended a series of preventive measures, including education of law enforcement officials and judges with a view to preventing ill-treatment

Although only members of the Committee and representatives of the relevant State party may take part in the dialogue, non-governmental organizations are encouraged to submit written information or reports to the Committee.

Individual Complaints: The first Optional Protocol to the Covenant allows individuals to submit complaints to the Human Rights Committee. The Committee has adopted detailed Rules of Procedure, which set out the complaint process. Model complaint forms are also available.

Admissibility: The conditions for admissibility are very similar to other mechanisms. For a complaint to be admissible:

- It must not be anonymous
- It must relate to a State that is a party to the first Optional Protocol.
- The party submitting the complaint must be the victim or a person acting on their behalf
- The complaint cannot be considered if the same problem is being investigated under another international procedure
- Domestic remedies must have been exhausted.

Merits: Once a communication has been declared admissible, the Committee asks the State concerned to explain or clarify the problem and to indicate whether anything has been done to settle it. A time limit of six months is set for the State party's reply. The author of the complaint then has an opportunity to comment on the State's reply. In a number of cases dealing with the right to life, torture and ill-treatment, and arbitrary arrests and disappearances, the Committee has established that the burden of proof cannot rest alone with the person complaining of the violation of rights and freedoms. The Committee also views a refutation in general terms of a complaint of a violation of a person's human rights as insufficient. Once the inquiry is completed, the Committee expresses its final views and sends them to the State concerned and to the author.

Interim Protection: Given the lengthy period of time from when the claim is initially filed to when it is ultimately decided, the Committee instituted a procedure for interim protection – to ensure that urgent requests are dealt with expeditiously. There have been cases, for example, in which the Committee has advised against a threatened expulsion, requested the suspension of a death sentence or drawn attention to the need for an urgent medical examination.

Decisions: The Committee issues final decisions, which States Parties are obliged to follow. The Committee has urged State parties to investigate

allegations of ill-treatment in detention, and in cases of disappearances, to establish the truth of what has happened and to bring to justice any persons found to be responsible. The Committee has noted the obligation to investigate and to prosecute criminally, try and punish those held responsible for violations under the Covenant, to grant appropriate compensation to victims and afford all necessary medical care. In some instances, it has called for the immediate release of persons wrongfully detained. Importantly, the Committee has called on State parties to take effective measures in order to ensure that similar violations do not occur in the future.

Follow Up: The Human Rights Committee has requested from State parties information on any relevant measures taken by the State party in respect of the Committee's decisions. In 1990, the Committee instituted a mechanism to assist it in monitoring more closely whether States parties have given effect to its final decisions on the merits, and cooperation from States parties has been encouraging.

The Committee Against Torture

The Committee against Torture was established pursuant to Article 17 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It consists of ten experts of high moral standing and recognized competence in the field of human rights, who serve in their personal capacity.

The Convention confers upon the Committee against Torture broad powers of examination and investigation calculated to ensure their effectiveness in practice. At their initial meeting held at Geneva in April 1988, the members of the Committee against Torture adopted rules of procedure and defined the Committee's working methods, in conformity with the provisions of the Convention.

Reports of States Parties: States Parties to the Convention are required to submit reports on the measures they have taken to give effect to their obligations under the Convention. The Committee considers these reports at regular meetings and makes general comments on the reports as appropriate.

Article 20 Procedure: If the Committee receives reliable information that torture is being systematically practiced, Article 20 of the Convention provides for a confidential inquiry procedure. The Commission will transmit these findings to the State Party concerned together with any comments or suggestions that seem appropriate in view of the situation. While the procedure is fully confidential, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report.

Complaints: A State Party to the Convention may declare that it recognizes the competence of the Committee to receive and consider complaints, from

other States Parties¹¹⁰ and/or from individuals who claim to be victims of a violation,¹¹¹ that it is not fulfilling its obligations under the Convention.

The Individual Complaints Procedure: Article 22 of the Convention allows individuals to submit complaints to the Committee under determinate criteria.

Admissibility: For an individual complaint to be admissible, the following criteria must be met:

- The communication must not be anonymous
- It cannot be an abuse of the right of submission or incompatible with the provisions of the Convention.
- The communication must relate to actions attributable to a State Party that has recognized the competence of the Committee to receive individual complaints
- The communication must relate to acts which come within the remit of the Convention against Torture
- The same matter has not been, and is not being, examined under another procedure of international investigation or settlement
- The individual submitting the communication must have exhausted all available domestic remedies. If it can be said that the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief, then the Committee may deem that domestic remedies have been exhausted

Provisional Measures: In the course of its consideration of either the admissibility or the merits of a communication, and before taking any decision, the Committee may request the State Party concerned to take steps to avoid possible irreparable damage to the alleged victim of the violation. This provision offers protection to persons alleging a violation of the Convention even before the Committee takes a decision on the admissibility or the merits of the case. Moreover, it does not prejudice the Committee's final decision.

Procedure: A model communication to the Committee against Torture is available on the Committee's website. Once a communication has been received and the Committee determines that it is admissible, the Committee will bring it to the attention of the State Party. This State is then obliged to provide the Committee with written explanations clarifying the matter and the remedy, if any, that may have been taken by that State. The Committee will then consider all information made available to it by or on behalf of the individual and by the State Party concerned. It will then forward its views to the State Party and the individual.

View of the Committee Against Torture: The Committee, in its views, has recognized that a breach of the Convention requires the State to take remedial measures. For instance, the Committee has requested that the State take steps to ensure that similar violations do not occur in future, and has

¹¹⁰ Article 21 of the Convention against Torture.

¹¹¹ Article 22 of the Convention against Torture.

considered that where complaints of torture are made during court proceedings it is desirable that they be elucidated by means of independent proceedings. It has also recognized in its views the obligation of authorities 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.

B. Regional Complaint Mechanisms

At the regional level, international mechanisms have been established by the Organization of American States (OAS), the Council of Europe and the Organization of African Unity (OAU, now the African Union). The three systems provide for individual complaints mechanisms, however, the African Commission on Human and Peoples' Rights has no power of binding decision-making. States have to become parties to the regional conventions before individual complaints may be brought.

i) The African System of Protection of Human Rights

The African Commission on Human and Peoples' Rights: Established by the African Charter on Human and Peoples' Rights which came into force on 21 October 1986 after its adoption by the Assembly of Heads of State and Government of the Organization of African Unity (O.A.U.), the African Commission on Human and Peoples' Rights is charged with ensuring the promotion and protection of Human and Peoples' Rights throughout the African Continent.

The procedure followed by the Commission in considering complaints is of a highly confidential nature. Complaints can be made by States (against other States Parties) or by others (physical or moral person, private or public, African or international). In the latter case, the Commission will consider the complaint at the request of the majority of its members.

Provisional Measures: If the victim's life, personal integrity or health is in imminent danger, the Commission has the powers under Rule 111 of its Rules of Procedure to adopt provisional measures, thereby urging the State concerned not to take any action that will cause irreparable damage to the victim until the case has been heard by the Commission. The Commission can also adopt other urgent measures as it sees fit.

Admissibility: Individuals and organisations may lodge a complaint with the African Commission alleging that a State Party to the Charter has violated one or more of the rights guaranteed.¹¹² For a complaint to be admissible:

- The communication must include the author's name even if the author wants to remain anonymous;

¹¹² Article 55 of the Charter.

- The communication must be compatible with the Charter of the OAU and with the present Charter;
- The communication must not be written in insulting language directed against the state or the OAU;
- The communication must not be based exclusively on news from the media;
- The complainant must have exhausted all available domestic legal remedies;
- The communication must be submitted within a reasonable time from the date of exhaustion of domestic remedies;
- The communication must not deal with a matter, which has already been settled by some other international human rights body.

Merits: In accordance with Rule 119, if the Commission decides that a complaint is admissible, it will inform the State concerned and the complainant. The State is then given 3 months to reply to the Commission providing explanations on the complaint and suggesting a way in which to remedy the situation. These will be forwarded to the complainant who will be given an opportunity to reply.

Friendly Settlement: Once a communication is declared admissible, the Commission may offer its good offices to facilitate a settlement of the dispute. If a friendly settlement is reached, a report containing the terms of the settlement is presented to the Commission at its session. This will automatically bring consideration of the case to an end. If no agreement is reached, a report is submitted to the Commission and the Commission will take a decision on the merits of the case.

Deliberations: During the session that the Commission is hearing the substance of the complaint, the parties can make written or oral presentations to the Commission. Where the Commission does not have sufficient information from the Parties, it may undertake an ex officio investigation, obtaining information from any other source.

Observations: On the basis of all of the information received, the Commission will make its 'observations' known to the parties. If a violation is found, it will make recommendations to the State Party concerned. However, the Commission does not have much power to secure compliance with its recommendations.

The Special Rapporteur on prisons and conditions of detention in Africa: The mandate of the Special Rapporteur on prisons and conditions of detention in Africa was created in 1996 by decision of the African Commission. Its primary functions are monitoring and fact-finding, but additionally, it may receive information from individuals, organisations and others. It will carry out fact-finding visits to States Parties and publish the findings of these visits. It may recommend certain courses of action based on the information received, and respond to urgent matters coming within its purview.

The Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines): The 'Robben Island Guidelines' were adopted at the 32nd session of the African Commission in October 2002. The guidelines encourage ratification of regional and international instruments prohibiting torture, and urge states to co-operate with the African Commission on Human and Peoples' Rights and its' Special Rapporteurs as well as the United Nations Human Rights Treaties Bodies, thematic and country specific special procedures. Significantly, they set out a range of practical measures for States to undertake which are aimed at eradicating torture: putting in place safeguards to prevent torture; ending impunity for alleged perpetrators and assisting survivors.

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights: On 8 June 1998, the Assembly of Heads of State and of Government of the OAU, voted to initiate the process for the creation of an African Court on Human and Peoples' Rights. To come into effect, the protocol for the proposed court requires the ratification of fifteen OAU member States. As of May 2002, only 5 had ratified. Article 5 of the Protocol provides that: the Commission, the State Party, which had lodged a complaint to the Commission, the State Party against which the complaint has been lodged at the Commission, the State Party whose citizen is a victim of human rights violation and African Intergovernmental Organizations are entitled to submit cases to the Court. In addition, Article 5 (3) specifies that "The Court may entitle relevant Non Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol."

Article 27 of the Protocol specifies that: "if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary."

ii) The Inter-American System of Protection of Human Rights

The Inter-American Commission on Human Rights: The Inter-American Commission on Human Rights is an organ of the Organization of American States, created to promote the observance and defence of human rights and to serve as consultative organ of the Organization. It examines allegations of violations of the Charter of the OAS and violations of the American Convention on Human Rights.

Individuals and organisations may petition the Commission to examine complaints regarding the violation of rights under the Charter and American

Convention on Human Rights.¹¹³ A form for petitioning the Commission is available on the Commission's website.

Admissibility: Article 20 of the Convention allows the Commission to receive petitions on behalf of individuals, charging a state of violating any of the rights enumerated in the declaration. The petitions may be filed by the victim himself or by a non-governmental organisation or another body on his behalf, thus not only victims of a violation have the right to file private petitions. The prerequisites for admissibility are similar to those of other international organs dealing with human right violations.

The petitioner must have exhausted domestic remedies in accordance with general principles of international law.

The petition should be submitted within a period of 6 months from the date of which the victim of the alleged violation was notified of the final domestic judgment in his case.

This requirement however, does not prevent the admissibility of a petition, but if it can be shown that domestic remedies do not provide for adequate due process; effective access to those remedies was denied or there has been undue delay in the decision on those remedies. The Commission rules of procedure provide that, the respondent government has the burden of demonstrating the non-exhaustion of domestic remedies by the victim.

Precautionary/Provisional Measures: The Commission may request that a state take "precautionary measures" to avoid serious and irreparable harm, if it receives a complaint that a serious violation of human rights is about to take place. The Commission may also request that the Court order "provisional measures" in urgent cases which involve danger to persons, even where a case has not yet been submitted to the Court.

Merits: The information about the petition is sent to the state concerned and the state is requested to send its comments on the petition. If a response is received from the state, the author of the petition is asked to comment on the states response. The Commission may carry out its own investigations, conduct on-site visits or hold a hearing on the case in which both parties, the author of the petition and the state concerned, would be asked to present their arguments. The Commission may also offer to assist the parties in negotiating a friendly settlement.

Decisions: The Commission will prepare a report on the case, which may include recommendations to the state concerned. The Commission may also present the case to the Inter-American Court on Human Rights.

¹¹³ In addition to responding to individual petitions, the Commission monitors the human rights situation in member states and publishes special reports, carries out on-site visits to countries, establishes dialogue with member states and recommends to them the adoption of measures that would contribute to human rights protection. It can also request advisory opinions from the Inter-American Court regarding questions of interpretation of the American Convention.

The Inter-American Court on Human Rights: The Inter-American Court on Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights.¹¹⁴

If a petition before the Commission did not resolve the matter, the matter may be brought to the attention of the Court, so long as the state concerned has accepted the Court's jurisdiction. The individual petitioner does not have the ability to invoke the Court's jurisdiction – only the Commission or a state party can do so. As such, a determination by the Court generally requires the Commission to forward a concluded matter directly to the Court.

The Court will then adopt a variety of approaches to obtain evidence of the matter before it: through written pleadings, oral hearings etc. It will then render its decision and should a violation be found, determine the scope of reparations.

The Court is empowered to award money damages and render declaratory judgments. It may also, specify not only what rights have been violated but also how the state should remedy the violation. Part of the judgment that stipulates compensatory damages may be executed in the country concerned in accordance with the domestic procedure governing the execution of judgments against the state.

iii) The European System of Protection of Human Rights

The European Court of Human Rights: The European Court of Human Rights was established pursuant to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force in September 1953, and as amended by Protocol No. 11.¹¹⁵

Any Contracting State or individual claiming to be a victim of a violation of the Convention may lodge a claim alleging a breach of any of the Convention rights. Individual applicants may submit applications themselves, but legal representation is recommended, and even required for hearings or once an application has been declared admissible. The Council of Europe has set up a legal aid scheme for applicants who do not have sufficient means.

Admissibility: In order for a claim to be admissible before the Court, the following conditions must be satisfied:

- The individual complaint is personally and directly the victim of a violation of one of the rights set out in the Convention and/or its Protocols;
- The complaint cannot be anonymous;

¹¹⁴ Article 1, Statute of the Inter-American Court on Human Rights, O.A.S. Res. 448 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 98.

¹¹⁵ Protocol 11 to the Convention introduced new numbering and some new articles. All references in the Charts are to the new articles. The Protocol also introduced a single court to replace the European Commission and Court of Human Rights as of 1 November 1998.

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- The complaint must relate to the conduct of a State that has ratified the European Convention, and the conduct in question must have occurred after the ratification;
- All domestic remedies must have been exhausted, or it must be demonstrated that such remedies would have been ineffective;
- The complaint must be filed within six months from the date on which domestic remedies were finally exhausted;
- The complaint cannot be incompatible with the provisions of the Convention or manifestly ill-founded or an abuse of the right of application.

Furthermore, Article 35 (2) (b) of the Convention specifies that the Court cannot deal with an application that is “substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.”

The Court has detailed forms and explanatory materials that explain what information must be supplied when filing a complaint.

Merits: Once a case is determined to be admissible, the Court will put itself at the disposal of the parties to pursue a friendly settlement, and/or proceed to a determination of the merits of the complaint. The Court will, on the basis of the evidence provided and through public hearings, make a finding as to the merits of the complaint and a judgment will be issued.

The Court has ruled that complainants whose rights have been violated are entitled to just satisfaction. In some instances, it has found that a finding of a violation in itself constituted ‘just satisfaction’, in other cases it has awarded both pecuniary and non-pecuniary damages. In respect of claims for the restoration of rights, the Court has ruled that a breach imposes on the State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). However, if *restitutio in integrum* is in practice impossible, the respondent States are free to choose the means whereby they comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard.

Provisional/Interim Measures: Rule 39 of the Rules of Court allows the Court, at the request of a party or any other person concerned, or on its own motion, to adopt interim measures.

The European Committee for the Prevention of Torture: The European Committee for the Prevention of Torture (CPT) was established pursuant to the 1987 Council of Europe and the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The Committee, by means of visits, examines the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or

punishment. Since its establishment, the Committee has undertaken more than 150 visits to places of detention.

The Committee's work was designed to complement the judicial approach of the European Court of Human Rights. It undertakes its preventive work in cooperation with national authorities. After each visit, the Committee will prepare a report on its findings and recommendations and discuss any remedial action with the authorities concerned. Committee reports are confidential though most State Parties have agreed to their publication.

