

article

2(3). Each State Party to the present Covenant undertakes:

- a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c) To ensure that the competent authorities shall enforce such remedies when granted.

of the International Covenant on Civil and Political Rights

International Covenant on Civil and Political Rights (ICCPR)

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Contents

FOCUS: REPARATION FOR VICTIMS OF HUMAN RIGHTS VIOLATIONS

- The draft Basic Principles and Guidelines on the
Right to a Remedy and Reparation for Victims of
Violations of International Human Rights and
Humanitarian Law 2
- The draft Basic Principles and Guidelines on the
Right to Remedy and Reparation: An effort to develop
a coherent theory and consistent practice of
reparation for victims 6
Gabriela Echeverria, International Legal Adviser, REDRESS
- The right to reparation at the International Criminal Court 20
Carla Ferstman, Legal Director, REDRESS
- Some perspectives on torture victims, reparation and
mental recovery 30
*Paul Dalton, Programme Coordinator,
International Rehabilitation Council for Torture Victims*

KOREA

- The National Human Rights Commission of Korea:
An assessment after one year 38
*Professor Kwak Nohyun, non-standing member,
National Human Rights Commission of Korea*

The draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*

I. OBLIGATION TO RESPECT, ENSURE RESPECT FOR AND ENFORCE INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

1. Every State has the obligation to respect, ensure respect for and enforce international human rights and humanitarian law norms that are, inter alia:

- (a) Contained in treaties to which it is a State party;
- (b) Found in customary international law; or
- (c) Incorporated in its domestic law.

2. To that end, if they have not already done so, States shall ensure that domestic law is consistent with international legal obligations by:

- (a) Incorporating norms of international human rights and humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
- (b) Adopting appropriate and effective judicial and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

* The draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law were submitted to the UN Commission on Human Rights 56th session by Professor M Cherif Bassiouni, Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, under item 11.d of the provisional agenda on 18 January 2000 (E/CN.4/2000/62), as an annex to his final report of that year. The entire document is available at [<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/42bd1bd544910ae3802568a20060e21f?Opendocument>].

(c) Making available adequate, effective and prompt reparation as defined below; and

(d) Ensuring, in the case that there is a difference between national and international norms, that the norm that provides the greatest degree of protection is applied.

II. SCOPE OF THE OBLIGATION

3. The obligation to respect, ensure respect for and enforce international human rights and humanitarian law includes, inter alia, a State's duty to:

(a) Take appropriate legal and administrative measures to prevent violations;

(b) Investigate violations and, where appropriate, take action against the violator in accordance with domestic and international law;

(c) Provide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation;

(d) Afford appropriate remedies to victims; and

(e) Provide for or facilitate reparation to victims.

III. VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW THAT CONSTITUTE CRIMES UNDER INTERNATIONAL LAW

4. Violations of international human rights and humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish perpetrators adjudged to have committed these violations, and to cooperate with and assist States and appropriate international judicial organs in the investigation and prosecution of these violations.

5. To that end, States shall incorporate within their domestic law appropriate provisions providing for universal jurisdiction over crimes under international law and appropriate legislation to facilitate extradition or surrender of offenders to other States and to international judicial bodies and to provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to and protection of victims and witnesses.

IV. STATUTES OF LIMITATIONS

6. Statutes of limitations shall not apply for prosecuting violations of international human rights and humanitarian law norms that constitute crimes under international law.

7. Statutes of limitations for prosecuting other violations or pursuing civil claims should not unduly restrict the ability of a victim to pursue a claim against the perpetrator, and should not apply with respect to periods during which no effective remedies exist for violations of human rights and international humanitarian law norms.

V. VICTIMS OF VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

8. A person is “a victim” where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person’s fundamental legal rights. A “victim” may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm.

9. A person’s status as “a victim” should not depend on any relationship that may exist or may have existed between the victim and the perpetrator, or whether the perpetrator of the violation has been identified, apprehended, prosecuted, or convicted.

VI. TREATMENT OF VICTIMS

10. Victims should be treated by the State and, where applicable, by intergovernmental and non-governmental organizations and private enterprises with compassion and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety and privacy as well as that of their families. The State should ensure that its domestic laws, as much as possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her retraumatization in the course of legal and administrative procedures designed to provide justice and reparation.

VII. VICTIMS’ RIGHT TO A REMEDY

11. Remedies for violations of international human rights and humanitarian law include the victim’s right to:

- (a) Access justice;
- (b) Reparation for harm suffered; and
- (c) Access the factual information concerning the violations.

VIII. VICTIMS' RIGHT TO ACCESS JUSTICE

12. A victim's right of access to justice includes all available judicial, administrative, or other public processes under existing domestic laws as well as under international law. Obligations arising under international law to secure the individual or collective right to access justice and fair and impartial proceedings should be made available under domestic laws. To that end, States should:

(a) Make known, through public and private mechanisms, all available remedies for violations of international human rights and humanitarian law;

(b) Take measures to minimize the inconvenience to victims, protect their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during, and after judicial, administrative, or other proceedings that affect the interests of victims;

(c) Make available all appropriate diplomatic and legal means to ensure that victims can exercise their rights to a remedy and reparation for violations of international human rights or humanitarian law.

13. In addition to individual access to justice, adequate provisions should also be made to allow groups of victims to present collective claims for reparation and to receive reparation collectively.

14. The right to an adequate, effective and prompt remedy against a violation of international human rights or humanitarian law includes all available international processes in which an individual may have legal standing and should be without prejudice to any other domestic remedies.

IX. VICTIMS' RIGHT TO REPARATION

15. Adequate, effective and prompt reparation shall be intended to promote justice by redressing violations of international human rights or humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered.

16. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for its acts or omissions constituting violations of international human rights and humanitarian law norms.

17. In cases where the violation is not attributable to the State, the party responsible for the violation should provide reparation to the victim or to the State if the State has already provided reparation to the victim.

18. In the event that the party responsible for the violation is unable or unwilling to meet these obligations, the State should endeavour to provide reparation to victims who have sustained bodily injury or impairment of physical or mental health as a result of these violations and to the families, in particular

dependants of persons who have died or become physically or mentally incapacitated as a result of the violation. To that end, States should endeavour to establish national funds for reparation to victims and seek other sources of funds wherever necessary to supplement these.

19. A State shall enforce its domestic judgements for reparation against private individuals or entities responsible for the violations. States shall endeavour to enforce valid foreign judgements for reparation against private individuals or entities responsible for the violations.

20. In cases where the State or Government under whose authority the violation occurred is no longer in existence, the State or Government successor in title should provide reparation to the victims.

X. FORMS OF REPARATION

21. In accordance with their domestic law and international obligations, and taking account of individual circumstances, States should provide victims of violations of international human rights and humanitarian law the following forms of reparation: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.

22. Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property.

23. 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.

24. Rehabilitation should include medical and psychological care as well as legal and social services.

25. Satisfaction and guarantees of non-repetition should include, where applicable, any or all of the following:

(a) Cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;

(c) The search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim;

(e) Apology, including public acknowledgement of the facts and acceptance of responsibility;

(f) Judicial or administrative sanctions against persons responsible for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels;

(i) Preventing the recurrence of violations by such means as:

(i) Ensuring effective civilian control of military and security forces;

(ii) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces;

(iii) Strengthening the independence of the judiciary;

(iv) Protecting persons in the legal, media and other related professions and human rights defenders;

(v) 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;

(vi) 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;

(vii) Creating mechanisms for monitoring conflict resolution and preventive intervention.

XI. PUBLIC ACCESS TO INFORMATION

26. States should develop means of informing the general public and in particular victims of violations of international human rights and humanitarian law of the rights and remedies contained within these principles and guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access.

XII. NON-DISCRIMINATION AMONG VICTIMS

27. The application and interpretation of these principles and guidelines must be consistent with internationally recognized human rights law and be without any adverse distinction founded on grounds such as race, colour, gender, sexual orientation, age, language, religion, political or religious belief, national, ethnic or social origin, wealth, birth, family or other status, or disability.

The draft Basic Principles and Guidelines on the Right to Remedy and Reparation: An effort to develop a coherent theory and consistent practice of reparation for victims

Gabriela Echeverria, International Legal Adviser,
REDRESS

Introduction: The development of victims' rights in international law¹

International law governing human rights abuses has developed rapidly since the end of the Second World War.² The state-centric international legal order of the late eighteenth to early twentieth centuries safeguarded individuals only in relation to certain conduct by states other than their own, such as enemy nations or states where they might reside or exercise commercial activities. The international legal system therefore originally approached the question of what to do about the victims of conflicts as a subsidiary element in disputes between states, and consequently policy was driven by the extent of a state's liability when harming another state. In contrast, today there is an extensive corpus of law designed to protect all individuals from the abuses of governments, including ones own, both in times of peace and war. International law is also increasingly concerned with the individuals involved in atrocities, whether perpetrator or victim.