VI. ANNEXES (KEY REPORT AND DECISION SUMMARIES) *

A. COMMITTEE AGAINST TORTURE

i) Reports

Saudi Arabia, CAT/C/CR/28/5, 28 May 2002¹¹⁶

Subjects of concern:

- While noting the State party's indication that the *Shari'a* law expressly prohibits torture, and other cruel and inhuman treatment, the State party's domestic law itself does not explicitly reflect this prohibition, nor does it impose criminal sanctions. The Committee considers that express incorporation in the State party's domestic law of the crime of torture, as defined in article 1 of the Convention, is necessary to signal the cardinal importance of this prohibition.
- The sentencing to, and imposition of, corporal punishments by judicial and administrative authorities, including, in particular, flogging and amputation of limbs, that are not in conformity with the Convention.
- The different regimes applicable, in law and in practice, to nationals and foreigners in relation to their legal rights to be free from, and their ability to complain of, conduct in violation of the Convention. The Committee recalls that the Convention and its protections are applicable to all acts in violation of the Convention that occur within its jurisdiction, from which it follows that all persons are entitled, in equal measure and without discrimination, to the rights contained therein.
- Allegations of prolonged pre-trial detention of some individuals beyond the statutory limits prescribed by law, which heightens the risk of, and may on occasion of itself constitute, conduct in violation of the Convention. In this connection, the Committee expresses its concern at instances of denial, at times for extended periods, of consular access to detained foreigners. Moreover, the Committee is concerned at the limited degree of judicial supervision of pre-trial detention.
- Reports of *incommunicado* detention, at times for extended periods, particularly during pre-trial investigations. The lack of access to external legal advice and medical assistance, as well as to family members, increases the likelihood that conduct violating the Convention will not be appropriately pursued and punished.

Positive Aspects regarding the implementation of the right to reparation:

The competence of the Board of Grievances to hear allegations of violations of human rights, and that certain medical facilities possess appropriate forensic medical expertise for examination of alleged victims of torture. The Committee welcomes the establishment of a standing commission to investigate accusations concerning the subjection of any person to torture or other cruel, inhuman or degrading treatment or punishment during the arrest, detention and investigation of suspects.

Recommendations for the implementation of appropriate forms of reparation:

The Committee recommends, in particular, that the State party:

- Expressly incorporate within its domestic law a crime of torture in terms that are consistent with article 1 of the Convention.
- Ensure that all persons who have been victims of a violation of their rights under the Convention have access, in law as well as in practice, to the means of obtaining full redress, including compensation, and that the persons who may be responsible for such violations are subjected to prompt and impartial investigation, and thereupon punished. The Convention and its protections are applicable to all acts in violation of the Convention which occur within its jurisdiction, from which it follows that all persons are

* The complete (charts) review of case law and States' reports from these mechanisms, including the Special Rapporteur on Torture, can be found on REDRESS' website (www.redress.org).

¹¹⁶The Committee considered the initial periodic report of Saudi Arabia (CAT/C/42/Add.2) at its 516th, 519th, 521st and 524th meetings on 8, 10, 13 and 15 May 2002 (CAT/C/SR.516, 519, 521 and 524) and adopted the following conclusions and recommendations.

entitled, in equal measure and without discrimination, to the rights contained therein.

- Ensure that the composition of the judiciary fully comports to the standards imposed by the United Nations Basic Principles on the Independence of the Judiciary.
- The apparent failure of the State party to provide effective mechanisms to investigate complaints of breaches of the Convention.
- While noting the State party's institution of mechanisms for the purpose of providing compensation for conduct in violation of the Convention, as a practical matter, compensation appears to be rarely obtained, and accordingly full enjoyment of the rights guaranteed by the Convention is limited.

Zambia¹¹⁷ CAT/C/XXVII/Concl.4, 23 November 2001

Subjects of concern:

The Committee expresses concern about the apparent impunity enjoyed by torture perpetrators. The Committee notes with concern that the State party has neither incorporated the Convention into its legislation nor introduced corresponding provisions in respect of several articles, in particular the: a) Definition of torture (article 1), b) Criminalisation of torture (article 4). Concern is also expressed regarding the: delay in investigating allegations of torture and in bringing suspects to timely trial.

Positive Aspects regarding the implementation of the right to reparation:

The State party's commitment to introduce a crime of torture in accordance with article 4 of the Convention, Proceed urgently with appropriate legislation and other measures to ensure the incorporation of the Convention into domestic law, and the creation of the Human Rights Commission.

Recommendations for the implementation of appropriate forms of Reparation:

- To incorporate the Convention into its legal system; To adopt a definition of torture which is fully in keeping with article 1 of the Convention and provides for appropriate penalties; To take appropriate measures to ensure jurisdiction over crimes of torture, wherever they may occur; To undertake legal and other measures to address impunity and ensure that acts of torture are prosecuted to the full extent of the law and that complainants have access to legal advice as necessary;
- To establish rehabilitation centres for victims of torture; To ensure the early and effective operation of the Police Public Complaints Authority.

Indonesia¹¹⁸ CAT/C/XXVII/Concl.3, 22 November 2001

Subjects of concern:

A climate of impunity, advanced in part because of the fact that there has been little progress in bringing to trial members of the military, the police or other state officials, particularly those holding senior positions, who are alleged to have planned, commanded and/or perpetrated acts of torture and ill-treatment.

Positive Aspects regarding the implementation of the right to reparation:

The adoption of Act No. 26/2000 on the establishment of human rights courts, which have jurisdiction over gross violations of human rights, including torture, and the State's assurances that the Human Rights Courts will be operational by early December 2001.

¹¹⁷ The Committee considered the initial report of Zambia (CAT/C/47/Add.2) at its 494th and 497th meetings, held on 19 and 20 November 2001 (CAT/C/SR/494 and 497) and adopted the following conclusions and recommendations.

¹¹⁸ The Committee considered the initial report of Indonesia (CAT/C/47/Add.3) at its 492nd and 495th meetings, held on 16 and 19 November 2001 (CAT/C/SR.492 and 495), and adopted the following conclusions and recommendations.

Recommendations for the implementation of appropriate forms of Reparation:

- To amend the penal legislation so that torture and other cruel, inhuman or degrading treatment or punishment are offences strictly prohibited under criminal law, in terms fully consistent with the definition contained in article 1 of the Convention. Adequate penalties, reflecting the seriousness of the crime, should be adopted.
- The failure of the State party to provide in every instance prompt, impartial and full investigations into the numerous allegations of torture reported to the authorities, as well as to prosecute alleged offenders, as required in articles 12 and 13 of the Convention;
- The plans outlined by the representatives of the State party for the imminent finalization of new laws on the protection of victims and witnesses, and on the establishment of a Commission of Truth and Reconciliation to re-examine past cases of human rights violations which have had a significant impact on the nation;
- To establish an effective, reliable and independent complaint system to undertake prompt, impartial and effective investigations into allegations of ill treatment and torture by police and other officials and, where the findings so warrant, to prosecute and punish perpetrators, including senior officials.
- The insufficient level of guarantees of the independence and impartiality of the National Commission on Human Rights (Komnas-HAM) which hinders it from fully carrying out its mandate, including, inter alia, having sole responsibility under Law 2000/26 to conduct initial investigations relating to gross violations of human rights, including torture, prior to forwarding them to the Attorney General for prosecution. Because only the Attorney General, and not Komnas-HAM, has the authority to decide whether or not to initiate proceedings, the Committee is further concerned that reports of Komnas-HAM on preliminary investigations are not fully published, and that Komnas-HAM does not have the right to challenge a decision by the Attorney General not to prosecute a case.
- The recognition by the State party that eradication of torture is linked to overcoming a culture of violence within the army and the police, and the assurances that efforts to continue to work towards this goal is a high priority of the government.
- To ensure that all persons, including senior officials, who have sponsored, planned, incited, financed or participated in paramilitary operations using torture, will be appropriately prosecuted.
- To take immediate measures to strengthen the independence, objectivity, effectiveness and public accountability of the National Commission on Human Rights (Komnas-HAM), and ensure that its reports to the Attorney General are published in a timely fashion.
- To ensure that the proposed *ad hoc* human rights court for East-Timor will have the capacity to consider the many human rights abuses, which were alleged to have occurred there during the period between 1 January and 25 October 1999.
- The country's penal legislation does not adequately define the offence of torture in terms consistent with article 1 of the Convention; as a result, torture is not punishable by appropriate penalties in the criminal code of the State party, as required in article 4, paragraph 2 of the Convention. The Committee notes, in this regard, that the definition of torture in Law 2000/26 is not fully consistent with article 1 of the Convention.
- The geographical and time limitations on the mandate of the proposed *ad hoc* human rights court on East-Timor.
- To ensure that crimes under international law such as torture and crimes against humanity committed in the past may be investigated and, where appropriate, prosecuted in Indonesian courts.
- To fully cooperate with UNTAET, in particular by providing mutual assistance in investigations or court proceedings in accordance with the Memorandum of Understanding signed in April 2000, including affording the members of its serious crimes unit full access to relevant files, authorizing mutual visits to Indonesia and East-Timor, and transferring suspects for trials in East-Timor.
- The inadequate cooperation with the serious crimes unit of the UN peacekeeping force in East Timor (UNTAET).
- 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.

<p>Brazil¹¹⁹ A/56/44, paras.115-120, 16 May 2001</p> <p>Subjects of concern:</p> <ul style="list-style-type: none"> - The persistence of a culture that accepts abuses by public officials, the numerous allegations of acts of torture and cruel, inhuman or degrading treatment - in police stations, prisons and facilities belonging to the armed forces - and the de facto impunity enjoyed by the perpetrators of those acts. - The competence of the police to conduct inquiries following reports of crimes of torture committed by members of police forces without effective control in practice by the Public Prosecutor's Office, with the result that immediate and impartial inquiries are prevented, which contributes to the impunity enjoyed by the perpetrators of these acts. <p>Positive Aspects regarding the implementation of the right to reparation:</p> <ul style="list-style-type: none"> - The promulgation, in April 1997, of Law No. 9455/97 (Torture Act), which introduces into Brazilian criminal law the categorization of torture as an offence, with appropriate penalties; - The establishment of various bodies intended to enhance respect for human rights, notably the Human Rights Commission of the Chamber of Deputies, the National Human Rights Secretariat under the Ministry of Justice, the Federal Procurator for Human Rights and the human rights commissions set up in some states. <p>Recommendations for the implementation of appropriate forms of Reparation:</p> <ul style="list-style-type: none"> - The State party should ensure that the law on the crime of torture is interpreted in conformity with article 1 of the Convention; - The State party should take all necessary measures to ensure that immediate and impartial inquiries are carried out, under the effective control of the Public Prosecutor's Office, in all cases of complaints of torture or cruel, inhuman or degrading treatment, including acts committed by members of police forces. During such inquiries, the officers concerned should be suspended from their duties; - The absence of an institutionalized and accessible procedure to guarantee victims of acts of torture the right to obtain redress and to be fairly and adequately compensated, as provided for in article 14 of the Convention.
<p>USA¹²⁰ A/55/44, 15 May 2000</p> <p>Subjects of concern:</p> <ul style="list-style-type: none"> - The failure of the State party to enact a federal crime of torture in terms consistent with article 1 of the Convention; - The legal action by prisoners seeking redress, which has been significantly restricted by the requirement of physical injury as a condition for bringing a successful action under the Prison Litigation Reform Act. <p>Positive Aspects regarding the implementation of the right to reparation:</p> <ul style="list-style-type: none"> - The broad legal recourse to compensation for victims of torture, whether or not such torture occurred in the United States of America; - The assurances given by the delegation that a universal criminal jurisdiction is assumed by the State party whenever an alleged torturer is found within its territory. <p>Recommendations for the implementation of appropriate forms of Reparation:</p> <ul style="list-style-type: none"> - Although it has taken many measures to ensure compliance with the provisions of the Convention, to also enact a federal crime of torture in terms consistent with article 1 of the Convention and withdraw its reservations, interpretations and understandings relating to the Convention; - To take such steps as are necessary to ensure that those who violate the Convention are investigated, prosecuted and punished, especially those who are motivated by discriminatory purposes or sexual gratification.

¹¹⁹ The Committee considered Brazil's initial report (CAT/C/9/Add.16) at its 468th, 471st and 481st meetings, held on 8, 9 and 16 May 2001 (CAT/C/SR.468, 471 and 481), and adopted the following conclusions and recommendations.

¹²⁰ The Committee considered the initial report of the United States of America (CAT/C/28/Add.5) at its 424th, 427th and 431st meetings, on 10, 11 and 15 May 2000 (CAT/C/SR.424, 427 and 431), and adopted the following conclusions and recommendations.

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ii) Case Law

Halimi-Nedzibi v. Austria *Communication No. 8/1991, 18 November 1993*

Facts: The author was arrested on 19 April 1988 and convicted on 4 July 1990 for having been in charge of an international drug-trafficking organization which allegedly operated from Austria between November 1985 and December 1987. He was sentenced to 20 years' imprisonment (which was later reduced to a term of 18 years). Following his arrest in 1988, the author and six named witnesses were maltreated, beaten and tortured by police inspector J.J., who was in charge of the criminal investigation. They were allegedly coerced to make incriminating statements. The author's wife, who was in her third or fourth month of pregnancy, had a miscarriage shortly after she had been interrogated by police inspector J.J. The police inspector allegedly also threatened to kill the author. The author raised these matters before the investigating judge on 5 December 1988. In particular, he stated: "I was pressured so long until I admitted that the drugs belonged to me. Inspector J.J. grabbed me by the hair and threw me against the wall; he also submerged my head in a bucket of water ... I suffered an eye injury which required hospital treatment." During the trial at first instance, author's counsel requested all statements made to inspector J.J. to be ruled inadmissible as evidence.

Violations:

(alleged violation of Article 15 rejected).

Article 12: The Committee notes that the author made his allegations before the investigating judge on 5 December 1988. Although the investigating judge questioned the police officers about the allegations on 16 February 1989, no investigation took place until 5 March 1990, when criminal proceedings against the police officers were instituted. The Committee considers that a delay of 15 months before an investigation of allegations of torture is initiated, is unreasonably long and not in compliance with the requirement of article 12 of the Convention.

Article 15: On the basis of the information before it, the Committee cannot conclude that the allegations of ill-treatment have been sustained. In the circumstances, the Committee finds no violation of article 15 of the Convention.

Forms of Reparation: The State party indicated that, if Inspector J.J. would be found guilty of having ill-treated detainees in order to obtain incriminating statements, the author's case could be reopened. It argued that a retrial would constitute an effective remedy.

Reparation Afforded to Victim or his/her Family: The State party is requested to ensure that similar violations do not occur in the future.

Henri Unai Parot v. Spain *Communication No. 6/1990, 2 May 1995*

Facts: The author's brother Henri Parot was arrested in Seville on 2 April 1990 after an exchange of gunfire with the Guardia Civil which had stopped his car. The Guardia Civil claimed that his car was carrying 300 kilograms of amonal, to be used to blow up the police headquarters of Seville. The Audiencia Nacional found him guilty of participation in terrorist acts, murder and attempted murder and, on different counts, sentenced him to consecutive terms of 30 years' imprisonment. The author learned the following from her brother: he was interrogated at the headquarters of the Guardia Civil in Seville until the early morning of 3 April 1990; in the course of the interrogation he was tortured. On 3 April 1990, he was transferred to Madrid, where the interrogation continued; allegedly, a special unit of the Guardia Civil normally stationed in Basque territory participated in this interrogation, with the purpose of administering "expert" torture. The interrogation continued for five entire days, during which he was not allowed to eat or sleep. Henri Parot's family has been able to witness the physical results of the torture on him - loss of hair, loss of weight, permanent exhaustion - and the psychological sequelae, manifested by a state of profound depression. Furthermore, he is said to suffer from periodic bouts of amnesia, in particular in respect of the first five days of his detention. On 7 April 1990, Mr. Parot was brought before the examining magistrate of the Juzgado Central de Instrucción No. 4 of the Audiencia Nacional of Madrid. At the conclusion of his statement before the judge, he complained of torture he had suffered at the hands of the Guardia Civil. During the hearing he was assisted by a lawyer who had been retained by his family. On 10 April 1990, Mr. Parot was transferred to the prison of Herrera de la Mancha. On 11 April, he was again brought before the Audiencia Nacional of Madrid to testify before a French magistrate to whom he also complained about the ill treatment. As to prison conditions, it is claimed that during his detention at the Caraban chal prison in Madrid from 7 to 10 April 1990, the prison guards prevented him from sleeping by refusing to switch off the light in his cell or by continuously banging against his cell door. At the prison of Herrera de la Mancha, he was kept incommunicado most of the time. The prison doctor made him sign a statement certifying that he had not suffered any form of torture or ill treatment. For 20 days, Mr. Parot was kept in a cell close to the office of the Guardia Civil, whose occupants sought to scare him by firing shots outside his cell and by threatening to kill him or members of his family. On 17 April, when taking a shower, he was allegedly severely beaten by a group of masked men, said to be members of the Guardia Civil. On 8 June 1990, Mr. Parot was transferred to the prison of Alcalá-Meco in Madrid, so as to facilitate the hearings before the examining magistrate of the

Audiencia Nacional.
<p>Violations: Article 13 (Alleged breach of Article 13 rejected) There are no grounds for Mr. Parot or the author of the communication to challenge the procedure followed in this case by the State party, since not only did Mr. Parot have the benefit of full assistance by counsel during the trial but he also made frequent exercise of his right to make other charges and complaints, which were also considered by the authorities of the State. The Committee against Torture therefore concludes that the State party did not violate the rule laid down in article 13 of the Convention and it considers that, in the light of the information submitted to it, no finding of violation of any other provision of the Convention could be made.</p>
<p>Legal Basis for Reparation: The Committee notes that, in principle, article 13 of the Convention does not require the formal submission of a complaint of torture. It is sufficient for torture only to have been alleged by the victim for the state to be under an obligation promptly and impartially to examine the allegation.</p>
<p>Forms of Reparation: The Committee considers that where complaints of torture are made during court proceedings it is desirable that they be elucidated by means of independent proceedings. Whether or not such action is taken will depend on the internal legislation of the State party concerned and the circumstances of the specific case.</p>
<p>Reparation Afforded to Victim or his/her Family: It is the Committee's view that the State party considered and rejected the allegation of torture made by Mr. Parot in the above-mentioned statement of 7 April 1990. The judgment of the Audiencia Nacional of 18 December 1990 dealt expressly with the said complaint and rejected it on the basis of the five medical examinations that were carried out at the time of the alleged torture and the statements made by Parot himself to the Seville medical examiner, which statements were never denied.</p>

<p><u>S.V. v Canada</u> Comm. No. 49/1996, 15 May 1996</p>
<p>Facts: The author was a member of the Tamil United Liberation Front, which argues for an autonomous Tamil state by peaceful means. From 1987, when fighting between the Liberation Tigers of Tamil Eelam (LTTE) and the Sri Lankan security forces (SLA), until 1992, he was arrested several times and tortured. He was evicted from his property by the LTTE and arrested by the SLA. The SLA tried to extract a confession that he was a member of the LTTE by banging his head against a wall until he lost consciousness, suffering brain damage as a result. He was beaten by the Colombo police and threatened with death by the LTTE. He fled to Canada, being joined by his family some months later. The family claimed refugee status which was refused on the grounds that Colombo provided an internal refuge. The decision was upheld on appeal.</p>
<p>Violations: Alleged breach of Article 3 rejected. The existence of a consistent pattern of gross violations of human rights is not, in itself, sufficient to found a claim. The Committee must be satisfied that the individual claimant is at risk of being subjected to torture in the country to which the State Party proposes to return him or her. The author made several visits outside Sri Lanka during the period in question, returning on each occasion. The Committee notes that during the final incident, which prompted the author's departure, he was not maltreated and was released. No allegations have been made that the author has been sought by the Sri Lankan authorities since his flight and, importantly, the author has not shown that has been involved in any political activity within or outside Sri Lanka or any other activity that might make him vulnerable to the risk of torture. Accordingly, the removal of the author and his family to Sri Lanka does not constitute a breach of Article 3.</p>

<p><u>Josu Arkauz Arana v France</u> Comm. No. 63/1997, 16 Dec 1996</p>
<p>Facts: The author left Spain in 1983 following the arrest by the security forces of numerous persons in his village allegedly belonging to ETA. Many of these persons were subjected to torture. The author's name was mentioned by the arrested persons under interrogation. The author's brother was arrested in 1984 and was tortured. He was told that the author would be executed. Several murders of Basque refugees occurred in Bayonne, where the author was staying and the local police chief informed the author of his concerns that an attempt on the author's life was being prepared. The author was arrested in 1991 on the charge of belonging to ETA and sentenced to eight years' imprisonment. He was then banned from French territory for 3 years in 1992. The author applied to annul the deportation order and began a hunger strike when his appeal was refused. He was deported to Spain in 1997. During the deportation, the author was kept handcuffed and was thrown to the ground and beaten while in France, and threatened, slapped and tortured with electrodes.</p>
<p>Violations: Article 3 The Committee notes the specific circumstances under which the author's deportation took place. First, the author had been convicted in France for his links with ETA, had been sought by the Spanish police and had been suspected, according to the press, of holding an important position within that organization. There had also been suspicions,</p>

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expressed in particular by some non-governmental organizations, that other persons in the same circumstances as the author had been subjected to torture on being returned to Spain and during their incommunicado detention. The deportation was effected under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police, without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer. That meant that a detainee's rights had not been respected and had placed the author in a situation where he was particularly vulnerable to possible abuse. The Committee recognizes the need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully respect the rights and fundamental freedoms of the individuals concerned. In the light of the foregoing, the Committee is of the view that the author's expulsion to Spain, in the circumstances in which it took place, constitutes a violation by the State party of article 3 of the Convention.

[Radivoje Ristic v. Yugoslavia](#), *Communication No. 113/1998*, 11 May 2001

Facts: The author and the alleged victim's father alleges that on 13 February 1995 three policemen arrested Milan Ristic in Šabac while looking for a murder suspect. One of the officers struck his son with a blunt object, presumably a pistol or rifle butt, behind the left ear, killing him instantly. The officers moved the body and, with a blunt instrument, broke both thighbones. It was only then that they called an ambulance and the on-duty police investigation team, which included a forensic technician. The policemen told the investigators that Milan Ristic had committed suicide by jumping from the roof of a nearby building and that they had an eyewitness to that effect. The parents of the victim filed criminal charges against a number of police officers before the Public Prosecutor in Šabac and took the case to an investigating judge, the Šabac District Court and the Serbian Supreme Court, but to no avail.

Violations: Articles 12 and 13. Alleged breaches of articles 2, 14 and 16 not considered.

Articles 2 and 16: It does not fall under the Committee's mandate to assess the guilt of persons who have allegedly committed acts of torture or police brutality. Its competence is limited to considering whether the State party has failed to comply with any of the provisions of the Convention.

Article 14: In the absence of proper criminal investigation, it is not possible to determine whether the rights to compensation of the alleged victim or his family have been violated. Such an assessment can only be made after the conclusion of proper investigations.

Articles 12 and 13: The investigation that was conducted by the State party's authorities was neither effective nor thorough. A proper investigation would indeed have entailed an exhumation and a new autopsy, which would in turn have allowed the cause of death to be medically established with a satisfactory degree of certainty. Moreover, six years have elapsed since the incident took place. The State party has had ample time to conduct a proper investigation. In the circumstances, the Committee finds that the State party has violated its obligations under articles 12 and 13 of the Convention to investigate promptly and effectively allegations of torture or severe police brutality.

Legal Basis for Reparation: The Committee urges the State party to carry out proper criminal investigations without delay in order to be able to assess if the victim and his family are entitled to compensation under Article 14.

Forms of Reparation: Possibly compensation (after proper criminal investigations).

B. HUMAN RIGHTS COMMITTEE

i) Reports

<p>Algeria (1998)</p> <p>Subjects of concern: The Committee has received innumerable reports of arbitrary or extrajudicial executions of individuals, some while in custody, others under suspicion of being associated in one way or another with terrorist groups. The Committee is deeply concerned over persistent allegations of systematic torture. The Committee deplores the apparent routine acceptance by trial court judges of confessions extracted under duress, even when there is medical evidence of torture, and calls on the State party to take all necessary measures to redress this situation. Furthermore, the Committee is concerned at reports of disappearances. Disappearances violate article 7 with regard to the relatives of the disappeared.</p> <p>Positive Aspects regarding the implementation of the right to reparation: The Committee welcomes the establishment of the National Observatory for Human Rights, and the Médiateur de la République (Ombudsman of the Republic), with competence to receive complaints from individuals about human rights violations.</p> <p>Recommendations for the implementation of appropriate forms of Reparation: State Party to ensure:</p> <ul style="list-style-type: none"> (a) independent mechanisms be set up to investigate all violations of the right to life and security of the person; (b) the offenders be brought to justice; (c) a credible system for monitoring treatment of all detainees so as to ensure that they are not subject to torture or to cruel, inhuman or degrading treatment; (d) that all specific allegations be investigated by an impartial body and that the results of such investigations be published; (e) nobody may be arrested or detained "outside the law"; (f) that complaints about such arrest or detention be given immediate attention and that relatives, friends or lawyers of persons detained are able to receive an effective remedy, which includes reviewing the legality of the detention; (g) all persons arrested be kept at officially designated places of detention; their families be immediately informed; they have immediate access to a lawyer; and they are promptly charged and brought to trial; (h) their detention should not exceed the limit provided by law and that they have a right to medical examination on arrest and at the end of their detention.
<p>Argentina (2000)</p> <p>Subjects of concern: Despite positive measures taken recently to overcome past injustices, including the repeal in 1998 of the Law of Due Obedience and the <u>Punto Final</u> Law, the Committee is concerned that many persons whose actions were covered by these laws continue to serve in the military or in public office, with some having enjoyed promotions in the ensuing years. It therefore reiterates its concern at the atmosphere of impunity for those responsible for gross human rights violations under military rule. Further, in relation to article 7 of the Covenant, the Committee regrets that questions of torture and excessive use of force by police officials were not adequately dealt with in the present report. The Committee is concerned at allegations it has received indicating that this is a widespread problem and that government mechanisms established to address it are inadequate.</p> <p>Positive Aspects regarding the implementation of the right to reparation: The Committee notes with satisfaction the operation of a number of institutions and programmes designed to serve as a channel of redress for victims of past abuses, including the Historical Reparation Programme, the National Commission on the Disappearance of Persons and the National Commission for the Right to an Identity. The Committee also appreciates the efforts being made to provide financial and other compensation to victims of arbitrary detention and the families of persons who died or disappeared under the military regime.</p> <p>Recommendations for the implementation of appropriate forms of Reparation: Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice. The Committee recommends that rigorous efforts continue to be made in this area and that measures be taken to ensure that persons involved in gross human rights violations are removed from military or public service. The Committee recommends that the State party include in its next report detailed information on the number of complaints received of torture and ill-treatment by the police, including the</p>

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recourse procedures and remedies that are available to complainants, the outcomes of such complaints, the type of disciplinary or punitive measures imposed on those found guilty of these practices, and the specific responsibilities of all relevant government bodies at federal and provincial levels.

France (1997)

Subjects of concern:

- The Committee is concerned at existing procedures of investigating human rights abuses committed by the police. It is also concerned at the failure or reluctance of prosecutors to apply the law on investigating human rights violations where law enforcement officers are concerned, and at the delays and unreasonably lengthy proceedings in investigating and prosecuting alleged human rights violations involving law enforcement officers.
- The Committee is seriously concerned at the number and serious nature of the allegations it has received of ill-treatment by law enforcement officials of detainees and other persons who come into conflictual contact with them, including unnecessary use of firearms resulting in a number of deaths, the risk of such ill-treatment being much greater in the case of foreigners and immigrants. It is also concerned at the reported increase in the number of suicides in detention centres. The Committee is concerned that in most cases there is little, if any, investigation of complaints of such ill-treatment by the internal administration of the police and the gendarmerie nationale, resulting in virtual impunity. The Committee is concerned that no independent mechanism exists to receive individual complaints from detainees.
- The Committee is concerned at the absence of an independent complaint mechanism for the protection and enforcement of respect for human rights, such as a national human rights commission.

Recommendations for the implementation of appropriate forms of reparation:

- The Committee recommends that the State party take appropriate measures to fully guarantee that all investigations and prosecutions are undertaken in full compliance with the provisions of articles 2, paragraph 3, 9 and 14 of the Covenant.
- The Committee recommends that the State party establish an independent mechanism to monitor detention centres and to receive and deal with individual complaints of ill-treatment by law enforcement officials.
- Therefore the Committee strongly recommends that an institutional mechanism be established by the Government of France for receiving complaints of violations of human rights, including all forms of discrimination, with the power to determine whether such complaints are justified, to act as conciliator between the parties and to award compensation.

India (1997)

- Subjects of concern:** The Committee notes with concern that criminal prosecutions or civil proceedings against members of the security and armed forces, acting under special powers, may not be commenced without the sanction of the central Government. This contributes to a climate of impunity and deprives people of remedies to which they may be entitled in accordance with article 2, paragraph 3, of the Covenant.
- The Committee regrets that the National Human Rights Commission is prevented by clause 19 of the Protection of Human Rights Act from investigating directly complaints of human rights violations against the armed forces, but must request a report from the central Government. The Committee further regrets that complaints to the Commission are subject to a one-year time limit, thus preventing the investigation of many alleged past human rights violations.

Positive Aspects regarding the implementation of the right to reparation: The Committee welcomes the establishment of the National Human Rights Commission in 1993 and the respect which the Government of India accords to its recommendations. The Committee notes that the Commission has been given powers, limited though these are, under the Protection of Human Rights Act, to inquire into complaints of human rights violations, to intervene in court proceedings involving allegations of human rights violations or otherwise dealing with human rights issues, to review constitutional and legal norms and the conformity of laws with international human rights instruments, to make specific recommendations to the Parliament and other authorities and to undertake activities in the field of human rights education. It also welcomes the recent setting up of human rights commissions in six states, including Punjab and Jammu and Kashmir, and of human rights courts in several other states of the Union.

Recommendations for the implementation of appropriate forms of Reparation: Therefore the Committee recommends that the requirement of governmental sanction for civil proceedings be abolished and that it be left to the courts to decide whether proceedings are vexatious or abusive. It urges that judicial inquiries be mandatory in all cases of death at the hands of the security and armed forces and that the judges in such inquiries, including those under the Commission of Enquiry Act of 1952, be empowered to direct the prosecution of security and armed forces personnel. - Therefore the Committee recommends that these restrictions be removed and that the National Human Rights Commission be authorized to investigate all allegations of violations by agents of the State.

<p>Japan (1998)</p> <p>Subjects of concern:</p> <ul style="list-style-type: none"> - The Committee, while acknowledging the abolition of forced sterilization of disabled women, regrets that the law has not provided for a right of compensation to persons who were subjected to forced sterilization - The Committee is deeply concerned at many aspects of the prison system in Japan which raise serious questions of compliance with articles 2, paragraph 3 (a), 7 and 10 of the Covenant. Specifically, the Committee is concerned with the following: <ul style="list-style-type: none"> (a) Harsh rules of conduct in prisons that restrict the fundamental rights of prisoners, including freedom of speech, freedom of association and privacy; (b) Use of harsh punitive measures, including frequent resort to solitary confinement; (c) Lack of fair and open procedures for deciding on disciplinary measures against prisoners accused of breaking the rules; (d) Inadequate protection for prisoners who complain of reprisals by prison warders; (e) Lack of a credible system for investigating complaints by prisoners; and <p>Frequent use of protective measures, such as leather handcuffs, that may constitute cruel and inhuman treatment.</p> <p>Recommendations for the implementation of appropriate forms of Reparation</p> <p>The Committee strongly recommends to the State party to set up an independent mechanism for investigating complaints of violations of human rights; Recommends that the necessary legal steps be taken.</p>
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ii) Case Law

<p><u>María del Carmen Almeida de Quinteros et al. v. Uruguay</u>, Communication No. 107/1981 (21 July 1983), U.N. Doc. CCPR/C/OP/2 at 138 (1990).</p> <p>Facts: (The author): My daughter (born on 9 September 1945) was arrested at her home in the city of Montevideo on 24 June 1976. Four days later, while she was being held completely incommunicado, she was taken by military personnel to a particular spot in the city near the Embassy of Venezuela. My daughter would appear to have told her captors that she had a rendezvous at that place with another person whom they wished to arrest. Once she was in front of a house adjoining the Embassy of Venezuela, my daughter succeeded in getting away from the persons accompanying her, jumped over a wall and landed inside the Embassy grounds. At the same time, she shouted out her name so as to alert passers-by to what was happening in case she was recaptured. The military personnel accompanying her then entered the diplomatic mission and, after striking the Secretary of the Embassy and other members of its staff, dragged my daughter off the premises.</p> <p>The Human Rights Committee, accordingly, finds that on 28 June 1976, Elena Quinteros was arrested on the grounds of the Embassy of Venezuela at Montevideo by at least one member of the Uruguayan police force, and that in August 1976 she was held in a military detention centre in Uruguay where she was subjected to torture.</p> <p>Violations: It is, therefore, the Committee's view that the information before it reveals breaches of articles 7, 9 and 10 (1) of the International Covenant on Civil and Political Rights.</p> <p>Forms of Reparation: The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, therefore concludes that responsibility for the disappearance of Elena Quinteros falls on the authorities of Uruguay and that, consequently, the Government of Uruguay should take immediate and effective steps: (a) to establish what has happened to Elena Quinteros since 28 June 1976, and secure her release; (b) to bring to justice any persons found to be responsible for her disappearance and ill treatment; (c) to pay compensation for the wrongs suffered; and (d) to ensure that similar violations do not occur in the future.</p>
<p><u>Carl Sterling v. Jamaica</u>, Communication No. 598/1994, U.N. Doc. CCPR/C/57/D/598/1994 (1996)</p> <p>Facts: The author of the communication is Carl Sterling, a Jamaican citizen who, at the time of submission of his complaint, was awaiting execution at St. Catherine District Prison, Jamaica. On 4 May 1993, the author was the victim of beatings at the hand of prison warders and police officers, while a search was carried out in his cell. As a result of the beatings the author was in severe pain, which included passing blood into his urine. He informed the acting superintendent that he wished to see a doctor. The swelling of</p>

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his testicles was such that he was unable to sleep during the night of 4 May 1993. He was finally taken to hospital, where medication was prescribed. However, the author did not receive any medication from the prison authorities; he purchased pain-killing tablets himself. The author claims that he is a victim of a violation of articles 7 and 10 of the Covenant, in view of the length of his detention on death row. The author has been held at St. Catherine District Prison, since his conviction on 28 September 1989, and has been on death row for over five years. Counsel alleges that the execution of the author after the period of time he spent on death row would render his execution cruel, inhuman and degrading treatment. Reference is made to the judgment of the Judicial Committee of the Privy Council in the case of Pratt and Morgan. Counsel submits that the conditions at St. Catherine District Prison amount to a violation of the author's rights under articles 7 and 10 paragraph 1. In respect of this claim the author reports an incident which took place on 3 and 4 May 1993, when, during a prison search, he was severely beaten by prison warders, as described in paragraphs 2.2 and 2.3 above.