When the United Nations was created, the protection of human rights became a fundamental aim of modern international law. However, the lack of a human rights 'catalogue' in the UN Charter has led the international community to continuously define and codify human rights. This endeavour began with the adoption on 10 December 1948 of the Universal Declaration of Human Rights, and since then by numerous instruments, including the International Covenant on Civil and Political Rights and recently the Statute of the International Criminal Court.³

“In recent decades the plight of victims has received increased international attention in law and policy”

Alongside these efforts, many organs and procedures, like the Human Rights Committee and the Committee Against Torture, have been created to monitor state compliance with the prescribed norms. Regional human rights bodies, such as the European Court of Human Rights and the Inter-American Commission and Court of Human Rights, have also been established. Parallel efforts by the International Committee of the Red Cross (ICRC) to update the principles of international humanitarian law resulted in the four Geneva Conventions of 1949 and corresponding protocols, which aim to prevent or otherwise punish atrocities committed during wartime.⁴

The efforts of the United Nations and its specialized agencies—together with the regional human rights mechanisms and the ICRC—had substantive results. Today a vast body of human rights and humanitarian law forms part of the international order. However, the international legal system is still weak in two of the most common procedures existing in domestic legal systems to remedy and deter wrongdoing: criminal sanctions and civil remedies. Yet new mechanisms are being developed: various forms of international justice complement national justice in the fight against impunity, like the International Criminal Court (ICC) and the United Nations ad hoc tribunals.⁵ States are also legislating to allow extraterritorial civil suits and criminal prosecutions.⁶

As a consequence, in recent decades the plight of victims has received increased international attention in law and policy. Whereas international law formerly concentrated on the violations, it has evolved to reflect newly recognized values and demands for accountability where international atrocities occur: the struggle against impunity is now concentrated on the individuals involved, that is, the perpetrator and the victim. In Nuremberg it was pointed out that “international wrongs are committed by individuals and not by abstract entities”.⁷ The rule of law thus demands that the perpetrator be held accountable and the victim protected and given redress. Justice necessitates reparation.

International law and the right to reparation for victims of human rights violations

The right to reparation is a fundamental right of general international law. As established by the Permanent Court of International Justice and upheld by international jurisprudence, the breach of an international obligation entails the duty to make reparations.⁸ The International Law Commission has reaffirmed this principle recently.⁹ International human rights law is not an exception to this principle: states must provide reparation whenever there is a breach of an international obligation, irrespective of origin. Furthermore, where states violate their duty to respect—and ensure respect for—human rights, an independent international obligation to provide reparation also arises. Both international human rights treaties and declarative

instruments support this principle, and international tribunals have recognised it.¹⁰ Similarly, when the norms of international humanitarian law are breached, a duty to make reparations also arises.¹¹

Global and regional human rights instruments expressly guarantee the right to a remedy for violations. In most cases this consists of both the procedural right to a fair hearing (through judicial or non-judicial remedies, or both) and the substantive right to reparations.¹² This guarantee implies that a wrongdoing state has the primary duty to offer redress to its victims. The role of international tribunals is subsidiary and only becomes necessary and possible when the state has failed to afford the required relief.¹³

Reparation should be adequate, effective, prompt, and proportional to the gravity and harm suffered. It should include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁴ However violations in human rights and humanitarian law are by their very nature irreparable, and any remedy will fail to be truly proportional to the gravity of the injury inflicted, particularly when the violations have been committed on a massive scale.¹⁵ Remedies must therefore concentrate on the accountability of the wrongdoers and on the restoration of the rights and dignity of victims.

The right to a remedy is not only a basic principle of general international law but is also a pillar of the rule of law and democracy.¹⁶ As noted, an extensive body of international norms on reparations for abuses of human rights and international humanitarian law has developed since the Second World War. Nowadays, a variety of international instruments at both the universal and regional levels refer to the right of victims to an effective remedy, and to obtain restitution, compensation and rehabilitation.¹⁷ Furthermore, United Nations treaty-based bodies and European, Inter-American and African human rights organs have dealt extensively with the right to a remedy and reparation as well as states' obligations to guarantee this right.¹⁸ Thematic and country mechanisms of the Commission on Human Rights have also developed comprehensive doctrine on the question.

It is clear, therefore, that a broad corpus of law on the subject of reparations exists and that it is possible to determine, from international instruments and jurisprudence, the definition, scope and nature of these rights. However, the abundant jurisprudence and international norms are extremely dispersed. International instruments approach reparations and the right to an effective remedy from the specific position of the rights they are designed to protect, whether the right to life, the right to liberty and security, freedom from torture, freedom from slavery, or whatever else. The body of law is thus fragmented. The sudden development and unprecedented nature of international human rights law, as well as its rapid expansion

“Reparation should be adequate, effective, prompt, and proportional to the gravity and harm suffered”

“The draft Basic Principles have two clear goals: to provide for effective and enforceable remedies for victims and to uphold the public interest by deterring future violations”

in recent years, has created an uneven proliferation of international complaint mechanisms and techniques with a mixture of remedies.

Domestic laws and judgements exhibit different standards and interpretations of the right to reparation. In particular, national institutions created to fulfil international obligations in the aftermath of gross and systematic violations have taken on different legal, judicial and administrative forms, leading to diverse responses to the right to reparation. Terms such as “reparation”, “restitution”, “compensation”, “rehabilitation”, “remedy”, and “redress” for human rights violations appear in a large number of international, regional and municipal instruments and jurisprudence, as well as in UN resolutions and reports. Taken cumulatively, these initiatives lead to a multiplicity of standards, principles and interpretations that may seriously obstruct clear application of applicable international norms on the right to reparation.

Efforts to systematize the corpus of law on the right to reparation

In the early 1990s, the United Nations Sub-Commission on Human Rights, recognizing the importance of the subject and the necessity to clarify the basic standards of reparation in international law, appointed Professor Theo van Boven as Special Rapporteur to consider the right to restitution, compensation and rehabilitation of gross violations of human rights and fundamental freedoms, and to prepare draft guidelines on this question in the light of existing relevant international instruments.

The studies prepared by Professor van Boven on the subject are a valuable systematisation of this corpus of law. Furthermore, the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law—prepared initially by Professor van Boven and subsequently by Professor M Cherif Bassiouni—constitute a significant contribution to the codification of these norms.¹⁹ These principles, even in draft form, are becoming a point of reference for international jurisprudence and national practice. The Inter-American Court of Human Rights, for example, has referred to the draft Basic Principles in several rulings.²⁰ And in general, since the drafting of these principles, the jurisprudence and doctrine from both universal and regional systems has echoed many of their provisions.²¹ Furthermore, the draft Basic Principles have been used as the basis for new remedies in national and international fora, as well as a standard for governments when implementing administrative measures and programs for victims.²²

The draft Basic Principles and Guidelines

The draft Basic Principles and Guidelines have two clear goals: first, to provide for effective and enforceable remedies for victims; secondly, to uphold the public interest by deterring future violations. In this way, the draft Basic Principles take into account the object and purpose of human rights treaties and the concept of obligations *erga omnes*: obligations owed to the international community as a whole, and binding irrespective of consent.²³

The draft Basic Principles are the result of an extensive study of legal sources on reparation in conventional and customary international law, and as such they reflect existing norms. However, they do not constitute a treaty, as they were drafted with a view to applying their provisions in light of current and future developments. They thus crystallize principles already forming part of international law (existing norms), as well as emerging concepts.

The draft Basic Principles are victim-oriented, and are applied equally to all breaches of human rights and humanitarian law resulting in the harm of individuals or groups; they are not restricted to a certain type of violation. They propose a comprehensive regime for redress that is consistent with the latest developments in international law.²⁴ For example, they establish that statutes of limitation shall not apply to violations that constitute crimes under international law, and that no limitation period should apply for other violations or for civil claims when no effective remedy existed for that violation. This principle not only takes into account the particularity of these severe crimes and the specific needs of the victims, but also rightly reflects a doctrine recognized in other international instruments and jurisprudence.²⁵

In an attempt to systematize the law of reparation, the draft Basic Principles aim to answer the many questions that arise when implementing this right: *Who* is entitled to a remedy? *Who* can commit violations that will carry an obligation to afford reparations? Does remedial justice demand the prosecution and punishment of those responsible for the violations? What part should the gravity of the offence play in the reparations awarded? *What criteria* should be applied to determine the type of reparation afforded (monetary compensation or other)?

In sum, the key elements in the draft Basic Principles are:

Definition of a victim and victims' rights

- Who a "victim" is;
- The treatment of victims;
- The right to an effective remedy and access to justice;
- The right to reparation and forms of reparation;
- Non-discrimination among victims.

“The draft Basic Principles are victim-oriented, and are applied equally to all breaches of human rights and humanitarian law resulting in the harm of individuals or groups”

“It is essential that the United Nations system have a universal instrument on the right to a remedy and reparation in international law”

States’ obligations

- The obligation of states to respect, ensure respect for and enforce international human rights and humanitarian law;
- The scope and limits of states’ obligations (including in the areas of prevention, investigation, punishment; remedy and reparation);
- The draft Basic Principles are victim-oriented, and are applied equally to all breaches of human rights and humanitarian law resulting in the harm of individuals or groups
- The continuing obligation of states to afford remedies, and the obligation of succeeding governments or states to provide reparations.

Procedural issues

- Incorporation within domestic law of appropriate provisions providing universal jurisdiction over crimes under international law (extradition, judicial assistance and assistance and protection to victims and witnesses);
- Statute of limitations and continuing violations.

As stated, the goal of the draft Basic Principles is to define the scope of the right to a remedy and reparation in international law, and allow for future remedies. However, this instrument is still being finalised (see annex) and the scope of some of its provisions in international law is yet to be clarified. Amendments may also be necessary to differentiate the provisions reflecting existing obligations under international law and those reflecting emerging norms, as well as to include some of the latest developments on the subject (like the right of victims to participate during proceedings recognized in art. 68 of the ICC Statute).