Violations: The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7 and 10, paragraph 1, of the Covenant.

Forms of Reparation: Pursuant to article 2, paragraph 3 (a) of the Covenant, the author is entitled to an effective remedy for the violations suffered. The Committee considers that this should entail adequate compensation for the ill-treatment and lack of medical attention he suffered. The State party is under an obligation to ensure that similar violations do not occur in the future.

[Katombe L. Tshishimbi v. Zaire, Communication No. 542/1993, U.N. Doc. CCPR/C/53/D/542/1993\(1996\)](#)

Facts: Katombe Tshishimbi is a career military officer. In 1973, he was stripped of all his functions and sentenced by a military tribunal to 10 years' imprisonment for his refusal to obey orders. The court's sentence was later reduced to four years, of which he spent two years in detention. On an unspecified subsequent date, he allegedly participated in a failed coup attempt against President Mobutu Sese Seko. From the late 1970s onwards, Mr. Tshishimbi sympathized with the principal movement of the political opposition to President Mobutu, the Union for Democracy and Social Progress (Union pour la Démocratie et le Progrès Social - UDPS). After UDPS leader Etienne Tshisekedi had been nominated Prime Minister by the National Sovereign Conference (Conférence Nationale Souveraine - CNS) in 1992, he appointed Mr. Tshishimbi as his military adviser. It appears that Mr. Tshishimbi was used primarily as one of Mr. Tshisekedi's bodyguards. Counsel recalls that after the Government of E. Tshisekedi took office, the Prime Minister, his Cabinet and his special advisers were subjected to constant surveillance, and at times harassment and bullying, from the military and especially members of the special presidential division (Division Spéciale Présidentielle - DSP), which generally remains loyal to President Mobutu. Detachments of DSP and paramilitary groups generally known as "owls" (Hiboux) circulating in unmarked vehicles have arbitrarily arrested opponents of the President, kidnapped them, extorted money, ransacked their homes, etc. It is submitted that anyone who openly supports the process of democratic reform in Zaire lives in constant insecurity, especially in Kinshasa. It was in this context that Mr. Tshishimbi was abducted during the night of 28 March 1993; Belgian press reports of 6 April 1993 mention that he had been arrested ("aurait été arrêté"). The exact circumstances of his abduction, which occurred after he had left the residence of Mr. Tshisekedi for his home, remain unknown. After his abduction, his family, relatives and colleagues have remained without news from him. It was believed - as reported in Belgian newspaper reports of 21 April 1993 - that he is/was detained at the headquarters of the National Intelligence Service (SNIP), where ill-treatment of detainees is said to be common.

Violations: The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee reveal violations by Zaire of articles 7 and 9, paragraph 1, of the Covenant.

Forms of Reparation: Under article 2, paragraph 3 (a), of the Covenant, the State party is under a duty to provide the author and the victim with an appropriate remedy. The Committee urges the State party: (a) to investigate thoroughly the circumstances of Mr. Tshishimbi's abduction and unlawful detention, (b) to bring to justice those responsible for his abduction and unlawful detention and (c) to grant adequate compensation to him and to his family for the violations of his rights suffered. The State party is under an obligation to ensure that similar violations do not occur in the future. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days of the transmittal to it of this decision, information about the measures taken to give effect to its Views.

[Ms. Yekaterina Pavlovna Lantsova v. The Russian Federation, Communication No. 763/1997 \(22 July 1996\), CCPR/C/74/D/763/1997.](#)

Facts (as submitted by author of communication):

In August 1994, Mr. Lantsov, during an argument, inflicted injuries on another person, as a consequence of which both criminal and civil charges were pressed against him. On 1 March 1995, he made full reparation to the plaintiff for damages determined in the civil case. Awaiting his criminal trial, set for 13 April 1995, Mr. Lantsov was initially

released. However, on 5 March 1995, after failing to appear for a meeting with the investigator, he was placed pre-trial detention at Moscow's pre-trial detention centre, "Matrosskaya Tishina", where he died on 6 April 1995, at the age of 25.

The author submitted that the conditions at Moscow's pre-trial detention centres are inhuman, in particular because of extreme overcrowding, poor ventilation, inadequate food and appalling hygiene. The State party admitted that at the time when Mr. Lantsov was detained, the detention centres (sledstvenii izoliator) held more than twice as many detainees as their design capacity, with the result that conditions of detention were not consistent with the regulations in force. The commission of inquiry concluded that there had been no medical error. The diagnosis of the causes of death had been confirmed in the post-mortem report prepared on 13 May 1995. Moreover, the State party admitted "that, generally speaking, conditions in detention centres constitute a serious problem for Russia and that there is no prospect of an immediate solution. A set of measures to reform the prison system has been established, with a view to improving conditions in the detention centres and bringing them into line with international standards for the treatment of prisoners. The State party cites two presidential edicts and a government decree as examples of recent steps towards the transfer of responsibility for prison establishments from the Ministry of the Interior to the Ministry of Justice. An increase in the number of places in detention centres and prisons was under way, but was being impeded by financial difficulties."

Violations: The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party failed in its obligation to ensure the protection of Mr. Lantsov, who lost his life as a direct result of the existing prison conditions. The Committee finds that articles 6, paragraph 1, and article 10, paragraph 1 of the Covenant were violated.

Forms of Reparation:

The Committee is of the view that Mrs. Lantsova is entitled, under article 2, paragraph 3 (a) of the Covenant, to an effective remedy. The State party should take effective measures: (a) to grant appropriate compensation (b) to order an official inquiry into the death of Mr. Lantsov; and (c) to ensure that similar violations do not recur in the future, especially by taking immediate steps to ensure that conditions of detention are compatible with the State party's obligation under articles 6 and 10 of the Covenant.

Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

El-Megreisi v. Libyan Arab Jamahiriya, Communication No.440/1990, 24 March 1994

Facts: The author states that, in January 1989, his family home in Benghazi... was searched at dawn. The intruders allegedly were members of the Mukhabarat, the Libyan security police. Mohammed El-Megreisi was asked to dress and accompany them, purportedly to assist in some unspecified security matter. He never returned. The author adds that "no one could visit his brother and no one was given any information about him". The author claims that the security police falsely suspected his brother of active involvement in politics. No specific charges were brought against Mohammed El-Megreisi, nor was a trial ever held. The family could not trace him for approximately three years and feared that he had been tortured or killed, which is said to be the usual fate of political detainees in Libya. In April 1992, the El-Megreisi family learned that he was still alive, since he was allowed a visit by his wife. According to Mrs. El-Megreisi, the Libyan authorities have told her husband that no charges against him exist and that they have no reason to keep him in detention other than for routine procedures. It is submitted that, during his wife's visit, Mohammed El Megreisi could not comment on the conditions under which he is detained, nor on whether he has been subjected to torture or to other cruel, inhuman or degrading treatment, out of fear of punishment, as meeting places are allegedly bugged and conversations between visitors and prisoners recorded. In a submission of September 1992, the author stated that, at that time, his brother was detained in a military camp in Tripoli; name and location of the camp were, however, unknown. The author reiterated that condition under which prisoners in Libya are detained are cruel and inhuman, without giving further details.

Violations: The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7, 9 and 10, paragraph 1, of the Covenant.

Forms of Reparation: The Committee is of the view that Mr. Mohammed Bashir El-Megreisi is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy.

C. THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

<p>Communications 16/88, 17/88, 18/88 Comité Culturel pour la Démocratie au Bénin vs. Bénin</p> <p>Facts: Communication 18/88 was declared inadmissible for non-exhaustion of domestic remedies as the applicant's request for reparation was pending before the national courts. Communication 16/88 concerns the arrest of students, workers and pupils and their detention without trial (some for several months), during which they were tortured and maltreated. Communication 17/88 concerns the applicant's arrest under suspicion of involvement of conspiracy against the government. He was kept under surveillance and deprived of his liberty for two years. His salary was suspended and his bank accounts frozen. On 7 September 1992 that applicant wrote to the Commission informing it had been released on 10 January 1990 but that no measure had been taken for his rehabilitation.</p> <p>Violations: Article 5 (right to respect for human dignity; prohibition of torture); Article 6 (right to liberty; prohibition of arbitrary detention); Article 18.1 (respect for family life)</p> <p>Legal Basis for Reparation: Communication 16/88 alleges serious and massive violations of human rights. The Commission finds that in such circumstances it is clear that the state has had ample notice of such violations. The Commission [...] cannot hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in respect of each individual complaint. This is the case where there are a large number of victims. Due to the seriousness of the human rights situation and the large number of people involved, such remedies as might theoretically exist in the domestic courts are as a practical matter unavailable or, in the words of the Charter, "unduly prolonged". (para 27.) The Commission took note that Benin had undergone an important political change since these events. However the Commission also noted "international law does stipulate that responsibility for a previous government's violations falls to the new government" (para 38).</p> <p>Forms of Reparation: The Commission further noted, "in these cases there is evidence that the new government has attempted to remedy the injustices committed by the previous administration. It has <u>repealed many of the laws</u> such that detention of individuals on the basis on which the persons in these communications were held would no longer be possible. In addition, the Commission notes the <u>release of political prisoners</u> and of the introduction of <u>amnesty laws</u>. All of the individuals in these particular cases have been released as a result of the new government's actions" (para 39). In addition some of the applicants were <u>reinstated</u> to their previous employments (paras 36 and 37). The Commission assumed "that the actions taken by the government remedy the prejudices complained" (para 40).</p>
<p>Communication No. 25/89, 47/90, 56/91, 100/93 Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah vs. Zaire, African Comm. Hum. & Peoples' Rights</p> <p>Facts: Comm. 25/89 The Communication alleges the torture of 15 persons by a Military Unit, on or about 19 January 1989, at Kinsuka near the Zaire River. On 19 April 1989 when several people protested their treatment, they were detained and held indefinitely. Comm. 47/90, dated 16 October 1990, alleges arbitrary arrests, arbitrary detentions, torture, extra-judicial executions, unfair trials, severe restrictions placed on the right to association and peaceful assembly, and suppression of the freedom of the Press. Comm. 56/91, dated 27 March 1991, alleges the persecution of the Jehovah's Witnesses, including arbitrary arrests, appropriation of church property, and exclusion from access to education. Comm. 100/93, dated 20 March 1993, makes allegations of torture, executions, arrests, detention, unfair trials, restrictions on freedom of association and freedom of the press. It also alleges that public finances were mismanaged; that the failure of the Government to provide basic services was degrading; that there was a shortage of medicines; that the universities and secondary schools had been closed for two years; that freedom of movement was violated; and that ethnic hatred was incited by the official media. There was no response from the Government of Zaire; the Commission therefore, continued its consideration of the case on the basis of facts and opinions submitted by the complainants alone. (para 40)</p> <p>Violations: The Commission holds that the facts constitute serious and massive violations of the African Charter, namely of Articles 4,5,6,7,8,16 and 17.</p> <p>Legal Basis for Reparation: Due to the seriousness of the human rights situation as well as the great number of people involved, such remedies as might theoretically exists in the domestic courts are as a practical matter unavailable [...] (para 57) An inevitable condition for the respect of the right of an individual to have his case heard by impartial courts and tribunals is that this imposes a duty on the State to provide the structures to enable this to be carried out. However, insufficient information was available to enable the Commission to take decisions on violations [...] (para 85)</p>

<p>Communication 64/92, 68/92, 78/92 <i>Krishna Achuthan on behalf of Aleka Banda, Amnesty International on behalf of Orton and Vera Chirwa v. Malawi</i></p> <p>Facts: Examples of torture were defined as: ill treatment and punishment for disciplinary reasons including reduction in diet, chaining for two days of the arms and legs with no access to sanitary facilities, detention in a dark cell without access to natural light, water or food, forced nudity, and beating with sticks and iron bars (para 33). The general prison conditions in Malawi also amounted to a violation of Article 5: shackling in the cell so that the prisoner is unable to move (sometimes during the night and day), serving of rotten food, solitary confinement, overcrowding in cells (200 people in a cell for 70), inability for prisoners to leave their cell for up to 14 hours at a time, lack of organised sports, lack of medical treatment, poor sanitary conditions, lack of access to visitors, post and reading materials (para 34). Banda had been imprisoned for 12 years without legal charge or trial. Orton and Vera Chirwa were taken into custody and sentenced to death for treason – they claimed at this trial that they were abducted from Zambia and returned by force to Malawi. Their sentences were commuted to life imprisonment in extremely poor conditions. Other applicants represented by Amnesty International were arrested and tortured while in detention, and others were shot during demonstrations and riots by trade unionists and students.</p> <p>Violations: Article 4 (respect for life); Article 5 (prohibition of torture); Article 6 (right to liberty and security and not to be arbitrarily detained); Article 7.1 (a), (c) and (d) (right to have cause heard and to be tried by impartial court speedily, with the assistance of counsel)</p> <p>Legal Basis for Reparation: Where the remedy is at the complete dissipation of the executive the existence of local remedies is futile [...] (para 20) Due to the seriousness of the human rights situation as well as the great numbers of peoples involved, such remedies as might theoretically exist in the domestic court are as a practical matter unavailable [...] (para 25) Mr Banda was not permitted recourse to the national court to challenge the violation of his fundamental right to liberty [...] he was detained without a trial [...] the Commission finds that Mr Banda's imprisonment violated art 7 [...] (para 38) "Principles of international law stipulate [...] that a new government inherits the previous government's international obligations, including the responsibility for the previous government's mismanagement. The change of government in Malawi does not extinguish the present claim before the Commission. Although the present government of Malawi did not commit the human rights abuses complained of, it is responsible for the reparation of these abuses" (para 43).</p> <p>Forms of Reparation: [...] the Commission found that, as there had been no response from Malawi despite the repeated notifications, the alleged facts given in the communications would be declared proven and that this decision be made known to all concerned, <i>including the victims or their relatives.</i> (para 18)</p>
<p>Communication 74/92 <i>Commission Nationale des Droits de l'Homme et des Libertés v. Chad</i></p> <p>Facts: The complaint alleged that journalists had been harassed and persons arbitrarily arrested, as well as several accounts of killings, disappearances and torture during detention. The complaint alleged that not only did government agents commit violations, but also that Chad failed to protect the rights from violations by other parties. Chad claimed that it had no control over non-State agent as it was in a state of civil war. The Commission held that it was responsible despite the state of civil war (paras 39-41).</p> <p>Violations: Article 4 (right to life and prohibition of arbitrary killings) This was defined as victims who did not have the benefit of any charge or trial before they were killed (para 43) Article 5 (prohibition of torture) This was defined as covering incidents where hands are bound behind the back and persons are suspended by their feet, violent beatings, electricity burns, deprivation of food and water and sexual assaults (para 46). Article 6 (right to liberty and not to be arbitrarily detained) This included situations where the government denies knowledge as to the whereabouts of individuals in respect of forced disappearances (para 49). Article 7 (right to have cause heard) The subsequent lack of investigation of the killings fell within a denial of this article (paras 50-51). Article 9 (freedom of expression)</p> <p>Legal Basis for Reparation: [...] the very fact that the alleged events, if true, would constitute a "series of serious or massive violations" it is clear that the State of Chad had ample notice of the human rights situation prevailing in its territory. (para 30) Due to the seriousness of the human rights situation as well as the great number of people involved, such remedies as might theoretically exist in domestic courts are as a practical matter unavailable [...]. (para 31) [...] A blanket denial of responsibility by a government is not sufficient to abdicate its responsibility and specific details are required. (para 35) The Charter specifies in Article 1 that the states parties shall not only recognize the rights duties and freedoms adopted by the Charter, but they should also "undertake...measures to give effect to them." In other words, if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the state or its agents are not the immediate cause of the violation. (para 49)</p>

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The subsequent lack of investigation of the killings presents a special question [...] criminal cases such as these are considered to affect the rights of all in society, and the responsibility falls to the government to vindicate the rights of its citizens. (para 50)
[...] The failure of the government to investigate these assassinations or prosecute those concerned constitutes a violations of Art 7. (para 51)
[...] the government has a duty to ensure the rights of its citizens, thus, even if the harassment of journalists is not carried out by government agents, the government is responsible for failure to protect the journalists in question. (para 54)

Communication 67/91 [Civil Liberties Organization vs. Nigeria](#)

Facts: The communication concerns the unsuccessful coup attempt against the Nigerian government on 22 April 1990, after which a large number of military and civilian people were arrested, including friend and family of the suspected plotters. The arrests were effected under the Sate Security and Detention Persons Decree. The compliant alleges that the arrest and the detentions violate provisions of the Charter. It alleges, in particular, that the continued detention of Glorian Morwarin, despite a court order calling for her release, is gross abuse of the judicial process. (para 1)

Violations: Violation of Articles 7(1)(a), (c) of the Charter

Legal Basis for Reparation: The release of the alleged victims does not nullify any violation of the victims' rights. If the allegations are true the government is guilty [...] and does not absolve it of liability in respect of nay violations that may have occurred. (para 5)

Forms of Reparation: In this instance, however, the complainant is a well-known NGO with other communications before the Commission. The Commission must interpret the complete lapse of communication as lack of desire to pursue the communication. Given the release of the individual on whose behalf the communication was brought, the likelihood is that the complainant considers the case satisfactorily resolved. (para 8)

For these reasons the Commission welcomes the release of detainees, finds the communication satisfactorily resolved. (findings)

D. INTER AMERICAN COURT OF HUMAN RIGHTS

<p>Velásquez Rodríguez vs Honduras, Series C No. 7 Compensatory Damages, Judgment of July 21, 1989</p> <p>Facts: Manfredo Velásquez, a student, 'disappeared' in Honduras in 1981. Around 150 others suffered the same fate in the early 1980s. The Court awarded 500,000 lempiras to Mr Velásquez's wife and children in compensation for his likely lifetime income. Moral damages for suffering were assessed at 250,000 lempiras. The sums apportioned to Mr Velásquez's children were ordered to be held in trust in the central bank. The Court also stressed the continuing duty of the State to investigate the disappearance.</p> <p>Violations: Article 4 (Right to life); Article 5 (Right to human treatment); Article 7 (Right to personal liberty)</p> <p>Legal Basis for Reparation The Court reaffirmed the principle of international law, which jurisprudence has considered "even a general concept of law," that every violation of an international obligation which results in harm creates a duty to make adequate reparation. Compensation, on the other hand, is the most usual way of doing so (Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21 and Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29; Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184). (para. 25)</p> <p>Reparation of harm brought about by the violation of an international obligation consists in full restitution (<i>restitutio in integrum</i>), which 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. (para 26)</p> <p><i>Emotional harm:</i> As to emotional harm, the Court holds that indemnity may be awarded under international law and, in particular, in the case of human rights violations. Indemnification must be based upon the principles of equity. (para. 27)</p> <p>Indemnification for human rights violations is supported by international instruments of a universal and regional character: +The Human Rights Committee, created by the ICCPR which has repeatedly called for indemnification, based on the Optional Protocol, (see, for example, communications 4/1977; 6/1977; 11/1977; 132/1982; 138/1983; 147/1983; 161/1983; 188/1984; 194/1985; etc., Reports of the Human Rights Committee, U.N.) +The ECtHR based upon Article 50 of the ECHR (para 28)</p> <p>Article 63(1) of the ACHR does not refer to or limit the ability to ensure the effectiveness of the means of reparation available under the internal law of the State Party responsible for the violation, so it is not limited by the defects, imperfections or deficiencies of national law, but functions independently of it. (para. 30)</p> <p>In order to fix the corresponding indemnity, the Court must rely upon the ACHR and the applicable principles of international law. (para. 31)</p> <p>Forms of Reparation: In this proceedings the Court had to define the content and the scope of the term "<i>just compensation</i>". (para. 24)</p> <p>Compensation: The fair compensation, described as "compensatory" in the judgment on the merits, includes reparation to the family of the victim of the material and moral damages they suffered because of the involuntary disappearance of Mr. Velásquez. (para 39)</p> <p>In cases of disappearance the amount of compensation cannot be based upon guidelines such as life insurance, but must be calculated as a loss of earnings based upon the income the victim would have received up to the time of his possible natural death (the salary the person was receiving at the time of his disappearance and calculate the amount he would have received at the time of his obligatory retirement and the fact that at retirement, he would have been entitled to a pension until his death). (para 46)</p> <p>Costs: The Court did not grant patrimonial damages (within the concept of damages including the expenses of the investigation and litigation) in the present case because they were not pleaded or proven opportunely. The Court made clear that despite this fact "it is theoretically correct that those expenses come within the definition of damages" (para. 42)</p> <p>Non-Pecuniary Measures: In the instant case the Court rejected the measures proposed by asked by the attorney of the applicant (investigation, punishment of those responsible, a public statement condemning the practice, the re-vindication of he victim). The Court argued that these measures would constitute a part of the reparation of the consequences of the violation of rights or freedoms and not a part of the indemnity, in accordance with Article 63 (1) of the Convention. (para. 33). The Court concluded that the duty to investigate had already been imposed to the State on the merits of the case. (para. 34)</p> <p>Otherwise, the Court understands that the judgment on the merits, is in itself a type of reparation and moral satisfaction of significance and importance for the families of the</p>
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victims. (para. 36)

Punitive damages: The Court rejected the argument of “punitive damages”, The Court said: “The expression “fair compensation,” used in Article 63 (1) of the Convention to refer to a part of the reparation and to the “injured party,” is compensatory and not punitive. Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time. (para 38)

Moral damages: The indemnification of the moral damages, which is primarily the result of the psychological impact suffered by the family, especially by the dramatic characteristics of the involuntary disappearance of persons. (para 50). The family had symptoms of fright, anguish, depression and withdrawal The Court found that the disappearance of Mr. Velásquez produced harmful psychological impacts among his immediate family which should be indemnified as moral damages. (para 51)

The Court after setting up its criteria of the scope and definition of the fair compensation said “Based upon a prudent estimate of the possible income of the victim for the rest of his probable life and on the fact that, in this case, the compensation is for the exclusive benefit of the family of Manfredo Velásquez [...], the Court sets the loss of earnings in the amount of five hundred thousand lempiras to be paid to [his] wife and children [...] (para. 49)

The Court believes the Government should pay compensation for moral damages in the amount of two hundred and fifty thousand lempiras, to be paid to the wife and children of Mr. Velásquez. (para 52).

Distribution of the award: One-fourth of the indemnity is awarded to the wife [...]. The remaining three-fourths shall be distributed among the children. With the funds from the award to the children, a trust fund shall be set up in the Central Bank of Honduras under the most favorable conditions permitted by Honduran banking practice. The children shall receive monthly payments from this trust fund, and at the age of twenty-five shall receive their proportionate part. (para 58)

The Court decided:

1. To award L 750,000 lempiras in compensatory damages to be paid to the family of the victim.
2. Decided that the amount of the award corresponding to the wife of the victim shall be L 187,000 lempiras.
3. Decided that the amount of the award corresponding to the children of the victim shall be L 562 500 lempiras.

Velásquez Rodríguez vs Honduras, Series C No. 9, Interpretation of the Compensatory Damages Judgment, Judgment of August 17, 1990.

Facts: The Commission asked the Court to provide some mechanism for protecting the amount held in trust at the central bank from depreciation through currency fluctuation. The Court held that the trustee of the fund might invest the sums in a range of assets, including foreign currencies, in order to preserve their value. It ordered the State to compensate the victim’s wife and family for the delay in making payments, during which time the value of the lempira had dropped against the US dollar

Legal Basis for Reparation: The Court acknowledges that restitution in integrum is unfortunately often impossible to achieve in some human rights violations, given the irreversible nature of the damages suffered, which is demonstrated in the instant case. 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.” (para. 27)

Forms of Reparation: Damages: the *loss of earnings, based upon a prudent estimate of the possible income of the victim for the rest of his probable life*, as well as moral damages (see Velasquez, reparations, para. 49 and 52) (para 28) The reparation afforded is linked to the possibility of maintaining the value of the damages stable over a relatively long period of time. One way of meeting this goal is so-called “indexing” which makes it possible to make periodic adjustments to the sums. (para. 29)

Reparation Afforded to Victim or his/her Family: The Court ordered the payment of interest in the case of delay of the payment. (para 42)
One other option could be “the conversion of the amount received into one of the so-called hard currencies. (para. 42)

Aloeboetoe Et. al. Case vs Suriname, Series C No. 15, Reparations, Judgment of September 10, 1993

Facts: The Commission asserted that the Government of Suriname had violated certain articles of the American Convention on Human Rights. They asked the Court to adjudicate the case under the Convention and to award just compensation to the victims' next of kin. Government soldiers had attacked villagers, beaten and tortured them and then taken 7 away. 6 had been killed but one escaped to tell the story. The Court awarded a total of \$453,102 to the victims' next of kin and stated that separate trust

funds should be set up for the adults and children.

Violations: Articles 1 Obligation to Respect Rights; Article 2 Domestic Legal Effect; Article 4 Right to life; Article 5 Right to human treatment.; Article 25 Right to judicial protection.

Legal Basis for Reparation” Article 63 (1) ACHR codifies a rule of customary law, which moreover, is one of the fundamental principles of current international law, as has been recognized by this Court (Velasquez R. Case, Comp. Damages, para 25; Godínez Cruz Case, Comp. Damages, para 23) an the case law of other tribunals (Factor at Chorzow, Jurisdiction (p.21) and Merits, PCIJ, (p. 29); Interpretation of Peace Treaties with Bulgaria, Hungry and Romania, Adv. Op, ICJ, 1950, p. 228) (para. 43)

The obligation contained in Article 63(1) of the ACHR is governed by international law in all of its aspects, i.e., its 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; *Jurisdiction of the Courts of Danzing*, Advisory Opinion, 1928, PCIJ, Series B, No. 15, pp.26 and 27; *Greco Bulgarian “Communities”*, Advisory Opinion, 1930, PCIJ, Series B, No. 17, pp. 32 and 35; *Free Zones of Upper Savoy and the District of Gex*, Order of 6 December 1930, PCIJ, Series A, No. 24, p. 12; *Free Zones of Upper Savoy and the District of Gex*, Judgment, 1932, PCIJ, Series A/B, No. 46, p. 167; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzing Territory*, Advisory Opinion, 1932, PCIJ, Series A/B, No. 44, p.24) (para. 44).

The solution provided by law in this regard consists of demanding that the responsible party make reparation for the immediate effects of such unlawful acts, but only to the degree that has been legally recognized. As for the various forms and modalities of effecting such reparation, on the other hand, the rule of in integrum restitutio refers to one way in which the effect of an international unlawful act may be redressed, but it is not the only way in which it must be redressed, for in certain cases such reparation may not be possible, sufficient or appropriate (Factory at Chorzow, merits, p. 48) The Court holds that this is the interpretation that must be given to Article 63(1) ACHR. (para 49)

According to arbitral case law, it is a general principle of law that such damages (pecuniary compensation) comprise both indirect damages and loss of earnings (*Chemin de fer de la baie de Delagoa*, sentence, 29 mars 1900, Martens, Nouveau Recueil Général de Traités, 2éme Série, t. 30, p. 402; *Case of Cape Horn Pigeon*, 29 November 1902, Papers relating to the Foreign Relations of the United States, Washington, D.C.: Government Printing Office, 1902, Appendix I, p. 40) Compensation shall furthermore include the moral damages suffered by the victims. The Permanent Court of International Justice so held (*Treaty of Neuilly*, Article 179, Annex, paragraph 4 (interpretation), judgment No. 3, 1924, PCIJ, Series A, No. 3, p. 9) as did the arbitral tribunals (*Maal Case*, 1 June 1930, Reports of International Arbitral Awards, vol. X, pp. 732 and 733; and *Campbell Case*, 10 June 1931, Reports of International Arbitral Awards, vol. II, p. 1158) (para. 50)

Moral Damages: in this case was described as the “abused by an armed band which deprived them of their liberty and later killed them”. The beatings received, the pain knowing they were condemned to die for no reason whatsoever, the torture of having to dig their own graves are all part of the moral damages suffered by the victims. (para 51)

Beneficiaries: The obligation to make reparation for damages caused is sometimes, and within the limits imposed by the legal system, extended to cover persons who, though not successors of the victims, have suffered some consequences of the unlawful act. This issue has been the subject of numerous judgments by domestic courts. (no citation) Case law nevertheless established certain conditions that must be met for a claim of compensatory damages filed by a third party to be admitted. (para. 67)

First, the payment must be based payments actually made by the victim to the claimant, regardless of whether or not they constituted a legal obligation to pay support. Such payments cannot be simply a series of sporadic contributions; they must be regular, periodic payments either in cash, in kind, or in services. What is important is the effectiveness and regularity of the contributions. Second, the nature of the relationship between the victim and the claimant should be such that it provides some basis for the assumption that the payments would have continued had the victims not been killed. Lastly, the claimant must have experienced a financial need that was periodically met by the contributions made by the victim. (para. 68) In the case of reparation to the successors the presumption is that the death of the victim caused them damages, the burden of proof is on the other party to demonstrate the contrary. (para. 71)

Forms of Reparation:

Restitution: The Court considers it appropriate for the next of kin of the victims to be reimbursed for expenses incurred in obtaining information about them after they were killed and in searching for their bodies and taking up matters with the local authorities. (para. 79)

Compensation: Article 63(1) of the Convention, as for the future, provides that the injured party shall be ensured of the enjoyment of the right or freedom that was violated. As for the past, the provision in question empowers the Court to impose reparations for the consequences of the violation and a fair compensation.

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In matters involving violations of the right to life reparation must of necessity be in the form of pecuniary compensation., given the nature of the rights violated. (**Velásquez R. Case**, judgment of July 1988, Seres C No. 444 ,para 189; **Godínez Cruz Case**, judgment of January 20, 1989. Series C No. 5, para. 199) (para 46)

When the victims have died and the beneficiaries of the compensation are his heirs, the family members have a current or future possibility of working or receiving income on their own. The children, who should be guaranteed an education until they reach a certain age, will be able to work thereafter. In the Court's opinion, "*it is not correct, then , in these cases, to adhere to rigid criteria [...] but rather to arrive at a prudent estimate of the damages, given the circumstances of each case*" (**Velásquez R**, Comp. Damages, para. 48; **Godínez Cruz Case** , Comp. Damages, para. 46) (para. 85)

Moral damages: As for the assessment of compensation for moral damages, the Court, in its judgments of July 21, 1989, stated that "*indemnification must be based upon the principles of equity*" (**Velásquez R**, Comp. Damages, para. 27; **Godínez Cruz Case** , Comp. Damages, para. 25)

Compensation has to be given to the successors (para. 54), under international law there is no conventional or customary rule that would indicate who the successors of a person are. Consequently, the Court has no alternative but to apply general principles of law (Article 38(1)(c) of the Statute of the ICJ) (para. 61)

Reparation Afforded to Victim or his/her Family: The Court did not give moral damages to the "tribe" for the damaged suffered by the invasion by the Army to their territory. The Court said "that the racial motive [...] had not been duly proven and finds the argument of thee unique social structure of the [...] tribe to be without merit. The assumption that a domestic rule on territorial jurisdiction was transgressed in order to violate the right to life does not of itself establish the right to moral damages claimed on behalf of the tribe. (para 84)

As regards the distribution of the amounts the Court considers that it would be fair to apply the following criteria:

a. Material damages. One third is assigned to the wives. If there is more than one wife, this amount shall be divided among them in equal parts. Two thirds shall go to the children, who shall also divide their portion equally among themselves if there is more than one child.

b. Moral damages: one half is allocated to the children, one quarter to the wives and the remaining quarter to the parents. If there is more than one beneficiary in any of these categories the amount shall be divided among them in equal parts.

c. The expenses shall be reimbursed to the person who incurred them. (para 97)

The Court ordered he creation of trust funds were formed for the beneficiaries. (para. 100)

The creation of a Foundation, non-profit organization, was ordered by the Court, with a view to provide the beneficiaries with the opportunity of obtaining the best returns for the sums received. (para 103).

The Court decided:

Sets reparations at US\$453, 102 to be paid to the persons listed in para. 98 and 99. The calculations were USD \$30, 000 approximately for each of the victims. (para 93). The expenses incurred by the families as a result of the disappearance of the victims was USD \$1,000 approx. for each of the seven families. (para. 95). Orders the creation of two trust funds and the establishment of a foundation (para. 100 to 108), they should not be taxed. Orders the State, as an act of reparation, to reopen the school located in the area and staff it with teaching and administrative personnel.

[Loayza Tamayo vs Peru](#), Series C No. 42, Reparations, Judgment of November 2, 1998.

Facts: Judgment on the merits in this case was given on September 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997), where the Inter-American Court of Human Rights ordered the State of Peru to release the victim María Elena Loayza-Tamayo within a reasonable time and to pay fair compensation to the victim and her next-of-kin and to reimburse them for any expenses they might have incurred in their representations before the Peruvian authorities in connection with this process. The facts of this case were as follows: on February 6 1993, Ms. Loayza-Tamayo, a Peruvian citizen and a university professor, was arrested together with a relative by officers of the National Counter-Terrorism Bureau (hereinafter "DINCOTE") of the Peruvian National Police Force in Lima, Peru. She was arrested without an arrest warrant issued by the competent judicial authority, as an alleged collaborator of the subversive group "Shining Path". It appears that an acquaintance of the victim who had been imprisoned on February 5, 1993, had denounced Ms. Loayza-Tamayo under a national Repentance Law. The victim was detained by DINCOTE from February 6 to 26, 1993, and was not taken before the Special Naval Court, in violation of Article 12(c) of Decree-Law No. 25.475 (crime of terrorism). She was held *incommunicado* in the DINCOTE offices for ten days and subjected to

torture, cruel and degrading treatment and unlawful pressure, in an effort to force her to incriminate herself and admit that she was a member of the Peruvian Communist Party -Shining Path. She was allowed no contact with her family or attorney, nor were they informed of her arrest. No protective remedy could be filed on her behalf because a national Treason Decree prohibited the filing of "a petition of habeas corpus when the acts in question concern the crime of terrorism." She was prosecuted before several military and civil courts and remained in prison throughout the proceedings. On October 20, 1997, Peru reported that on October 16 of that year it had released the victim in compliance with the Judgment issued by the Court on September 17, 1997. The proceedings in question dealt with the amount of reparation payable to the victim and her family.