Conclusion

Remedies and reparations not only provide redress for the victims, but also serve the community interest by punishing the perpetrator and deterring future violations by the same or other wrongdoers. They serve the rule of law at all levels of society and are an essential element of justice.

Under international law, there is a well-established right entitling victims of human rights abuses to a remedy and reparations for their loss and suffering. The corpus of law regulating this principle, however, is dispersed and not systematized. The sudden opening of avenues for redress has created a mixture of remedies. In addition, different international, regional and municipal instruments and procedures are currently developing standards on this right. Therefore, there is a clear need for defined basic standards of the right to reparation in international law. The body of norms containing the basic principles of the right to reparation should be coherent and

universal. This would result in standards that are amenable to universal application by all states, reflecting the various legal cultures and traditions of the world, rather than those of only one or some sections.

It is essential that the United Nations system have a universal instrument on the right to a remedy and reparation in international law. A coherent and universal set of norms regulating this right would:

- Guarantee that the victim is the *point of departure* for the application and development of the right to reparation;
- Clarify the *terminology* and thus prevent inconsistencies that may seriously obfuscate a clear rendering of the applicable international legal norms on the right to “reparation”;
- Reflect *standards* that are acquiescent to universal application by all states; and finally,
- Ensure that the *measure* of damages should always *correlate* to the *gravity* of harm suffered.

For this purpose, the draft Basic Principles represent a necessary and invaluable reference. Their adoption, subject to further consultations and possible changes, would be a significant contribution to the full and adequate recognition of the right to an effective remedy and reparations. Furthermore, such an instrument would be a valuable tool for states to fulfil their obligations to guarantee an effective remedy, to provide reparation for violations of international human rights and humanitarian law and to contribute to the prevention of such violations.

End Notes

¹ In keeping with the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, in this article the term “reparation” refers to the range of measures that may be taken in response to an actual or threatened violation; it embraces both the substance of relief as well as the procedure through which it may be obtained. “Remedy” or “remedies” refers to the (procedural) means by which a right is enforced or the violation of a right is prevented, redressed or compensated. Finally, the terms “reparations” and “redress” refer to the substance of the relief afforded, such as an award for damages or a public apology.

² For a discussion of the development of human rights law and the victim’s right to a remedy, see Dinah Shelton, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 1999, pp. 1-37.

³ The International Covenant on Civil and Political Rights, 16 December 1966, entered into force on 23 March 1976, GA Res. 2200A (XXI), UN Doc. A/6316, 1966, 999 UN T S 171. The Statute of the International Criminal Court, 17 July 1998, entered into force on 1 July 2002, UN Doc. A/CONF183/9.

⁴ Previously, the principles governing the laws of war were those in the Geneva Convention of 1864, reinforced by the Geneva Convention of 1906 and Hague Conventions of 1899 and 1907, and updated by the Geneva Conventions of 1929.

⁵ Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/25704, annex, 1990. Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES/995, annex, 1994.

⁶ As established in principle 3 of the 1973 UN Principles of International Co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, "States shall co-operate with each other on bilateral and multilateral basis with a view to halting and preventing war crimes against humanity, and shall take the domestic and international measures necessary for that purpose." UN GA Res. 3074 (XXVIII) of 3 December 1973. Many Conventions also specify the obligation for State Parties to implement universal jurisdiction legislation, such as the Convention against Torture and other Cruel Inhuman and Degrading Treatment or Punishment. UN GA Res. 39/46, 10 December 1984.

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

⁸ *Factory at Chorzow*, Jurisdiction, Judgement No. 8, 1927, PCIJ, ser. A, no. 17, p. 29. Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports, 1949, p. 184. Interpretation des traites de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif, CIJ, 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". ILC Draft Articles on State Responsibility, UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001.

⁹ See Report of International Law Commission, 53rd session, 23 April–1 June & 2 July–10 August 2002, Official Document of the General Assembly, 56th Session, Addendum No. 10, A/56/10.

¹⁰ These include the Universal Declaration of Human Rights (art. 8), the International Covenant on Civil and Political Rights (arts 2.3, 9.5 & 14.6), the International Convention on the Elimination of All Forms of Racial Discrimination (art. 6), the Convention of the Rights of the Child (art. 39), the Convention against Torture and other Cruel Inhuman and Degrading Treatment (art.14), and the Rome Statute for an International Criminal Court (art. 75). It is also established in the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (rule 106), as well as in several regional instruments, including the European Convention on Human Rights (arts 5.5, 13 & 41) the Inter-American Convention on Human Rights (arts 25, 68 & 63.1), and the African Charter of Human and Peoples' Rights (art. 21.2). It is also important to mention the following international standards: the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by GA Res. 40/34, 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (art. 19), GA Res. 47/133, 18 December 1992; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by the Economic and Social Council resolution 1989/65, 24 May 1989 (principle 20); and, the Declaration on the Elimination of Violence against Women. Among international tribunals, the principle was upheld in the ruling of the

Inter-American Court of Human Rights in the *Velásquez Rodríguez Case*, ser. C, no. 4, 1989, para. 174. See also *Papamichalopoulos vs. Greece*, art. 50, ECHR, ser. A, no. 330-B, 1995, p. 36.

¹¹ 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 ICC used the Draft Principles as a reference. A/CONF.183/C.1/WGPM/L.2/Add.7, 13 July 1998, p.5, note 5.

¹² Some instruments call for the development of judicial remedies for the rights they guarantee, although effective remedies could be supplied by non-judicial bodies. See for instance, the International Covenant on Civil and Political Rights, article 2.3.b. On the substantive right, see Jeremy McBride, 'Access to Justice and Human Rights Treaties', 17 Civil Justice Q 235, 1998.

¹³ Shelton, *Remedies in International Human Rights Law*.

¹⁴ Theo van Boven, Final Report to the Sub-Commission on Prevention and Discrimination and Protection of Minorities, UN Commission on Human Rights, E/CN.4/1997/104, 16 January 1997.

¹⁵ Van Boven, Final Report.

¹⁶ Council of Europe, Resolution 78.8 of the Committee of Ministers, cited by G Meleander, 'Article 8', in *The Universal Declaration of Human Rights: A commentary*, Asbjorn Eide et al. (eds), Scandinavian University Press, Oxford, 1992, p.143. *Blake v. Guatemala*, Reparations, para. 63. See also *Castillo Paez v. Peru*, 1997, 34 Inter-Am. Ct HR, ser. C, paras 82-3. *Suárez Rosero v. Ecuador*, 1998, 375 Inter-Am. Ct HR; 1985, 35 Inter-Am. Ct HR, ser. C, para. 65. *Peru*, Reparations, judgment of 27 November 1998, para 169. *Castillo Paez v. Peru*, Reparations, judgment of 27 November 1998, para. 106.

¹⁷ Such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention of the Rights of the Child, and the UN Convention on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Several regional instruments, such as the Inter-American Torture Convention, contain the obligation of states to afford reparation. The African Charter of Human and Peoples' Rights, the American Convention of Human Rights, and the European Convention of Human Rights include the obligation to afford effective remedies as well as adequate compensation. The statutes of the two UN ad hoc tribunals make reference to the right to compensation, and the Rome Statute contains elaborate provisions on reparations to victims. The array of instruments regulating the laws and customs of war also contain provisions related to the right to reparation.

¹⁸ The jurisprudence and commentaries of treaty-based bodies like the Human Rights Committee and the Committee Against Torture have explicit references to the right of victims to effective remedies, restitution, rehabilitation and compensation. The Inter-American Commission and Court of Human Rights, together with the European Court of Human Rights, has also extensively interpreted the provisions of the right to reparation for victims of human right violations and the scope and appropriate forms of such remedies. See for example, *Caso*

Velazquez Rodriguez, Indemnizacion Compensatoria, sentencia de 21 Julio de 1989, art. 63.1 de la Convencion Americana sobre Derechos Humanos, ser. C, no. 7, para. 25. *Caso Godínez Cruz*, Indemnizacion Compensatoria, sentencia de 21 de Julio de 1989, art. 63.1, Convencion Americana sobre Derechos Humanos, ser. C, no. 8, para. 23. *Aloboetoe et al. case*, Reparations, art. 63.1, American Convention on Human Rights, judgement of 10 September 1993, ser. C, no. 15, para. 43. *Soering v. United Kingdom*, ECHR App. No. 14038/88, judgement of 7 July 1989. *Aksoy v. Turkey*, ECHR App. No. 21987/93, judgement of 18 December 1996.

¹⁹ See annex for further discussion.

²⁰ See Inter-American Court of Human Rights, *Bámaca Velásquez vs. Guatemala*, Reparations, judgement of 22 February 2002, para. 75. *Castillo Páez vs. Peru*, judgement of 27 November 1998, para. 48.

²¹ In its General Comment No. 29 on States of Emergency, the Human Rights Committee recalled that even during states of emergency the right to a remedy cannot be derogated. UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 14. Furthermore, the limitation contained in the draft Basic Principles (principle 25.i-ii) that military tribunals may only have jurisdiction over offences closely related to military functions has been reiterated by the UN Human Rights Committee. See Concluding Observations and Recommendations for Cameroon CCPR/C/79/Add.116; Guatemala, CCPR/CO/72/GTM; Kuwait, CCPR/CO/69/KWT; Peru, CCPR/CO/70/PER, Dominican Republic, CCPR/CO/71/DOM; Syria, CCPR/CO/71/SYR, Uzbekistan, CCPR/CO/71/UZB, and Chile, CCPR/C/79/Add. 104. See also the Committee Against Torture, Observations on Peru A/55/44, and Venezuela A/54/44. *Durand and Ugarte c Peru*, Inter-Am. Ct HR, judgement of 16 August 2000, ser. C. no. 68, paras 117–18. *Ciraklar vs. Turkey*, ECHR, judgement of 28 October 1998, and *Gerger vs. Turkey*, judgement of 8 July 1999.

²² The drafters of the ICC Statute, for instance, intended that the draft Basic Principles would have priority in the interpretation of the Statute. A/CONF.183/C.1/WGPM/L.2/Add.7. The draft Basic Principles have also been used as a point of reference by, for example, the US Secretary of State in requesting the Northern Ireland Human Rights Commission consult and advise the Secretary on the scope of a Bill of Rights for Northern Ireland. When dealing with victim's rights, the Commission relied on the standards in the draft Basic Principles. 'Making a Bill of Rights for Northern Ireland', consultation document by the Northern Ireland Human Rights Commission, September 2001.

²³ Human rights obligations are *erga omnes*, and all states have the right to vindicate them. *Barcelona Traction Case (Belgium v. Spain)*, 1970 ICJ 4, p. 32. See Shelton, *Remedies in International Human Rights Law*, pp. 24 & 48.

²⁴ The principles oblige states to enforce domestic and foreign judgments against private individuals (para. 19, principle IX), reinforcing the concept of universal jurisdiction. Together with paragraph 18—establishing that the state is ultimately responsible to provide reparation—this provision creates a comprehensive regime of redress.

²⁵ Principle IV acknowledges that many victims of human rights violations who wish to pursue remedies may only have gained access to effective remedies after extended periods of time, though such remedies might have always existed. This is often the case with victims seeking remedies in countries of asylum. Equally, victims suffering from trauma may not have been in a position to pursue civil claims within the traditional deadlines assigned for common crimes and torts.

Other international instruments that reflect this doctrine include the Rome Statute of the ICC, UN Doc. A/CONF.183/9, and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, ST/HR/ UN GA Res. 2391 (XXIII), 26 November 1968. See also *Garrido y Baigorria v. Argentina*, Reparations, 39 Inter-Am. Ct HR, judgement of 27 August 1998.

Annex: Brief background on the development of the draft Basic Principles and Guidelines on the Right to Remedy and Reparation

In the early 1990s, Professor Theo van Boven was appointed by the Sub-Commission on Human Rights to consider the right to restitution, compensation and rehabilitation of gross violations of human rights and fundamental freedoms and to prepare draft guidelines on this question. The final report of the study Professor van Boven carried out as Special Rapporteur contained in document E/CN.4/Sub.2/1993/8 served as the basis for the first draft of the principles and guidelines. Between 1993 and 1997 two revised versions were prepared (see E/CN.4/Sub.2/1996/17, 24 May 1996, and E/CN.4/1997/104, 16 January 1997); he submitted the final version in 1997. The draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law were sent to the Commission on Human Rights for consideration, where they received substantive comments by states, intergovernmental and non-governmental organizations.

At its 1998 session the Commission on Human Rights adopted resolution 1998/43 in which it appointed an Independent Expert, Professor M Cherif Bassiouni, to prepare the revised version of the Draft Basic Principles and Guidelines with a view to their adoption by the General Assembly. The 1999 report (E/CN.4/1991/65), proposed a comprehensive round of study, discussion, conferences and seminars to consider the question. It took into account not only the draft guidelines on restitution, compensation and rehabilitation but also those relating to the question of impunity (the Joint Principles E/CN.4/Sub.2/1997/20/Rev.1, Annex II). The report contained information on, among other things: structural differences between the versions; the 1997 proposed changes; elements of reparation for victims of human rights violations; special measures; the right to reparation; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN GA Res. 40/34); and, an assessment of the provisions on reparations in the Statute of the International Criminal Court (UN Doc. A/CONF.183/9). In resolution 1999/33, the Commission stipulated that the Independent Expert was to build on the work previously undertaken and submit a final report to the 2000 session.

The report to the 56th Session recalls that the prior drafts of the draft Basic Principles were examined in light of the Victims' Declaration, the pertinent provisions of the Rome Statute and

other relevant UN norms and standards. The annex to the report contains the text of the draft Basic Principles and reaffirms that victims of crimes and abuse of power should be treated with compassion and respect for their dignity, and have their right of access to justice and redress fully respected. It also urges the establishment, strengthening and expansion of national funds for compensation to victims, together with the expeditious development of appropriate rights and remedies for victims.

The Commission on Human Rights resolution (E/CN.4/RES/2000/41) in that year requested the Secretary-General to circulate the text of the draft Basic Principles to all Member States, and requested that comments on the text be submitted to the Office of the High Commissioner. The resolution also requested the Commission hold a consultative meeting in Geneva for all interested governments, intergovernmental organizations and NGOs with ECOSOC consultative status, with a view to finalizing the draft on the basis of the comments submitted, and to prepare a report on the final outcome of the meeting. In January 2002 the Office of the High Commissioner informed the Commission that preparations were underway to hold the consultative meeting later in 2002.

Pursuant to resolution 2002/44 the UN High Commissioner for Human Rights convened a consultative meeting to finalise the “Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law” in Geneva from 30 September to 1 October 2002. A recommendation to establish an appropriate and effective mechanism to finalise the Basic Principles and Guidelines was adopted and will be transmitted to the Commission for consideration at its 59th session. The recommendation further established that such a mechanism should take into account the discussions and conclusions of the consultative meeting, as well as consult and cooperate with interested governments, IGOs and NGOs, and the experts Professors Theo van Boven and M Cherif Bassiouni.

The right to reparation at the International Criminal Court¹

Carla Ferstman, Legal Director, REDRESS

One of the key achievements of the Statute of the International Criminal Court is its acknowledgement of the rights of victims. The Statute has importantly recognized the right of victims to participate in proceedings, not only as witnesses of the crimes within the jurisdiction of the International Criminal Court (ICC) but as persons with a valid interest in the outcome. It has also made it possible for the ICC to order reparations to, or in respect of victims, including restitution, compensation and rehabilitation. This is a significant departure from previous international criminal tribunals, and one that is likely to have a major impact on the course of justice before the ICC.

Article 75, paragraph 1 of the Statute provides that

The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting,

These principles are further elaborated upon in the Rules of Procedure and Evidence.²

The inclusion of provisions relating to reparation for victims was a significant achievement without precedent in international criminal tribunals.³ The initial draft statute prepared by the International Law Commission also made no provision for reparation, other than to propose that the Court be empowered to order that fines paid be transferred to a trust fund established by the UN Secretary General for the benefit of victims of crime.⁴

There was strong resistance to the call for a reparation regime for the ICC. It will be difficult enough for the ICC to meet what has been understood to be its core mandate, bringing perpetrators of crimes within its jurisdiction to justice. Reparations could potentially cloud procedures before the Court, and there will be practical challenges for the ICC to decide on the form and extent

of reparations, exacerbated by the fact that judges come from an array of legal jurisdictions.⁵ There was also concern that the introduction of reparation provisions might somehow invoke principles of state responsibility, when the Court had a clear focus on individual responsibility.⁶ Some feared that the exercise would be futile, in that many individual perpetrators who might be called upon to pay reparations would be judgment-proof.⁷

How will the reparation provisions play out in practical terms? The flexibility of the Rome Statute and Rules of Procedure and Evidence should allow the ICC to devise mechanisms that suit particular circumstances, though there are a number of associated risks. For example, the manner in which national jurisdictions will enforce the reparation orders of the ICC is left open, and it is not clear how national courts will deal with competing claims for assets.⁸ Will they prioritize orders emanating from the ICC? To what extent will the Court inquire into the adequacy or effectiveness of domestic reparation regimes, where they exist? These questions remain to be answered.

The steps in reparation proceedings at the ICC

The reparation procedures at the Court encompass a series of measures. Once a warrant of arrest or a summons has been issued, the Pre-trial Chamber may make an order for protective measures to ensure that any assets which might be the subject of a future reparations order are maintained (art. 57.3.e). This provision may well be of critical importance to the realisation of reparations awards, in those instances where there are assets and they are traceable. Upon a finding of guilt, the Court may proceed to a determination of reparations to victims.

The basic provisions regarding reparations before the Court appear in article 75 of the Statute and rules 94–8 of the finalized draft 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”. 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”.

Paragraph 3 provides that before making an order for reparations, the Court “may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States”. Victims’ requests for reparations will be filed with the Registrar, who will duly notify the person named in the request or identified in the charges, and to the extent possible, to any interested persons or any interested states, subject any protective measures (rule 94). Rule 95 provides that the Court, when determining orders for

“The flexibility of the Rome Statute and Rules of Procedure and Evidence should allow the ICC to devise mechanisms that suit particular circumstances”

“Collective awards may be, at times, the only method to bring a certain measure of justice”

reparations on its own motion, will request the Registrar to notify the persons against whom the order may be made, and to whatever extent possible, also notify victims, interested persons and interested states.

While those interested in making representations regarding reparations are required to file written requests with the Registrar in accordance with rules 94 & 95, oral representations can be made in certain circumstances. These representations can be made during the sentencing hearing or subsequent hearings scheduled by the Trial Chamber (art. 76.3 & rule 143).