Violations: Article 7 in relation to Articles 25(1) and 1; Article 5; Article 8(1), 8(2), 8(4) in relation to Articles 25(1) and 1

Legal Basis for Reparation: The State ordered the release of the victim in the merits (para. 3)

Article 63(1) ACHR is the provision applicable to reparations. This article embodies one of the fundamental principles of general international law (Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21 and Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29; Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184). It has been applied by this Court. (in, among others, the Neira Alegría et al. Case, Reparations, Judgment of September 19, 1996. Series C, No. 29, para. 36; Caballero Delgado and Santana Case, Reparations, Judgment of January 29, 1997. Series C No. 31, para. 15; Garrido and Baigorria Case, Reparations, Judgment of August 27, 1998. Series C No. 39, para. 40). When an unlawful act imputable to a State occurs, that State becomes responsible in law for violation of an international norm, with the consequent duty to make reparations. (para. 84)

It is a universally recognized principle that the obligation to make reparations ordered by international courts is governed by international law in all of its aspects: its scope, nature, modality, and the determination of beneficiaries, none of which may be altered by the State required to make reparations by invoking provisions of its domestic law (among others, Neira Alegría et al. Case, Reparations, supra 84, para 37; Caballero Delgado and Santana Case, Reparations, supra 84, para. 16 and Garrido and Baigorria Case, Reparations, supra 84, para. 42). (para. 86)

"In keeping with the language used in the Judgment on the merits and in Article 63 of the Convention, it is also up to the Court to determine which of the victim's "next of kin" are, in the instant case, "injured parties". (par.89)

"The Court considers that the expression "next of kin" of the victim should be interpreted in a broad sense to include all persons related by close kinship.... As such, they could be entitled to receive compensation if they meet the tests established in the jurisprudence of this Court (Aloeboetoe et al. Case, Reparations, Judgment of September 10, 1993. Series C No. 15, para. 71 and Garrido and Baigorria Case, Reparations, supra 84, para. 52). (para.92)

Forms of Reparation: Reparations is a generic term that covers the various ways a State may make amends for the international responsibility it has incurred (*restitutio in integrum*, payment of compensation, satisfaction, guarantees of non-repetitions among others). (para.85)

Restitution: "It is the view of this Court that the State does have an obligation to make every effort within its power to have the victim reinstated in the teaching positions she held in public institutions at the time of her detention". (para. 113)

"The Court further considers that the State is under the obligation to re-enter the victim's name on the proper retirement records, retroactive to the date on which she was removed from those records, and to ensure that she enjoys the same retirement rights to which she was entitled prior to her detention". (para. 114)

"The State, therefore, has an obligation to do every thing necessary to ensure that the victim receives her salaries, social security and employment benefits as of the date of issuance of this Judgment and until such time as she is able to effectively re-join the teaching service. The Court believes the prudent course of action would be to use the domestic mechanisms that apply in cases of employment disability or any other suitable means that will ensure that this obligation is honored". (para. 116.)

"The Court believes that strictly speaking, the victim's claims regarding her career prospects and promotion would not be measures of restitution; it will, therefore, examine them when it evaluates the damages the victim is claiming to her "life plan" [proyecto de vida] (para 117.)

Pecuniary damage: "The State's release of the victim is not sufficient to fully redress the consequences of the human rights violations perpetrated against her, given the length of time that she remained in prison, the suffering she endured as a result of the cruel, inhuman and degrading treatment to which she was subjected, and the fact that she was held incommunicado during her incarceration, paraded in prison uniform before the mass media, held in solitary confinement in a small, unventilated cell with no natural light, beaten and subjected to other forms of abuse such as threatened drowning, intimidation with threats of further violence, and restricted prison privileges (Loayza Tamayo Case, Judgment of September 17, 1997. Series C No. 33, para. 58).The consequences of that treatment cannot be fully redressed or compensated"

(para 123). "Alternative forms of reparation have to be found, such as pecuniary compensation for the victim and, where appropriate, her next of kin. This compensation is mainly for injuries suffered and, as this Court has ruled previously, includes pecuniary as well as moral damages (Garrido and Baigorria Case, Reparations, para. 43).

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(para. 124) “In the case of pecuniary damages for survivors of human rights violations, the Court has held that the compensation to be awarded depends on a number of factors, one of which is the time during which the victim remained unemployed (El Amparo Case, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of September 14, 1996. Series C No. 28, para. 28). (para.128)

Moral damage: “It is obvious to the Court that the victim suffered moral damages, for it is characteristic of human nature that any one subjected to the kind of aggression and abuse proven in the instant Case will experience moral suffering. No evidence is required to arrive at this finding”.(para.138)

“The Court has also established that grievous violations were committed against the victim and must presume that they had an impact on her children, who were kept apart from her and were aware of and shared her suffering”.(para.140) “The Court can reasonably presume that (the victim’s parent) suffered moral damages because of what happened to the victim, as it is human nature that any individual should experience pain at his or her child’s torment. The State did not disprove this presumption”. (para.142) “The same considerations apply to the victim’s siblings, who as members of a close family could not have been indifferent to Ms. Loayza-Tamayo’s terrible suffering, a presumption not disproved by the State. It is proper, therefore, to name the victim’s siblings as beneficiaries of the fair compensation referred to in operative paragraph six of the Judgment on the merits.” (para.143)

Life plan (Proyecto de vida)

“The head of damages to a victim’s “life plan” has been examined both in recent doctrine and case law. This notion is different from the notions of special damages and loss of earnings. It is definitely not the same as the immediate and direct harm to a victim’s assets, as in the case of “indirect or consequential damages.” The concept of lost earnings refers solely to the loss of future economic earnings that can be quantified by certain measurable and objective indicators. The so-called “life plan,” deals with the full self-actualization of the person concerned and takes account of her calling in life, her particular circumstances, her potentialities, and her ambitions, thus permitting her to set for herself, in a reasonable manner, specific goals, and to attain those goals”. (para.147) “The damage to the “life plan”, understood as an expectation that is both reasonable and attainable in practice, implies the loss or severe diminution, in a manner that is irreparable or reparable only with great difficulty, of a persons prospects of self-development. Thus, a person’s life is altered by factors that, although extraneous to him, are unfairly and arbitrarily thrust upon him, in violation of laws in effect on a breach of the trust that the person had in government organs duty-bound to protect him and to provide him with the security needed to exercise his rights and to satisfy his legitimate interests”. (para.150) “For all these reasons, the claim seeking reparation, to the extent possible and by appropriate means, for the loss of options that the wrongful acts caused to the victim is entirely admissible. The reparation is thus closer to what it should be in order to satisfy the exigencies of justice: complete redress of the wrongful injury. In other words, it more closely approximates the ideal of restitutio in integrum”.(para.151)

Separate Concurring opinion of Judge Jackman: “no call and no room, in my opinion, for new categories of redress to be imported into the jurisprudence of the Court, particularly if such categories are defined in broad and sweeping terms”.

Other forms of reparation: “The Court considers that this Judgment, coupled with Judgment on the merits which found Peru responsible for human rights violations, constitute adequate reparation” (rejecting the public apology to the victims’ relatives). (para.158)

“with respect to Decree-Laws 25,475 and 25,659, the Court finds that the State must comply with its obligations under Article 2 of the Convention”. (para.164)

The State has an obligation to investigate the facts in the instant Case, to identify those responsible, to punish them, and to adopt the internal legal measures necessary to ensure compliance with this obligation (Article 2 of the American Convention). (para.171)

Costs and expenses: “the activity in which they engaged to have recourse to an international court involves or can involve financial outlays and commitments for which the victim must be compensated when a judgment of condemnation is delivered”. (para. 176)

“the concept of costs being examined here also includes the costs involved in proceedings before the domestic courts (Garrido and Baigorria Case, Reparations, supra 84, para. 81) and those seeking justice on an international plane, before two bodies: the Commission and the Court”. (para.178)

“the Court considers that the costs to which Article 55(1) of its Rules of Procedure refers include the various outlays that the victim makes or pledges to make to accede to the inter-American system for the protection of human rights, and include the fees that are routinely paid to those who provide them with legal assistance. Obviously, these expenses refer solely to those that are necessary and reasonable, according to the particularities of the case, and that are effectively made or pledged to be made by the victim or her representatives (Garrido and Baigorria Case, Reparations, supra 84, para. 80). (para.177)

“In exercise of this jurisdictional power, it is up to the Court to make a prudent assessment of the specific scope of the costs to which the judgment of condemnation refers,

taking into account timely verification thereof, the circumstances of the specific case, the nature of the jurisdiction for the protection of human rights, and the characteristics of the respective proceedings, which are unique and different from those of other proceedings, both domestic and international. A reasonable amount of the costs incurred by the victim or her representatives and attorneys vis-à-vis Perú, the Inter-American Commission and this Court will be determined on the basis of equity (Garrido and Baigorria Case, Reparations, supra 84, para. 82). (para.179)

Reparation Afforded to Victim or his/her Family:

“Based on the information received, its own case law and the facts proven, the Court determines that the compensation for pecuniary damages in the instant case shall include the following:

- a) A sum corresponding to the salaries that the victim ceased to receive between the time she was detained and the date of the present Judgment.... The calculation will be made on the basis of 12-monthly salaries per year, plus a bonus of two months’ salary for each year. The interest accruing up to the date of this Judgment will be added and, as the victim requested, no deduction whatever will be made for personal expenses, since, as the victim is alive, it must be concluded that either she or members of her family paid for those expenses for the period in question using other means
- b) A sum for the victim’s medical expenses during her incarceration, since the Court considers that there is sufficient evidence to show that the corresponding ailments began during her confinement, a fact not refuted by the State.
- c) A sum corresponding to the travel expenses incurred by the next of kin to visit the victim during her incarceration.
- d) An amount corresponding to the future medical expenses of the victim and her children, since the Court finds there is sufficient evidence to show that her ailments began during the victim’s confinement, a fact not disproved by the State”. (para 129)

“The Court recognizes the existence of grave damage to the “life plan” of Ms. María Elena Loayza-Tamayo, caused by violations of her human rights. Nevertheless, neither case law nor doctrine has evolved to the point where acknowledgment of damage to a life plan can be translated into economic terms. Hence, the Court is refraining from quantifying it. It notes, however, that the victim’s recourse to international tribunals and issuance of the corresponding judgment constitute some measure of satisfaction for damages of these kinds”. (para. 153)

Compensatory damages: That the State of Peru shall pay, under the conditions and in the manner described in paragraphs 183 to 190 of this judgment, a total of US\$167,190.30 (one hundred sixty-seven thousand one hundred ninety United States dollars and thirty cents) or its equivalent in Peruvian currency: - 99.190,30 for the victim; 20.000 for the victim’s parents; 30. 000 for the victim’s children; 18.000 for the victim’s brothers. That the State of Peru shall pay, in the form of fees and costs and under the terms and in the manner described in paragraphs 183 to 190 of this Judgment, the sum of US\$ 20,000.00 (twenty thousand United States dollars) or its equivalent in Peruvian currency, to Ms. Carolina Maida Loayza-Tamayo.

Cost and Fees: The State shall pay USD\$20,000 to Ms. Carolina Maida Loayza Tamayo. The State has to comply within 6 months from the notification of the judgment. The reparations shall be exempted from taxation.

Other forms of reparation: That the State of Peru shall adopt the internal legal measures necessary to adapt Decree Laws 25,475 (Crime of Terrorism) and 25,659 (Crime of Treason) to conform to the ACHR. The State of Peru shall investigate the facts in the instant case, identify and punish those responsible for those acts, and adopt all the necessary domestic legal measures to ensure that this obligation is discharged

The Court decided:

- 1. The State shall take measures necessary to re-instate Ms. Loayza-Tamayo in the teaching service in public institutions, on the understanding that the amount of her salaries and other benefits shall be equal to the pay she was receiving for the teaching services in the public and private sectors at the time of her detention, appreciated to reflect its value a of the date of this judgment.
- 2. The State shall guarantee to Mrs Loayza-Tamayo her full retirement benefits, including those owed for the period transpired since the time of her detention.
- 3. The State shall take domestic legal measures necessary to ensure that no adverse decision delivered in proceedings against Mrs Loayza-Tamayo in the civil courts has any legal effect whatever

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[Blake Case vs Guatemala](#), Series C No. 48, Reparations, Judgment of January 22nd, 1999.

Facts: Mr. Nicholas Chapman Blake, a 27 year-old journalist, had traveled in 1985 to Guatemala to write a series of articles on the situation of Guatemala's domestic conflict. In 1985, he was arrested and 'disappeared' at the border of El Llano and El Quiche at a place called Los Campamentos by the El Llano Civil Patrol. He and another journalist were killed and their dead bodies were thrown into the undergrowth and covered with tree trunks. Blake's remains were not discovered until 1992. In the ruling, the Inter-American Court ordered the State of Guatemala to continue investigation of the facts and to punish those responsible. The Court also noted the need to adopt measures in domestic law to assure compliance with this obligation. Additionally, Guatemala was ordered to provide reparation in the form of financial compensation for a total of \$161,000 to the family members of Nicholas Blake for the moral and material damage incurred.

Violations: Article 8(1) Right to a fair trial- judicial guarantees; Article 5 Right to humane treatment

*All these articles in relation to Article 1(1) (general obligation to Respect Rights)

Legal Basis for Reparation:

In matters of reparations the applicable provision is Article 63(1) of the ACHR. (para 30)

The obligation to make reparation established by international courts is governed, as has been universally accepted, by international law in all its aspects: scope, nature, forms, and the determination of beneficiaries, which cannot be modified by States invoking its domestic law (*Neira Alegria and alt. Case, Reparations*, C Series N. 29, para. 36; *Caballero Delgado y Santana Case, Reparations*, C Series N. 31, para. 15; *Garrido y Baigorria Case, Reparations* C Series N. 39, para. 40; *Loayza Tamayo Case, Reparations* C Series N. 42, para. 84 and *Castillo Páez Case, Reparations*, C Series, N. 43, para. 50, *Suarez Rosero Case, Reparations*, C Series, N.44. para. 42) (para. 32)

Article 63 (1) of ACHR codifies a rule of customary law which, moreover, is one of the fundamental principles of current international law on the responsibility of States (*Aloeboetoe et. Al. Case, Reparations*, C Series N. 15, para. 43 and *cfr. Usine de Chorzów*, compétence, arrêt no. 8, 1927, C.P.J.I. série A, no. 9, p. 21 y *Usine de Chorzów*, fond, arrêt no. 13, 1928, C.P.J.I. série A, no. 17, p. 29; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184). This is the sense in which this Court has applied that provision (*Garrido and Baigorria Case, Reparations*, , para. 40; *Loayza Tamayo Case, Reparations*, para. 84 and *Castillo Páez Case, Reparations*, para. 50). The Court considered that when a wrongful act occurs that is imputable to a State, the State incurs international responsibility for the violation of international law, with the resulting duty to make reparation for the violations and its consequences. (para. 33)

Reparation involves measures that are intended to eliminate the effects of the violation that was committed. Their nature and amount depend on the damage done both at the material and moral levels. Reparations are not meant to enrich or impoverish the victim or his heirs (*cfr. Garrido and Baigorria Case, Reparations*, para. 43; *Castillo Páez case, Reparations*, para. 53 and *del Ferrocarril de la bahía de Delagoa Case*, LA FONTAINE, *Pasicrisie internationale*, Berne, 1902, p. 406). (para.34)

Obligation to afford effective remedies: The Court considered that the State has the duty to prevent and combat impunity, which the Court has defined as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the ACHR." (*Paniagua Morales et al. Case*, para. 173) In this respect, the Court has advised that "...the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives. (*Paniagua Morales et al. Case, supra* 63, para. 173). (paras. 64)

Beneficiaries: For the purpose of reparations, the Court determines that the relatives also constitute the *injured party* within the meaning of Article 63 (1) ACHR.

Separate Opinion of Judge Cançado Trindade: Judge Cançado Trindade in its separate opinion commented on the contribution of the present case to the position of relatives of the disappeared person also as victims and *titulaires* of the rights protected by the ACHR. All those who were withdrawn from the protection of the law –the disappeared person as well as his relatives- form, thus, the "injured party", in the sense of article 63(1) of ACHR, this position finds full support in contemporary doctrine and case-law (*The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by U.N. General Assembly on 29.11.1985, Res. 40/34-; *K. Achuthan Case (in the name of A. Banda) v. Malawi* (1994), Afr. Comm. on Human and Peoples' Rights, ACHPR Decisions, Series A, volume I, Banjul, 1997, pp. 63 y 68; *Eur. Comm. on Human Rights, X versus Federal Republic of Germany Case*, Application n. 4185/69, Decision of 13.07.1970, *Collection of Decisions of the Eur. Comm. of Human Rights*, vol. 35, pp. 140-142; *Eur. Comm. on Human Rights Koolen versus Bélgica Case*, application n. 1478/62, in *Collection of Decisions of the Eur. Comm. of Human Rights*, vol. 13, p. 89; *X. versus Federal Republic of Germany Case*, application n. 282/57, in *Yearbook of the Eur. Conv. on Human Rights*, vol. I, p. 166; *Eur. Comm. on Human Rights*, application n. 5961/72, decision of admissibility of 11.10.1973, pp. 1-14. pars. 1-30 specially par. 26 –mimeographed, internal circulation- and cf. for the friendly

settlement of the case, *Eur. Comm. on Human Rights, Amekrane versus United Kingdom Case*, Report of the Commission (of 19.07.1974), pp- 1-5; *Andronicou y Constantinou versus Cyprus Case*, Application N. 25052/94, decision of admissibility of 05.07.1995, in: Commission Européenne des Droits de l'Homme, *Décisions et Rapports*, vol. 82-B, Strasbourg, C.E., 1995, p. 112; *United Nations Committee on Humans Rights, García Lanza de Netto Case*, Application n. 8/1977, in: ICCPR, *Human Rights Committee - Selected Decisions under the Opt. Protocol*, [vol. I], N.Y., U.N., 1985, pp. 45-46, in *Valentini de Bazzano Case*, Application n. 5/1977, in *ibid.*, pp. 41 y 43; and in Application n. 63/1979, Uruguay, decided by the Committee in 1981, presented by Violeta Setelich, in the name of her husband Raúl Sendic Antonaccio (in *ibid.*, pp. 102 y 104) (pars. 41 to 44).