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, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.

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. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.

The reparations provisions are without prejudice to the rights of victims under national or international law, and also without prejudice to the responsibility of states under international law.

The possibility for the Court to award collective reparations is likely to have a significant effect on the shaping and developing of new jurisprudence for reparations. There will only be a limited amount of funds for reparation awards when compared with the rights and needs of victims, and therefore collective awards may be, at times, the only method to bring a certain measure of justice.

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. Paragraph 2 provides that the Court may order that awards for “reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim”. Paragraphs 3 & 4 provide that awards for reparations be made through the Trust Fund “where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate” or when made “to an intergovernmental, international or national organization approved by the Trust Fund”. Paragraph 5 provides that “other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79”.⁹

The Court may decide to request assistance from States Parties, such as the execution of searches and seizures, and the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes, to facilitate forfeiture proceedings.¹⁰ States Parties would be obliged to give effect to fines and forfeitures ordered by the Court, as well as reparation orders.¹¹ In this regard, rule 217 provides that

The Presidency shall, as appropriate, seek cooperation and measures for enforcement... as well as transmit copies of relevant orders to any State with which the sentenced person appears to have direct connection by reason of either nationality, domicile or habitual residence or by virtue of the location of the sentenced person's assets and property or with which the victim has such connection.

Rule 218.3 provides that

In order to enable States to give effect to an order for reparations, the order shall specify:

- (a) The identity of the person against whom the order has been issued;
- (b) In respect of reparations of a financial nature, the identity of the victims to whom individual reparations have been granted, and, where the award for reparations shall be deposited with the Trust Fund, the particulars of the Trust Fund for the deposit of the award; and
- (c) The scope and nature of the reparations ordered by the Court, including, where applicable, the property and assets for which restitution has been ordered.

In accordance with rule 219, national authorities do not have the ability to modify the reparations specified by the Court, the scope or extent of any damage, loss or injury determined by the Court or the principles stated in the order. However, parties adversely affected can appeal against orders for reparations.¹²

How will the ICC reparation regime relate to proceedings before domestic courts?

Assets to be forfeited could be located in any number of national jurisdictions. If the Court's reparations regime is to be effective, it will require significant interaction and coordination with national jurisdictions of States Parties and non-States Parties alike. This will involve a series of hurdles for victims.

States Parties have a general obligation to cooperate with the Court, and to ensure that their national legislation enables and facilitates cooperation.¹³ This is a positive obligation of all States Parties, which may require significant amendment of national laws. In respect of reparations, States Parties will need to implement the ICC's requests for provisional and protective measures to trace and freeze assets as appropriate, and to recognize the jurisdiction—and enforce the reparations orders—of the Court. As an extension to the complementarity principle, they would arguably need to do the same for orders emanating from the national courts of other States Parties.¹⁴

“If the Court's reparations regime is to be effective, it will require significant interaction and coordination with national jurisdictions”

“The obligation to cooperate will not itself guarantee the implementation of reparation orders”

The Statute does not specify the manner in which states must cooperate on issues related to provisional measures or enforcement of reparation orders. Nevertheless, the duty to implement the reparation orders of the Court would necessarily include the obligation to ensure that there are effective national procedures available, and to create such procedures if they do not exist. States retain a measure of discretion to give effect to this obligation in accordance with their national laws, but the overriding duty to cooperate means that enforcement could not be obstructed or obfuscated. Consequently, procedural bars existing in various national jurisdictions that could have the effect of inhibiting cooperation with the Court may be inconsistent with the Statute and Rules of Procedure and Evidence. However, it is not clear how these inconsistencies will be dealt with by the Court, if at all, and the role that the Assembly of States Parties may have, if any, in ensuring this type of compliance by States Parties.

There is no overriding obligation on non-States Parties to cooperate with the Court, though those that wish to cooperate may do so “on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis” (art. 87.5.a). If assets are located in the territory or control of non-States Parties, the Court, or most likely the individual recipients of reparations orders, would need to advocate for the recognition of the ICC order in that jurisdiction. It may be difficult to secure such assets in these circumstances.

Tracing assets and implementing protective measures

The obligation to cooperate will not itself guarantee the implementation of reparation orders. It will be a challenge to trace, freeze and seize assets located in the state where the crime is alleged to have occurred, as it may be in transition from a conflict, or may not wish to support the ICC proceedings, or both. It will also be difficult to locate and trace extraterritorial assets. Mutual assistance in criminal matters is traditionally slow and a major source of frustration for requesting authorities. This slowness is made worse by the speed with which debtors can move their assets if they learn that a freezing or seizure order is imminent.¹⁵ Even where assets can be traced in the national jurisdiction of a State Party or non-State Party willing to cooperate with the Court, it would need to be conclusively shown that the assets are owned or controlled by the debtor. Proving this will be a continual challenge complicated by bank secrecy laws in those jurisdictions where assets are likely to be located.¹⁶

Most States Parties that have already adopted internal legislation on their cooperation with the Court have dealt with the requirements of the Statute to provide assistance in the identification, tracing and freezing of assets. This has been done by incorporating an executive function into requests for assistance, by involving an Attorney General or Public Prosecutor

in the request, which would then be analysed with varying tests and degrees of discretion. For the most part, implementing legislation has provided that the ICC's provisional orders or warrants issued in accordance with article 57.3.a are enforceable as if they were domestic orders or warrants.

Implementing reparation orders of the Court

In respect of post-conviction reparation orders or forfeiture and confiscation proceedings relating to assets (these will be located outside of jurisdiction of the Court) States Parties must take all necessary steps to enforce the orders. However, it is not evident how national courts will deal with competing claims for assets, or how they will assign priorities in order to adjudicate between these claims. For instance, it is plausible and likely that in the trial of major leaders or government figures, the state in the jurisdiction where the crimes occurred will have a competing claim against the perpetrator for corruption or misappropriation of state funds, or other economic crimes. Similarly, there may also be additional corporate creditors or victims who have not applied for reparations through the ICC and whose claims will need to be adjudicated by national courts.¹⁷ Most jurisdictions will have pre-existing rules on related matters, though they may not be sufficiently precise or appropriate, nor will they necessarily give priority to the orders emanating from the Court. International conventions and agreements have also been developed to address some of these problems, but they may not deal with all possible eventualities.¹⁸

The Statute provides that in those cases when it is not possible for the state to give effect to an order for forfeiture, it "shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties" (art. 109.2). This will require national courts to implement a variety of proceedings traditionally associated with defaulting debtors, such as garnishee orders, liens, and enforced sales of property. However, in keeping with the focus on individual criminal responsibility, the Statute does not go so far as to suggest that states should step in when the individual debtors are judgment-proof.¹⁹ If the debtor has no traceable assets whatsoever, there is little that can be done to recover the amounts owing to victims. Who will intervene when the perpetrator cannot pay? The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power dealt with this problem in its 12th and 13th principles, as follows:

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

- (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
- (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

“It is not evident how national courts will deal with competing claims for assets, or how they will assign priorities in order to adjudicate between these claims”

“The Rome Statute and Rules of Procedure and Evidence provide a clear opening for victims to assert and realize their rights, though practical uncertainties and impediments abound”

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

However, these principles have not been specifically incorporated into the Statute.²⁰

The Trust Fund for Victims

The Statute does not refer to the potential role of States Parties in providing victims with compensation for injuries when perpetrators cannot, though it does provide in article 79 for the establishment of a Trust Fund “for the benefit of victims of crimes of crimes within the jurisdiction of the Court, and of the families of such victims”. This Trust Fund could in principle provide relief to those victims for whom reparation orders had been awarded but where no enforcement of the awards has been possible due to the insolvency of the perpetrator or the inability to recover his or her assets.²¹ Although its precise scope has not yet been defined, at least at its outset the Fund will lack resources, and the demands placed upon it will be far greater than what could feasibly be supplied. Victims may look to other more solvent debtors (aside from or in addition to the individual perpetrators convicted by the Court) to ensure that they receive some form of redress. This may require that they lodge actions for reparation before national courts.

Conclusion

For perhaps the first time in the history of international criminal tribunals, justice for victims is a real possibility. The Rome Statute and Rules of Procedure and Evidence provide a clear opening for victims to assert and realize their rights, though practical uncertainties and impediments abound. These impediments are not restricted to proceedings before the ICC, but reflect the challenges that victims and other judgement-creditors continue to face in a much wider context, particularly when claims pass beyond one jurisdiction.

There are, however, certain specific challenges relating to the ICC reparations regime, which stem from the complex relationship States Parties and non-States Parties will have with the Court and the degree to which the Court can oversee the enforcement of its orders. As States Parties are obliged to cooperate with the Court but not necessarily with the victims or other recipients of awards for reparations, victims will certainly need the assistance of the Court in seeking to enforce orders before national jurisdictions. This should be taken into account in the development of victims’ services at the Court. Much will be learned from the first Court proceedings, and those remaining procedural deficiencies may need to be reviewed as this new and important institution continues to develop.

End Notes

¹ This is an abridged version of an article published in the *Leiden Journal of International Law*, vol. 15, no. 3, 2002.

² Article 97 of the finalised draft Rules of Procedure and Evidence provides:

1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.

2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint 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. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.