Moral damages: The Court stated that while its jurisprudence may establish precedents in this regard, it cannot be invoked as an absolute criterion, as each case must be examined individually. (*Neira Alegría et al. Case, Reparations, Series C. No. 29, para. 55, and Castillo Páez Case, Reparations, para. 83*). (para. 54)

Forms of Reparation: Reparation is a generic term that covers the various ways a State can redress the international responsibility it has incurred (*restitutio in integrum*, payment of compensation, satisfaction, guarantees that the violation will not be repeated, among others) (*Loayza Tamayo Case, Reparations, Judgment of November 27, 1998, Series C No. 43, para. 85; Castillo Páez Case, Reparations, Judgment of November 27, 1998, Series C No. 43, para. 48, and Suárez Rosero Case, Reparations, Judgment of January 20, 1999, Series C No. 44, para. 41*). (para. 31)

There may be cases in which *restitutio in integrum* is impossible, insufficient, and inadequate. Compensation is the primary remedy for damages suffered by the injured party, and includes both material and moral damages. (*Garrido and Baigorria Case, Reparations, para. 41; Loayza Tamayo Case, Reparations, para. 124, and Castillo Páez Case, Reparations, para. 69; cfr. Chemin de fer de la baie de Delagoa, sentence, 29 mars 1900, Martens, Nouveau Recueil Général de Traités, 2ème Série, t. 30, p. 402; Case of Cape Horn Pigeon, 29 November 1902, Papers relating to the Foreign Relations of the United States, Washington, D.C.: Government Printing Office, 1902, Appendix I, p. 470; Traité de Neuilly, article 179, annexe, paragraphe 4 (interprétation), arrêt No 3, 1924, P.C.I.J., series A, No. 3, p.9. Maal Case, 1 June 1903, Reports of International Arbitral Awards, vol. X, pp. 732 and 733, and Campbell Case, 10 June 1931, Reports of International Arbitral Awards, vol. II, p. 1158.*) (para. 42)

Moral Damages: There are numerous cases in which other international tribunals have determined that a judgment of condemnation constitutes adequate reparation *per se* for moral damages (Cfr. case law of the Eur. Court of Human Rights; cfr., v.g. *arrêt Ruiz Torija c. Espagne du 9 décembre 1994. Serie A no.303-Ap p. 13, 7pár.33*). Nevertheless, in the grave circumstances of the present case it is not sufficient; for which reason the Court deems it necessary to award compensation for moral damages. (cfr. in this regard, *El Amparo Case, Reparations, Judgment of September 14, 1996, Series C No. 28, para. 35, and Castillo Páez Case, Reparations, supra 31, para. 84*). This same criteria has been applied by the European Court (*Cour eur. D.H., arrêt Wiesinger du 30 octobre 1991, séries A No. 213, para. 85; Cour eur D.H., arrêt Kemmache c. France (article 50) du 2 novembre 1993, série A No. 270-B, para. 11; Cour eur. D.H., arrêt Mats Jacobsson du 28 juin 1990, série A No. 180-A, párr. 44; Cour eur. D.H., arrêt Ferraro du 19 février 1991, série A No. 197-A, para.. 21*) (para. 55)

The violation of Article 5 in the context of the special gravity of the forced disappearance of a person can cause his parents and brothers suffering, intense anguish, and frustration in the face of the authorities' failure to investigate and the cover up of what occurred. The suffering of the family members, in violation of Article 5 of the Convention, can not be disassociated from the situation created by the forced disappearance of the victim that that lasted until 1992 when his mortal remains were located. (para. 56)

Other measures of reparation: The Court considered that the State has the duty to prevent and combat impunity... Consequently, the State has a *duty to investigate* the acts that resulted in violations of the American Convention in the present case, *to identify and punish those responsible and to adopt the internal legal measures necessary to ensure compliance with this obligation.* (*Loayza Tamayo Case, Reparations, para. 171 and Suárez Rosero Case, Reparations, para. 80*). (paras. 64 and 65)

Reparation Afforded to Victim or his/her Family:

Material damages: The Court rejected the injured party's claim of more than a million dollars, since the amount of reparations must be limited to those corresponding to the violation of Articles 5 and 8(1) in relation to Article 1(1). The expenses, trips, meals, lodging, were of an extra judicial nature, since the family of Nicholas Blake did not resort to the domestic tribunals. Consequently the Court considered that it was appropriate to order the State to pay the reasonable expenses incurred by the injured party from date of Guatemala's acceptance of the contentious jurisdiction of the Court, which considered in equity: US\$16,000. (paras. 47 to 49)

The Court determined that it was appropriate to grant to the brother of the disappeared victim, in equity, the amount of US\$15,000 for the medical treatment received, because it had been proven that his ailments occurred due to the situation of the disappearance of his brother; the uncertainty, the suffering caused by his brother's death, and his frustration and impotence in the face of the lack of results of the factual investigations and their later cover up. (para. 50)

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Moral Damages: The Court holds that the grave moral damage suffered by the four family members is completely proven and it is considered equitable to award US\$30,000 to each one of the four. (paras. 56 to 58)

Costs and Expenses: It falls to the Court to carefully assess the specific scope of those expenses, for even though the attorneys for the injured party worked gratuitously, the Tribunal understands that they had to incur certain expenses to process the present case before the Inter-American system for the protection of human rights, for which reason the Court considers it equitable to grant to the injured party indemnification of US\$10,000 as compensation for the expenses resulting from its actions before this system. (para. 70)

The Court decided:

1. To order the State to investigate the facts of the present case, identify and punish those responsible, and adopt the measures in its domestic law that are necessary to assure compliance with this obligation, of which it will inform the Court, semi-annually, until the end of the corresponding actions.
2. To order the State of Guatemala to pay US\$151,000.00 to be distributed: i. US\$30,000.00 as moral damages to each of the victims (family members of the victim). ii. US\$15,000.00 as medical expenses to his brother. iii. US\$16,000.00 as expenses of an extrajudicial nature. Also, US\$10,000.00 for the costs and expenses incurred in the processing of the case before the Inter-American System.
3. To order the payments within six months of the notification of the Judgment.
4. To order exemption from existing or future tax or duty.

Blake Case, Series C No. 57, Interpretation of the Judgment of Reparations, Judgment of October 1st, 1999

Facts: This judgment evaluates the terms of the Blake Case's Judgment of January 22, 1999 from Series C No. 48. The interpretation affirms that reparation shall be given for the expenses of an extra-judicial nature and the reimbursement of expenses incurred in processing the case before the Inter-American system for the protection of human rights.

Violations: Article 8(1) Right to a fair trial- judicial guarantees; Article 5 Right to humane treatment

*All these articles in relation to Article 1(1) (general obligation to respect rights)

Legal Basis for Reparation: The Court clarifies that Article 23 of its Rules of Procedure recognized *locus standi* to the victims, their next of kin or their representatives, and this condition allows them to submit their own arguments and evidence independently during the reparations stage and their right to reimbursement of representation-related expenses to be recognized. (para 16)

(The new Rules of Procedure of the Court (May 2001) in article 35(4) establishes the autonomy of representation of the victim)

The Court has said that "in practice, the legal assistance provided to the victim does not begin with the reparations phase; instead, it begins with the proceedings before the domestic courts and continues throughout each phase of the proceedings under the Inter-American system for the protection of human rights, in other words, in the proceedings conducted before the Commission and before the Court..." (*Garrido y Baigorra Case*, Reparations, Judgment of August 27th, 1998, Series C No: 39, para. 81) (para. 27)

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

Facts: In 1993, the Peruvian government detained Luis Alberto Cantoral Benavides, a 20 year-old University biology student at the time, based on treason and terrorism charges. He was pardoned for the charges four years later, in 1997. During his four years of detainment and as a result of the punishment he endured, Cantoral Benavides suffers from severe psychiatric and physical disorders and is no longer living in Peru for fear of his personal freedom and safety. Moreover, the victim was unable to complete his studies and therefore does not have a higher degree to assist him in obtaining work. The victim's brother, Luis Fernando Cantoral Benavides suffered a similar fate. Further, the family of Luis Alberto shared in his pain and consequently suffered both physical and emotional. Reparations were awarded to the victim as well as his mother and three brothers for material and moral damage. Payment was also awarded to the victim's legal representatives. The Peruvian Supreme Court was ordered to reverse the verdict of conviction delivered against the victim and that the state should nullify any proceedings that may exist against the victim. Other forms of reparation included public apology, medical treatment for his mother, investigation of the facts, and an academic fellowship for the victim to pursue his university studies.

Violations: Article 5 Right to Humane Treatment; Article 7 Right to personal liberty; Article 8 Right to a fair trial (judicial guarantees); Article 9 Freedom from ex post facto laws. Article 7.6 and Article 25.1 Right to an effective habeas corpus; Article 1.1 General obligation to respect and protect rights; Article 2 Domestic Legal Remedies; Articles 2, 6, 8

of the Inter-American Convention against Torture.

Legal Basis for Reparation Article 63.1 ACHR codifies a norm of customary law, which constitutes one of the most fundamental principles in contemporary international law with regard to State responsibility. Thus, when an illicit act was performed and the State is to blame, the international responsibility comes to light immediately; subsequently, the State has the duty to repair and to make the consequences of the violation stop. [Cesti Hurtado Case, reparations, at para. 35; “Street Children” Case (Villagrán Morales et al.), reparations, at para. 62; Case of the “Panel Blanca” (Paniagua Morales et al.), reparations, at para. 78]. (para. 40)

The reparation for the damage inflicted because of the breach of an international obligation requires, if possible, the entire restitution (*restitutio in integrum*), which consists of the reestablishment of the situation prior to the violation. When this is not viable, an international tribunal is allowed to order the adoption of measures that tend to guarantee the rights violated and to repair the consequences that such abuse produced, including, among others, the payment of compensation as a consequence of the harm inflicted. [Cesti Hurtado Case, reparations, at para. 33; “Street Children” Case (Villagrán Morales et al.), reparations, at para. 60; Case of the “Panel Blanca” (Paniagua Morales et al.), reparations, at para. 76]. (para. 25)

The obligation to repair is regulated in all its aspects (scope, nature, forms, and the determination of beneficiaries) by international law and the State cannot disobey or modify so by invoking its internal law. (para. 41, *in fine*).

[Cesti Hurtado Case, reparations, at para. 34; “Street Children” Case (Villagrán Morales et al.), reparations, at para. 61; Case of the “Panel Blanca” (Paniagua Morales et al.), reparations, at para. 77].

Reparations consist of measures that are intended to eliminate the effects of the violation that was committed. Their nature and amount depend on the damage done both at the material and moral levels. Reparations are not meant to enrich or impoverish the victim or his heirs. [Cesti Hurtado Case, reparations, at para. 36; “Street Children” Case (Villagrán Morales et al.), reparations, at para. 63; Case of the “Panel Blanca” (Paniagua Morales et al.), reparations, at para. 79]. (para. 42)

The reparations decreed must be in accordance to the violations found in the merits phase. (para. 42, *in fine*)

Obligation to afford effective remedies: The State is obliged to combat impunity, because it permits the persistent repetition of human rights violations and the vulnerability of the victims and their relatives. [Cfr. Cesti Hurtado Case, reparations, at para. 63; “Street Children” Case (Villagrán Morales et al.), reparations, at para. 100; Case of the “Panel Blanca” (Paniagua Morales et al.), reparations, at para. 201] (para. 69)

Otherwise, if the State does not sanction the human rights violations, it is in breach of article 1.1 of the Convention. (para. 69, *in fine*)

[Cfr. “Street Children” Case (Villagrán Morales et al.), reparations, at para. 99; Case of the “Panel Blanca” (Paniagua Morales et al.), reparations, at para. 199; Bámaca Velásquez Case, merits, at para. 129]

The Court emphasised the right that the victims’ and their family have as to know what happened. [Cfr. “Street Children” Case (Villagrán Morales et al.), reparations, at para. 100; Case of the “Panel Blanca” (Paniagua Morales et al.), reparations, at para. 200; Aloeboetoe et al. Case, reparations, at para. 109] (para. 69) Also, it reiterated the right to know which agents of the State were responsible for the violations in a specific case. Therefore, the identification and sanction to those responsible is understood as a means of reparation. (para. 69, 70)

This State’s obligation must be performed seriously and not as a mere formality. [Cfr. Cesti Hurtado Case, reparations, at para. 62; “Street Children” Case (Villagrán Morales et al.), reparations, at para. 100; Case of the “Panel Blanca” (Paniagua Morales et al.), reparations, at para. 200] (para. 69)

Forms of Reparation

Material Damages: The *lucrum cessans* decreed by the Court included two periods and aspects: the first one related the time in which the victim had stayed in prison (para. 49, a); whereas the second corresponded to the salaries the victim would have earned as a professional (biologist) in its early years. The latter compensation should embrace the time since he was released from prison until the date of the reparations judgment. (para. 49, b)

The *lucrum cessans* established by the Court took into account the relevant domestic law, which included the annual bonuses. The resulting amount should be updated to the date of the reparations judgment. (para. 49, *in fine*)

Moral damage: The Court defined the moral damage as the consequences derived from the facts, which lack economic or other character and, third, cannot be valued in monetary terms. The moral damage embraces the suffering as well as the afflictions caused to the direct victims and their next of kin, as well as the lessening of very significant values, other disturbances that are not feasible to be measured in economic terms. It also includes the alterations in the living conditions of the victim and his family.

Due to the impossibility to afford an economic value to the moral damage, the Court might compensate in two ways:

By paying a monetary award or by supplying goods and services that can be estimated monetarily, which are to be decided by the Court according to equity.

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By the carrying out of public acts and performances that tend to recover the memory of the victims; the restoration of their dignity, the consolation of their beloved, or the diffusion of an official rejection to the human rights violations of a certain case, as well as the State's commitment that it will act with the due diligence so as to impede that such heinous acts will not happen again. [Cfr. "Street Children" Case (Villagrán Morales et al.), reparations, at para. 84]. (para. 53)

The Court reiterated that the judgment, *per se*, could be considered as a form of compensation for moral damage. [Cfr. The Mayagna (Sumo) Awas Tingni Community Case, Series C No. at para. 166; Cesti Hurtado Case, reparations, at para. 51; "Street Children" Case (Villagrán Morales et al.), reparations, at para. 88] (para.57)

Notwithstanding that, the Court concluded that the State must pay for the moral damages caused, according to equity [Cfr. The Mayagna (Sumo) Awas Tingni Community Case, Series C No. at para. 167; Cesti Hurtado Case, reparations, at para. 51; "Street Children" Case (Villagrán Morales et al.), reparations, at para. 88]. In deciding so, it took into account the gravity of the circumstances in the case; the intensity of the grievance that the facts caused to the victim; that some suffering was produced to his family; the alterations in the living conditions of the victim and his relatives and other immaterial consequences to the latter. (para.57, *in fine*)

In order to determine immaterial (moral) damage, the Court took into consideration the hostile and restrictive prison conditions; that he was tortured and was subject of different cruel, inhuman and degrading treatments, which caused him intense physical pain and emotional suffering. Moreover, it was determined that the domestic procedure against him did not fulfil due process requisites... and last but not least, that the tortured has not been investigated. (para. 59)

The Court reaffirmed its jurisprudence by reiterating that a moral damage suffered by the parents of the victim is presumed and, hence, does not have to be probed. [Cfr. "Street Children" Case (Villagrán Morales et al.), reparations, at para. 66; Castillo Páez Case, reparations, at para. 88] (para. 61, a)

Notwithstanding that, the Court recognised that the victim's mother had assumed personally the responsibility of releasing her son and that also she witnessed the prison conditions lived by her son. In the Court's view, that implies a psychological maltreatment. Furthermore, she was humiliated, harassed and frightened; ...Her family was disintegrated; her other sons had to leave the country because of the situation lived in Peru. Finally, her health has diminished since her son was arrested. (para. 61, a)

The Court considered that in order to determine the moral damage among brothers, it has to pay attention to the relationship between them, and the affection that exists. [Cfr. Case of the "Panel Blanca" (Paniagua Morales et al.), reparations, at para. 109] (para. 61, b)

Life plan (Proyecto de vida)

The Court considered evident that the violations inflicted to the victim had caused an alteration to his life. Those changes obstructed in a particular manner his professional life, thus, causing lessening to his life plan. (para. 60) [Loayza Tamayo Case, reparations, at para. 147]

Fees and expenses: Fees and expenses must be understood within the definition of reparation guaranteed by article 63.1 of the American Convention. The Court considered that this concept of fees embraces the needed and reasonable expenses to accede the Inter-American system for the protection of human rights, which includes, the costs of those who gave legal advice. (para. 85)

It is up to the Court to determine the reach of the costs and fees. The Court does that, by taking into account the circumstances of the case and the nature of the international jurisdiction for the protection of human rights, which has different features from the domestic courts. [Cesti Hurtado Case, reparations, at para. 71; "Street Children" Case (Villagrán Morales et al.), reparations, at para. 107; Case of the "Panel Blanca" (Paniagua Morales et al.), reparations, at para. 212] (para. 85, *in fine*)

The costs embrace both the domestic and international litigation of the case, including in the latter the Commission and the Court. (para. 86)

[Cfr. The Mayagna (Sumo) Awas Tingni Community Case, Series C No. at para. 168; Cesti Hurtado Case, reparations, at para. 72; "Street Children" Case (Villagrán Morales et al.), reparations, at para. 108]

Reparation Afforded to Victim or his/her Family

Material damages: The Court resolved in equity that US\$24.000,00 was enough amount to compensate the salaries that the victim would have perceived if he was not in prison. (para. 49, *in fine*); For the medical treatment of Luis Alberto Cantoral Benavides (direct victim) during his incarceration (US\$1.000,00); For future medical treatment of the afore-mentioned victim, considering that there was enough evidence demonstrating that the suffering of the victim was originated while in prison. Therefore, the Court granted in equity the sum of US\$10.000,00 to Luis Alberto Cantoral Benavides. The Court settled a sum regarding to the costs of transportation in which the family had incurred with the aim of visiting their relative in prison. The Court decided in equity the amount of US\$500,00, which had to be paid to Mrs. Benavides López (the victim's mother). The Court considered it proved that the mother of the victim had suffered and still has physical and psychological pain, which was originated by the imprisonment and situation of her son. Hence, it gave US\$1.500,00 for medical treatment. Because Fernando Cantoral Benavides (brother of the victim) was very affected and hence needed medical and psychological aid, the Court decided in equity to confer him the sum of US\$3.000,00.

Moral damage: The Court determined that the moral damage should be paid in equity. (para. 62)

To the direct victim, Luis Alberto Cantoral Benavides, US\$60.000,00; To the victim's mother, US\$40.000,00; To the victim's brother, Luis Fernando Cantoral Benavides, US\$20.000,00; To the victim's brother, Isaac Alonso Cantoral Benavides, US\$5.000,00; To the victim's brother, José Antonio Cantoral Benavides, US\$3.000,00.

Costs and expenses: The State must pay US\$8.000,00. The Court estimated in equity the costs due to the lack of evidence presented by the victim's attorneys. (para. 87)

Other forms of reparation: The State must leave without effect the domestic judgment that condemns the direct victim. The Court ordered the State the annulment of any criminal, administrative or judicial records against Luis Alberto Cantoral Benavides. (para. 78). The merits judgment must be understood as a form of reparation. (para. 79). Notwithstanding that, the Court determined that the State must publish the operative paragraphs of the merits judgment in the official journal and in other nation-wide journal. (para. 79, in fine). The State must publicly make amends to the victim, as recognition of its responsibility in this case and as a guarantee that these violations will not occur again. (para. 81) As reparation for the loss of the victim's life plan, the Court ordered the State to grant him a scholarship for graduate studies in a recognised institution, and will provide him with monthly fees for living expenses. Both the victim and the State shall choose the university.

(para. 80) The State must provide medical treatment to the victim's mother. The State must investigate the violations, identify and sanction those responsible. The State must comply with the reparations within the next six months. The payments are free from taxation.

E. EUROPEAN COURT OF HUMAN RIGHTS

Soering v. United Kingdom App. No. 14038/88 Judgment of 7 July 1989

Facts: The applicant, a German national, was detained in prison in England pending extradition to the USA to face charges of murder. The US authorities informed the UK government that it intended to seek the death penalty. The extradition warrant was signed after the House of Lords rejected the applicant's appeal, but pursuant to interim measures before the Commission the applicant was not transferred to the USA. The Court held that the applicant should not be extradited.

Violations: Article 3 (prohibition of torture)

Legal Basis for Reparation: "The decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention" (para 91).

"The effect of Article 13 is to require the provision of a domestic remedy allowing the competent "national authority" both to deal with the substance of the relevant Convention complaint and to grant appropriate relief" [*Silver and others v. United Kingdom* App. No. 5947/72 Judgment of 24 October 1983] (para 120)

Forms of Reparation:

Just Satisfaction: Non-pecuniary damage: Here, due to the particular circumstances (length of detention prior to execution, conditions on death row, the applicant's age and mental state and the possibility of extradition towards Germany) "the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration" (para 111). Although no breach of the Convention has as yet occurred, the fact that the Court found that extradition would breach Article 3 must be taken into account (para 126). The Court considers that its finding regarding Article 3 of itself amounts to adequate just satisfaction for the purposes of Article 50 (now Article 41 – just satisfaction)¹²¹.

Directions regarding application of the judgment. "The Court is not empowered under the Convention to make accessory directions of the kind requested by the applicant"[*Dudgeon v. United Kingdom* App. No. 7525/76 Judgment of 24 February 1983]. The responsibility for supervising execution of the Court's judgment rests with the Committee of Ministers of the Council of Europe (pursuant to Article 46 of the Convention) (para 127).

Costs and Expenses. "The applicant's essential concern, and the bulk of the argument on all sides, focused on the complaint under Article 3, and on that issue the applicant has been successful. The Court therefore considers that in equity the applicant should recover his costs and expenses in full" (para 128).

Reparation Afforded to Victim or his/her Family:

Compensation.

- Pecuniary: N/A
- Non-pecuniary: N/A

Costs and Expenses. Awarded in full: £26,752.80 and 5,030.60 FRF.

Ribitsch v. Austria App. No. 18896/91 Judgment of 4 December 1995

Facts: The applicant complained that while in police custody at the security branch of the Vienna Federal Police Authority he had undergone ill treatment and suffered injuries inflicted by the police officers that had questioned him. The applicant brought proceedings against the police officer, who was convicted of assault occasioning actual bodily

¹²¹ Protocol 11 to the Convention introduced new numbering and some new articles. All references in this document are to the new articles. The Protocol also introduced a single court to replace the European Commission and Court of Human Rights as of 1 November 1998.

harm and sentenced to imprisonment. The conviction was quashed on appeal.
Violations: Article 3 (prohibition of torture)
Legal Basis for Reparation: Article 50 of the Convention provides: "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." (para 41) Under this provision (art. 50) the applicant requested compensation for non-pecuniary damage and reimbursement of his costs and expenses. (para 42)
Forms of Reparation: Compensation. <u>Non-pecuniary damage:</u> "In respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement" of Article 3 (para 38). In the instant case the injuries suffered by Mr Ribitsch show that he underwent ill-treatment which amounted to both inhuman and degrading treatment. (para 39) The Court considered that the applicant had suffered undeniable non-pecuniary damage. It took into account the various relevant factors and made its assessment on an <i>equitable basis</i> (para 46).
Costs and Expenses. The Court made its assessment on an equitable basis and in light of the criteria it applies in this matter (para 50).
Reparation Afforded to Victim or his/her Family: Compensation. - Pecuniary: N/A - Non-pecuniary: 100,000 ATS (£5,656). Costs and Expenses. 200,000 ATS (£11,312) less legal aid received.

<u>Kurt v. Turkey</u> App. No. 24276/94 Judgment of 25 May 1998
Facts: The applicant brought her claim on behalf of herself and her son who had disappeared. Her son was arrested by the security forces and beaten after which the applicant had not seen her son. She complained to the Commission and was intimidated by the authorities to withdraw her complaint.
Violations: Article 3 (prohibition of torture); ¹²² Article 5 (right to liberty and security); ¹²³ Article 13 (right to an effective remedy); Article 25 (now Article 34) (individual applications)
Legal Basis for Reparation: "The unacknowledged detention of an individual is a complete negation of [the guarantees of Article 5] and a most grave violation of Article 5 [...] For this reason, <u>Article 5</u> must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person had been taken into custody and has not been seen since" (para 124). <u>Article 13</u> "requires the provision of a domestic remedy to deal with the substance of the relevant Convention complaint and to grant appropriate relief", although States are granted some discretion as to how to comply. "The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint [...]. The remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities" (referring to <i>Aksoy, Aydin</i> and <i>Kaya</i> ¹²⁴) (para 139). "Where the relatives of a person having an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purpose of Article 13 entails, in addition to payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure" (referring to <i>Aksoy, Aydin</i> and <i>Kaya</i> ¹²⁵) (para 140). "The requirements of

¹²² In respect of the applicant herself, not her son.

¹²³ The Court decided to deal with the applicant's complaints under Article 2 and 3 concerning her son's disappearance under Article 5.

¹²⁴ *Kaya v. Turkey* App. No. 22729/93 Judgment of 19 February 1998.

¹²⁵ See footnote 124.

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Article 13 are a broader than a Contracting State's obligation under Article 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible" (para 140).

Forms of Reparation:

The applicant claimed compensation for non-pecuniary damage as well as reimbursement of costs and expenses under Article 50 of the Convention (para 170)

Compensation. Non-pecuniary damage: The applicant approached the public prosecutor after her son's disappearance, she had witnessed his detention in the village, and had been left with the anguish of knowing her son had been detained with a complete absence of official information as to his subsequent fate (para 133). The Court recalls that it has found the respondent State in breach of Article 5 in respect of the applicant's son. It considers that an award of compensation should be made in his favour having regard to the gravity of the breach in question. [...] which amount is to be paid to the applicant and held by her for her son and his heirs. (para 174)

Moreover, given that the authorities have not assisted the applicant in her search for the truth about the whereabouts of her son, which has led it to find a breach of Articles 3 and 13 in her respect, the Court considers that an award of compensation is also justified in her favour. (para 175)

Costs and Expenses. The Court "is not persuaded of the merits of the claim made on behalf of the [Kurdish Human Rights Project], having been provided with no details on the precise extent of that organisation's involvement in the preparation of the case" (para 180).

Reparation Afforded to Victim or his/her Family:

Compensation.

- Pecuniary: N/A

- Non-pecuniary: £15,000 to the applicant's son, to be held by the applicant for her son and his heirs. £10,000 to the applicant herself.

Costs and Expenses. £15,000 plus VAT less legal aid received.

Selmouni v. France App. No. 25803/92 Judgment of 28 July 1999

Facts: The applicant was arrested and detained on suspicion of involvement in drug trafficking. Following his arrest, he complained in December 1991 that he had been ill treated and had suffered injury. At the time of judgment that case had still not been resolved.

Violations: Article 3 (prohibition of torture); Article 6(1) (right to a fair trial)

Legal Basis for Reparation:

"The Court considers 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 of how those injuries were caused, failing which a clear issue arises under Article 3" (referring to *Tomasi and Ribitsch*) (para 87).

"Where an individual has an arguable claim that there has been a violation of Article 3 (or of Article 2), the notion of an effective remedy entails, on the part of the State, a thorough and effective investigation capable of leading to the identification and punishment of those responsible" (referring to *Aksoy, Assenov*¹²⁶ and *Soering*) (para 79).

"Accordingly, given the lack of convincing explanation by the Government as to the "effectiveness" and "adequacy" of the remedy they relied on, that is, a criminal complaint together with an application to join the proceedings as a civil party, the Court considers that the remedy available to the applicant was not, in the instant case, an ordinary remedy sufficient to afford him redress in respect of the violations he alleged. While emphasising that its decision is limited to the circumstances of this case and must not be interpreted as a general statement to the effect that a criminal complaint together with an application to join the proceedings as a civil party is never a remedy which must be used in the event of an allegation of ill-treatment during police custody, the Court decides that the Government's objection on grounds of failure to exhaust domestic remedies cannot be upheld" (para 81).

Forms of Reparation:

Compensation. Non-pecuniary damage: The Court is satisfied that the physical and mental violence, considered as a whole, committed against the applicant's person caused "severe" pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture" (para 105).

The Court found that the applicant had not proven the more serious allegations of mistreatment. Nevertheless the Court found that in respect of the applicant's detention and the extreme seriousness of the violations he had suffered injury to which the findings of a violation in the judgment did not afford sufficient just satisfaction. It therefore made an award on an equitable basis (para 123).

¹²⁶ *Assenov v. Bulgaria* App. No. 24760/94 Judgment of 28 October 1998.

Other forms of reparation: Request for transfer: The Court dismissed the applicant's request that he be transferred to the Netherlands to serve his sentence: "The Court reiterates that Article 41 does not give it jurisdiction to make such an order against a Contracting State" (para 126). Request regarding attachment: The applicant had asked that any sum paid should be exempt from attachment: the applicant had been ordered to pay jointly and severally a customs fine. "The Court considers that the compensation fixed pursuant to Article 41 and due by virtue of a judgment of the Court should be exempt from attachment. It would be incongruous to award the applicant an amount in compensation for, *inter alia*, ill-treatment constituting a violation of Article 3 of the Convention and costs and expenses incurred in securing that finding if the State itself were then to be both the debtor and creditor in respect of that amount. Although the sums at stake were different in kind, the Court considers that the purpose of compensation for non-pecuniary damage would inevitably be frustrated and the Article 41 system perverted if such a situation were to be deemed satisfactory. However, the Court does not have jurisdiction to accede to such a request" (referring to *Philis*¹²⁷ and *Alenet de Ribemont*¹²⁸) (para 133).

Costs and Expenses. The Court considered that the amount was reasonable and awarded it in full. (para 130)

Reparation Afforded to Victim or his/her Family:

Compensation.

- Pecuniary: N/A
- Non-pecuniary: 500,000 FRF (£50,950).

Costs and Expenses. 113,364 FRF (£11,552) less legal aid.

Taş v. Turkey App. No. 24396/94 Judgment of 14 November 2000

Facts: The applicant's son disappeared following his detention by the security forces. The applicant complained that the authorities had failed to investigate his son's disappearance, that he could be presumed to have died in circumstances for which they were responsible and there had been no further investigation. He further alleged that his son had been the victim of torture and that he himself had also suffered such treatment because of his son's disappearance. In addition he argued that his son's disappearance breached Article 5 and complained of a lack of effective domestic remedy.

Violations:

Article 2 (right to life);¹²⁹ Article 3 (prohibition of torture);¹³⁰ Article 5(1), (3), (5) (right to liberty and security); Article 13 (right to an effective remedy).

Legal Basis for Reparation:

"Where an individual is taken into 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 of how those injuries were caused, failing which an issue arises under Article 3" (referring to *Tomasi, Ribitsch* and *Selmouni*). The obligation to account for injuries is particularly stringent when the individual dies (para 63).

The obligation to protect life under Article 2 read in conjunction with the general obligation on a State under Article 1 "requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force" (referring to *McCann* and *Kaya* (para 68).

Article 5 requires the authorities to "conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since" (referring to *Kurt* and *Çakici*) (para 84).

Article 13 requires the provision of a domestic remedy to deal with the substance of an "arguable claim" and to grant appropriate relief, although States are granted discretion as to how to comply. The remedy must be effective in practice as well as in law and must not be hindered by the authorities (para 91). "Where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, or where a right with as fundamental an importance as the right to life is at stake, Article 13

¹²⁷ *Philis v. Greece* App. No. 12750/87 Judgment of 27 August 1991.

¹²⁸ *Alenet de Ribemont v. France* App. No. 15175/89 Judgment of 7 August 1996.

¹²⁹ Both for the presumed death of the applicant's son and the lack of investigation into the disappearance.

¹³⁰ Only in relation to the applicant.

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requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure” (referring to *Kurt* and *Yasa*) (para 91).

Forms of Reparation:

Compensation. Non-pecuniary damage: Referring to *Kurt*, the Court held that it did not “establish any general principle that a family member of a “disappeared person” is thereby a victim of treatment contrary to Article 3” (para 79). Having regard to the indifference and callousness of the authorities to the applicant’s concerns and the acute anguish and uncertainty which he has suffered as a result and continues to suffer, the Court finds that the applicant may claim to be a victim of the authorities’ conduct, to an extent which discloses a breach of Article 3 of the Convention. (para 80)

The Court noted that awards have been made to surviving spouses and children and where appropriate to applicants who were surviving parents or siblings. It has previously awarded sums as regards the deceased where it was established that there had been arbitrary detention or torture before his disappearance or death (referring to *Kurt* and *Çakıcı*). It found it appropriate here to award damages to be held for the son’s heirs (para 102) and for the applicant due to the conduct of authorities in relation to his search for his son (para 103).

Costs and Expenses. Decided on an equitable basis and having regard to the details of the claims submitted by the applicant. Save as regards translation costs the Court was not persuaded that the fees claimed in respect of the Kurdish Human Rights Project were necessarily incurred (para 106).

Reparation Afforded to Victim or his/her Family:

Compensation: Pecuniary: N/A; Non-pecuniary: £20,000 in respect of the applicant’s son, £10,000 in respect of the applicant.

Costs and Expenses. £14,975 less legal aid received.