3. In all cases, the Court shall respect the rights of victims and the convicted person.

³ Neither of the International Criminal Tribunal for the former Yugoslavia or International Criminal Tribunal for Rwanda Statutes provide for reparation to be dealt with by the court itself. The Inter-American Court on Human Rights and the European Court of Human Rights do provide for reparation, though they deal with state responsibility for violations of human rights and therefore are of only limited relevance.

⁴ Report of the International Law Commission on the Work of its 46th Session, 49 UN GAOR, 49th Sess., Supp. No. 10, UN Doc. A/49/19, 1994, art. 47.3.c.

⁵ For a discussion on these issues, see Christopher Muttukumar, 'Reparations to Victims', in *The International Criminal Court: The making of the Rome Statute; Issues, negotiations, results*, Roy S Lee (ed.), in cooperation with the Project on International Courts and Tribunals, Kluwer Law International, The Hague & Boston, c.1999, pp. 262-4.

⁶ As Muttukumar observes,

It became obvious that a significant number of delegations were not prepared to accept the notion of State responsibility to, or in respect of victims. However, this refusal does not diminish any responsibilities assumed by States under other treaties and will not – self-evidently, prevent the Court from making its attitude known through its judgments in respect of State complicity in a crime.

Muttukumar, 'Reparations to victims', p. 267.

⁷ See generally, Muttukumar, 'Reparations to victims'. See also, David Donat-Cattin, 'Article 75', in *Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article*, Otto Triffterer (ed.), Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 966.

⁸ The way in which states enforce fines or forfeitures is "in accordance with the procedure of their national law".

⁹ At its final session of 1-12 July 2002, the Preparatory Commission adopted a draft resolution of the Assembly of States Parties calling for the creation of the Trust Fund. The draft resolution provided that the Assembly of States Parties elect a Board of Directors consisting of five persons with relevant experience in order to develop the principle rules and operating procedures of the fund, subject to approval by the Assembly.

¹⁰ Paragraph 5 of article 75 provides that “the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this Article, it is necessary to seek measures under Article 93, paragraph 1”. Article 93.1.h deals with searches and seizures and article 93.1.k with the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes.

¹¹ Article 75.5 specifically refers to the applicability of article 109 (dealing with the requirements of states parties to enforce fines and forfeitures, and/or to take measures to recover the value of the proceeds, property or assets as ordered by the Court) to the reparation orders of the Court.

¹² Article 82.4 of the Rome Statute provides that,

A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

¹³ Article 86 of the Rome Statute provides that, “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.” Article 88 specifies that, “States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.”

¹⁴ This is not spelled out in the Rome Statute of the Rules of Procedure and Evidence, though it is arguably a natural extension of the provisions relating to complementarity. It will depend for the most part on whether or not the states in question have entered into bilateral agreements or treaties.

¹⁵ As Guy Stessens observes,

The elaborate procedures for lifting banking secrecy and the multiple remedies that are available to those that are accused of not providing information and to any party concerned—especially in offshore jurisdictions and large financial centers—have become strongly resented by some requesting authorities.

Guy Stessens, *Money laundering: A new international law enforcement model*, Cambridge University Press, Cambridge & New York, 2000, p. 313.

¹⁶ For a detailed explanation of how this problem affected the recovery of the Marcos assets, see David Chaikin, *Tracking the proceeds of organised crime: The Marcos Case*, paper presented at the Transnational Crime Conference convened by the Australian Institute of Criminology in association with the Australian Federal Police and Australian Customs Service, Canberra, 9–10 March 2000, [<http://www.aic.gov.au/conferences/transnational/chaikin.pdf>].

¹⁷ Victims are not obliged to apply for reparations before the ICC. In fact, article 75.6 specifically provides that reparations proceedings before the ICC will not impact on domestic proceedings: “Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.”

¹⁸ See, for example, the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention), and the Council of Europe 1990 Convention No. 141 on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (the Strasbourg Convention).

¹⁹ See, for example, principle 11 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA 40/34, annex, 40 UN GAOR Supp. No. 53, p. 214, UN Doc. A/40/53, 1985, which provides that:

Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

²⁰ Although these principles were not specifically incorporated, the drafters of the ICC Statute intended that the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power would have priority in interpretation of the Statute. A/CONF.183/C.1/WGPM/L.2/Add.7.

²¹ This has been advocated by a number of organisations and institutes following the deliberations at the meetings of the Preparatory Commission for the ICC. See, for example, REDRESS, 'Ensuring the Rights of Victims in the ICC: Specific Concerns and Recommendations Relating to the Trust Fund for Victims', prepared for the 8th Preparatory Commission of the ICC, Sept–Oct 2001 [<http://www.redress.org/Trustfund.html>]. Amnesty International, 'International Criminal Court: Ensuring an effective Trust Fund for Victims', IOR 40/005/2001, 01/09/2001 [<http://web.amnesty.org/ai.nsf/Index/IO400052001?OpenDocument>]. Thordis Ingadottir, 'The Trust Fund for Victims (Article 79 of the Rome Statute) A Discussion Paper', Project on International Courts and Tribunals, February 2001 [<http://www.pict-pcti.org/publications/publications.html>].

Some perspectives on torture victims, reparation and mental recovery

Paul Dalton, Programme Coordinator, International Rehabilitation Council for Torture Victims

This article surveys issues related to the pursuit of reparation by victims of torture or their family members. What is the legal right to reparation, and how successfully has it been implemented in different countries? How does the pursuit of reparation relate to the needs of torture victims themselves, and what will be the likely consequences if it is denied in part or in whole? Are some forms of reparation fundamental for the successful recovery and reintegration of the torture victim, such that the denial of the right will prolong or reinforce the victim's sense of powerlessness and isolation? As human rights advocates, can we ever permit ourselves to express support for a national process of reconciliation and reparation for victims of torture that does not meet in full those rights guaranteed by international law?

The article contends that national authorities committed to implementing the right to reparation should take as a starting point the needs and wishes of victims themselves. The forms of reparation recognised at international law are many and varied. It is unlikely that all victims will find the same form of reparation beneficial or desirable. National authorities should therefore facilitate access to a variety of reparations, including judicial, compensatory, rehabilitative, restitutive, declaratory and commemorative forms.

Even in those societies where reparation schemes are provided for violations committed by former regimes, there can be strong political disincentives to the adoption of a victim-oriented approach. There are many ingrained social prejudices against victims, even in cases where the facts of the violation and the suffering caused are beyond dispute. Before laws or practices can be reformed, it is sometimes necessary to confront attitudes that may exist among legislators or administrators that reflect the prejudices or ignorance of the wider community. This is

particularly so in the case of torture, a violation committed in secret and in spite of official denial, and for which many victims continue to suffer in silence.

The author is neither a health professional nor a practicing lawyer, but hopes that the presentation of this subject in a multidisciplinary way will inspire new voices, in particular Asian voices, to take up this issue for further discussion.

The international legal framework

The right to reparation for victims of a wrongful act is a well-established principle of international law.¹ This obligation also applies in respect to international human rights and humanitarian law. Since World War Two, the obligation to provide reparation to victims of human rights violations has been reiterated in a large number of treaties and declarations, many of which have by now been ratified by a majority of UN Member States. As regards the crime of torture, the right to reparation is grounded in articles 2.3 & 7 of the International Covenant on Civil and Political Rights, article 39 of the Convention on the Rights of the Child, and in article 14 of the Convention Against Torture (CAT). Article 14 guarantees the right of torture victims to obtain reparation, including redress, fair and adequate compensation and the means for as full rehabilitation as possible.

The CAT does not define “redress”, “compensation” or “rehabilitation”; neither does it contain a strict definition of who is considered to be a “victim”. However, two UN documents that have attempted to do so are the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power (the Victims Declaration)—adopted by the UN General Assembly at its 40th session in 1985 (UN GA Res. 40/34)—and the UN draft Basic Principles and Guidelines on the Right to a Remedy and Reparation.²

The Victims Declaration and the draft Basic Principles are indicative of a general trend in human rights reporting over the past 30 years, which has been to move away from treatment of violations as abstract phenomena, towards an increasing emphasis on the subjects (both victims and perpetrators) of the violations. On the one hand is the victim, whose rights have been violated, who continues to suffer the consequences of the wrongful act, and whose right to obtain full reparation should be facilitated by the state. On the other is the perpetrator, who must be brought to justice, in part to afford reparation to the victim, but also to satisfy States Parties’ obligations under the CAT to investigate, prosecute and punish.

The Preamble to the draft Basic Principles notes that by recognizing the right of victims to benefit from remedies and reparation, the international community keeps faith and human solidarity with victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law. Further, “By adopting a victim-orientated point of departure, the community, at local, national

“Since World War Two, the obligation to provide reparation to victims of human rights violations has been reiterated in a large number of treaties and declarations”

and international levels, affirms its national solidarity and compassion with victims of violations...as well as with humanity at large.”

“A precondition for successful reparation is that those responsible for making and interpreting laws and policies within the national administration are empathetic to the rights and needs of victims”

Mental and psychosocial consequences of torture

Torture, the deliberate infliction of severe pain by one human being against another, leaves particular kinds of mental and psychological scars. Torture victims commonly report feelings of fear, guilt, shame, disillusionment, insecurity and humiliation.³ These symptoms, either alone or in combination, are also common in other psychological disorders that do not have their origins in violations of human rights. What is unique about torture and other forms of organized violence, however, is that the trauma they induce includes the immoral act of a perpetrator. This moral dimension continues to affect the victims, perpetrators and entire society until steps have been taken to restore justice.⁴

Attitudes towards victims

As discussed, all states are obliged to provide reparation to victims of torture. A precondition for successful reparation is that those responsible for making and interpreting laws and policies within the national administration are empathetic to the rights and needs of victims. Yet there exists in many societies deep-seated prejudices towards the weak or powerless, and this is particularly so in the case of persons who claim to be psychologically damaged and seek compensation or support.⁵

Even where structures for reparation have been put into place by the state, the granting of reparation may be compromised by the way in which claims assessors perceive trauma and suffering. Danieli describes pervasive societal reactions to Holocaust survivors after the liberation as comprising obtuseness, indifference, avoidance, repression and denial.⁶ The accounts of the survivors were too horrifying for many people to listen to or believe. Victims were faced with the pervasively held myth that they had actively or passively consented to their own suffering or that they had themselves committed crimes in order to survive. As has been the experience of victims in other periods and other regions, they were also told that everyone had suffered, that it was time to forgive and forget and to get on with their lives.⁷

The effect of these attitudes, if unchecked, can be to reinforce victims' silence and impede healing and reintegration; what Rojas has called 'frozen mourning'.⁸ Many studies have documented the transmission of the psychological effects of torture to the second and even third generation. In such cases we can concur with William Faulkner that, 'The past is never dead. It's not even past.'

Reparation as ‘therapy’

A number of commentators believe that the pursuit of reparation has a therapeutic benefit for the victim, in addition—or as a supplement—to more targeted forms of medical or psychosocial treatment and support. Carmichael et al. take the view that seeking reparation is an important part of the rehabilitation process, both for the individual and for the society in which the torture occurred.⁹ Health professionals also prefer a holistic approach to rehabilitation, including consideration and treatment of the immediate family of the victim as well as community-based programs targeting the general community. Torture victims come, more often than not, from the most vulnerable groups in society and need outside assistance. Where resources permit, rehabilitation programs offer a variety of services to survivors, both social and legal, with a view to reintegrating the person to the fullest extent possible. It has been said that reparation is both a process and a result. The pursuit of reparation can be empowering for a victim, allowing them to overcome feelings of isolation and pain in a public process closely linked to the disclosure of events and the naming of the guilty.¹⁰

“The pursuit of reparation can be empowering for a victim, allowing them to overcome feelings of isolation and pain”

The question arises as to whether some forms of reparation may be more therapeutically beneficial than others. Several commentators have considered the relative merits of civil and criminal proceedings. Gordon has argued that victims have a more active role in the initiation and resolution of civil proceedings than they would have in a criminal proceeding, and that presenting and negotiating a claim can reinforce many of the elements addressed in a formal rehabilitation process.¹¹ McFarlane, on the other hand, warns of potential problems in both the civil and criminal justice systems.¹² Many victims perceive legal processes to lack empathy, a problem perhaps most prevalent in civil litigation, where court officials and advocates are unused to dealing with victims of torture or other violent crime.

Roht-Arriaza and Rojas both emphasize that procedures serving to promote truth and justice are essential to successful psychological closure.¹³ Traumatized people have an instinctive need to tell their stories and have their experiences validated. Silence and deception are common in countries where torture has taken place; victims typically suffer in silence and their plight is both unknown and unacknowledged by the community. Public truth-telling must be undertaken before real healing can occur. Allan & Allan go further, to say that survivors must be given the opportunity to meet the people who abused them if they wish to do so.¹⁴ This can help to create empathy between survivors and perpetrators, an aspect of restorative justice that may be even more important than the prosecution of perpetrators. However, there is a potential conflict here between the needs and wishes of the individual victim and the (perceived) needs of the society, discussed further below.

Consequences of failure to obtain reparation

“There is very strong support for the view that other forms of reparation will be inadequate if the perpetrators of violations are not brought to justice”

Could the unsuccessful pursuit of a remedy leave a person in a worse position, mentally and emotionally, than if they had done nothing? This question arises in particular when seeking judicial or quasi-judicial remedies. In both cases, the victim is likely to be required to recount the violation on a number of occasions, placing them at risk of further trauma. No research appears to have been done on this issue to date. What seems to be important, bearing in mind that all legal processes involve an element of calculated risk, is for helpers, legal advisers or counselors to be particularly responsive to their client's wishes. Victims of torture or other serious human rights abuses should not be encouraged to pursue a remedy if they no longer wish to do so. The conviction of the helper that the need to obtain (formal) justice is paramount may in fact not conform to the victim's own needs and wishes.

Another area of concern arises when the state refuses to provide the form of reparation sought by the victim. There is very strong support, among both health and legal professionals, for the view that other forms of reparation will be inadequate if the perpetrators of violations are not brought to justice. Sveaass & Lavik believe that to grant amnesty and permit impunity is to perpetuate political violence.¹⁵ In these circumstances the experiences of individual victims are denied or invalidated, and psychological reactions of worthlessness or disempowerment, and even cognitive distortions, may follow. Many others, including Kordan, Rojas and Danieli share this view, which is also in accordance with State Party obligations under all relevant human rights treaties, not least of all the CAT. Van Boven has emphasized that if state authorities fail to investigate the facts and establish criminal responsibility, it may prove impossible for victims or their relatives to seek and receive redress and reparation.

In the case of truth commissions, which primarily serve collective goals of national reconciliation rather than individual goals of redress, the role played by the victim can be particularly problematic. He or she is expected to recount the violation suffered with a view to creating a public record of the event, and while this truth-telling may have a reparative value for many victims, it may also be traumatic. Nevertheless, a small number of dissenting views do exist, both within the health profession and the general human rights community. Allan & Allan believe that the South African Truth and Reconciliation Commission was relatively successful as a therapeutic tool, despite the amnesties granted and the fact that it primarily addressed collective goals rather than individual needs or wishes.¹⁶

Cobban, however, is scathingly critical of the International Criminal Tribunal for Rwanda (ICTR) as a means for delivering justice to victims of the Rwandan genocide.¹⁷ Seven years after its establishment, the ICTR had delivered just nine judgements, despite a staff of over 800 and an annual budget of around US\$90 million. Even taking into account those prosecutions carried out

by Rwandan courts, the number of cases processed each year has been around 1500–2000; just a fraction of the over 125,000 detained genocide suspects. Cobban believes that the imposition of an exclusively criminal justice solution on the Rwandan people has denied them the benefit of restorative justice that has been used with success in South Africa and Mozambique, elements of which would have been better suited to promoting social stability and long-term reconciliation.

Gaps between national reparation schemes and rights at international law

Can human rights advocates ever express support for reparation schemes that exclude one or more of the elements of reparation guaranteed at international law? Can we afford to endorse the kinds of political compromises that lie behind the establishment of truth commissions or national compensation schemes side by side with *de jure* or *de facto* amnesties for perpetrators of torture? These are very difficult questions. On the one hand, we know that impunity will prolong, or in some cases deepen, the mental scars borne by the victim or by members of their families. On the other, would it have been possible to achieve a peaceful democratic transition in South Africa or El Salvador, for instance, if the new governments had instigated a policy of prosecuting all perpetrators, rather than granting amnesties?

Morocco offers an interesting example, in that a means for addressing past repression—including the establishment of an arbitration tribunal to assess reparation claims—was initiated under an ongoing regime. As at June 2002, the tribunal there had already awarded US\$59 million in compensation to over 800 claimants—victims of arbitrary detention and relatives of disappeared persons. It has been criticized on several grounds: its mandate does not extend to cases of torture; very little information has been made available to relatives about the fate of disappeared persons; and, most significantly, the tribunal is not mandated to investigate or prosecute those responsible for violations. On the contrary, a decree granting a general amnesty to all former violators has been approved, but has not yet entered into force. In their defense, the Moroccan authorities say that what has been achieved in Morocco to date is without precedent in the Arab world, and for that matter, in several European countries with similar histories of political repression, arbitrary detention and use of torture.

One element often overlooked is the right to rehabilitation and reintegration. In those few countries such as Morocco or Bulgaria where reparation schemes have been established for former victims of torture, the emphasis has tended to be on judicial or compensatory procedures, rather than social or medical ones. Rehabilitation and reintegration is often seen as being the responsibility of civil society organizations, or alternatively, an issue that can be addressed by the existing public health system without any specific state involvement. Yet in order for

“Can human rights advocates ever express support for reparation schemes that exclude one or more of the elements of reparation guaranteed at international law?”

“More thought needs to be given to ways in which criminal and restorative justice can be combined without compromising the right of victims to reparations”

the right to rehabilitation to be realistic there has to be a corresponding duty on the state to ensure that the necessary knowledge and facilities are present in the country. To this end, states should be urged to promote acquisition of the appropriate knowledge and skills within the relevant legal, medical, psychological and social professions, and to support the establishment of treatment facilities and services.

Conclusion

Despite a plethora of international standards on reparation, the needs and wishes of the victim continue to be treated with secondary importance by many national authorities. Truth commissions primarily seek to address collective goals rather than to respond to individual needs. Even reparation programs, where established, have been limited in their scope, preferring to balance a complex set of economic, social and political considerations. Looking at a variety of countries in which governments have attempted to address past repression and provide reparation to victims of torture and members of their families, it seems that there is an unavoidable tension between political considerations and the requirements of international law.

More thought needs to be given to ways in which criminal and restorative justice can be combined without compromising the right of victims to reparations. There is potential for enhanced dialogue between health and legal professionals, human rights advocates, and victims' support groups, drawn together by the common conviction that the perspective of the victim is paramount.

End Notes

¹ *Chorzow Factory Case (Germany v Poland)*, 1928, PCIJ, ser. A, no.17, p. 47.

² The full title of this document is the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law. The current draft text of the Guidelines is located in the final report of the Special Rapporteur, Professor M Cherif Bassiouni, to the 56th session of the UN Commission on Human Rights, E/CN.4/2000/62.

³ Libby T Arcel et al., 'Reparation for victims of torture: Some definitions and questions', *Torture*, vol. 10, no. 3, 2000, pp. 89-91.

⁴ Nora Sveaass & Nils Johan Lavik, 'Psychological aspects of human rights violations: The importance of justice and reconciliation', *Nordic Journal of International Law*, vol. 69, no. 1, 2000, pp.35-52.

⁵ Alexander McFarlane, 'Attitudes to victims: Issues for medicine, the law and society', in *International Victimology: Selected Papers from the 8th International Symposium*, Chris Sumner et al. (eds), Australian Institute of Criminology, Canberra, 1996, pp. 259-75.

⁶ Yael Danieli, 'Preliminary reflections from a psychological perspective', in *Seminar on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, Theo van Boven et. al (eds), SIM Special No. 12, Utrecht University, Utrecht, 1992, pp. 196-213.

⁷ For instance, subsequent to the military dictatorship in Argentina. Diana Kordon, 'Impunity's psychological effects: Its ethical consequences', *Journal of Medical Ethics*, vol. 17, supplement, 1991, pp. 29-32.

⁸ Paz Rojas Baeza, 'Mental health disturbances caused by the absence of truth and justice', paper delivered at the 7th International Conference for Health and Human Rights, organised by the International Society for Health and Human Rights, Cavtat, Croatia, 2001.

⁹ Keith Carmichael, Fiona McKay & Bill Dishington, 'The need for REDRESS: Why seek a remedy? Reparation as rehabilitation', *Torture*, vol. 6, no. 1, 1996, pp. 7-9

¹⁰ For a discussion, see Nora Sveaass, 'The psychological effects of impunity', in *Pain and survival: Human rights violations and health*, N J Navik et al. (eds), Scandinavian University Press, Oslo, 1994, pp. 211-20.

¹¹ Neve Gordon, 'Compensation suits as an instrument in the rehabilitation of tortured people', in *Torture: Human rights, medical ethics and the case of Israel*, Neve Gordon & Ruchama Marton (eds), Zed Books, London, 1995.

¹² McFarlane, 'Attitudes to victims'.

¹³ Naomi Roht-Arriaza (ed.), *Impunity and human rights in international law and practice*, Oxford University Press, New York, 1995. Rojas, 'Mental health disturbances caused by the absence of truth and justice'.

¹⁴ Alfred Allan & Marietjie M. Allan, 'The South African Truth and Reconciliation Commission as a therapeutic tool', *Behavioral Sciences and the Law*, vol. 18, no. 4, 2000, pp. 459-77.

¹⁵ Sveaass & Lavik, 'Psychological aspects of human rights violations'.

¹⁶ Allan & Allan, 'The South African Truth and Reconciliation Commission as a therapeutic tool'.

¹⁷ Helena Cobban, 'The legacies of collective violence: The Rwandan genocide and the limits of the law', *Boston Review*, April/May 2002, [<http://bostonreview.mit.edu/BR27.2/cobban.html>]. See also a response to Cobban's article, Kenneth Roth and Alison DesForges, 'Justice or therapy?', Human Rights Watch Editorials, [<http://www.hrw.org/editorials/2002/ictr0724.htm>]; and, Helena Cobban, 'Helena Cobban replies', *Boston Review*, Summer 2002, [<http://bostonreview.mit.edu/BR27.3/cobbanreplies.html>].

The National Human Rights Commission of Korea: An assessment after one year

Professor Kwak Nohyun, non-standing member,
National Human Rights Commission of Korea

In strictly legal terms, the difference between a modern state that may be called 'civilized' versus one that is 'barbaric' hinges on the presence or absence of a national human rights commission. Korea only became civilized in this sense with the advent of its National Human Rights Commission (NHRC) in 2001. Late last November, the Korean NHRC celebrated its first anniversary. Its experiences of the last year warrant a critical introduction for international observers.

The Commission at a glance

The Korean NHRC features a broad mandate and diverse functions. It is an all-in-one human rights institution designed to protect and promote human rights across the spectrum and to fight and rectify discrimination. Its counterparts in other countries include commissions relating to prisons, the police and army, intelligence, privacy, information, and so on. Also included would be all types of anti-discrimination and equal opportunity commissions, such as those relating to gender, race, disability discrimination, equal employment opportunity, and the like. At another level, the Korean NHRC can be said to function like a combination of all the major United Nations human rights instruments, condensed to suit the one nation.

The NHRC has both a policy advisory function and a complaint-resolving function. It is also endowed with research and education, and publicity and networking roles. This multiplicity of functions is a distinct feature of the Commission when compared with the traditional judiciary. Unlike a court, which should be an impartial and dispassionate adjudicator, the Commission is intended to serve as a monitor, inspector, advocate, advisor, educator, facilitator, promoter, mediator and adjudicator.

Of all the Commission's roles, the most important are advice and advocacy. Even when it adjudicates complaints of human rights violations in quasi-judicial manners, the Commission is different from a court, for the following reasons. First, in most cases the remedial package of the Commission includes legal and policy measures necessary for curbing or preventing a reoccurrence of the same or similar violations. Secondly, judgements by the Commission normally go beyond the respondent to include any superior agency with supervisory powers over the respondent. Thirdly, Commission decisions come as recommendations, because coercion is an alien and improper method for an advisor-advocate-educator. Fourthly, as its decisions are not binding, the Commission can be more progressive in selecting criteria for decisions.

“The NHRC is an independent and autonomous state agency answerable to none other”

The NHRC is an independent and autonomous state agency answerable to none other, whether the Ministry of Justice, President, National Assembly or Supreme Court. Legally, the Commission enjoys absolutely independence, just as a court does. However when it comes to budgeting, recruiting, and rule-making procedures, its independence has been less assured. As a statutory body, the Commission lacks certain guarantees and safeguards conventionally reserved only for constitutional bodies. For instance, if the budget of a constitutional agency is due to be cut, its head must be consulted, whereas the Commission has been denied this protection.

Although the Commission has been granted autonomy, it is not free from the danger of being mistaken for an administrative agency under government control. A recent episode involving overseas travel by the Commission's president is a telling example. Upon his return from the Asia-Pacific Forum of National Human Rights Institutions in New Delhi, the Commission's president unexpectedly received an official and open warning from the President's Secretariat on two counts: first, for failing to comply with the legal requirement that international business trips by officials at ministerial rank be subject to the President's approval; secondly, for failing to follow the President's order that ministerial-level officials not make unnecessary foreign trips. The Commission quickly pointed out that legally the NHRC does not belong to the administration and therefore is not subject to presidential control. Instead of understanding this, the mass media simply enjoyed the apparent conflict between the Blue House (the President's office) and the Commission, and it sided with the Blue House. The Commission's clean image was tarnished as a result. In fact, the President's Secretariat was acting after feeling uneasy with a number of principled decisions the Commission had made without considering their effects on power politics in general and the administration's position in particular. It is noteworthy that human rights NGOs were unanimous in supporting the Commission's interpretation. This episode vividly indicates the administrative threat to the NHRC's

“Despite their solid legal knowledge, the present members have been criticized as lacking proper expertise in human rights”

independence. If the President is displeased with the Commission, he or she may have many means available to disrupt its activities.

Composition

The Korean NHRC is composed of eleven members and a secretariat. The eleven members comprise the president, three standing members, and seven non-standing members. Four, including the president and one standing member, are nominated by the President of Korea, another four, including two standing members, by the National Assembly, and the remaining three by the Chief Justice of the Supreme Court, though all members are eventually appointed by the President. Four or more members should be women.

The Commission members were appointed on 9 October 2001 for a term of three years. No parliamentary hearings or public consultations preceded the nomination and appointment. Due to internal strife, human rights NGOs failed to actively participate in the nomination procedure. Consequently, NGO influence was virtually non-existent and those with the legal power to nominate—namely the President, political parties and Chief Justice of the Supreme Court—were able to appoint people they preferred without difficulty. That said, the outcome was not bad. The president is a respected human rights lawyer and former president of the Korean Bar Association. The three standing members consist of a former director of the World Council of Churches in Asia, a former appellate court judge, and a schoolteacher turned writer. The seven non-standing members consist of three law professors specializing in criminal law, family law, and labour law respectively, three lawyers—including two former judges—one former prosecutor, and one feminist NGO leader. Five members, including the president and two standing members, have past or current NGO affiliations. One standing member and three non-standing members are women. This profile appears rather diverse compared to other Korean commissions, though legal professionals are over-represented at the expense of people from backgrounds in fields such as religion, labour and journalism.

Despite their solid legal knowledge, the present members have been criticized as lacking proper expertise in human rights. Given that this requires more than legal expertise, even members with legal training cannot be called human rights specialists in the proper sense. Lack of human rights experience leads to a lack of timely initiatives and significant contributions, especially in policy matters of strategic importance. As members become more experienced, however, this problem is sure to diminish.

From the perspective of this writer, three members are politically progressive, three are centrist, and five are conservative. This implies that without pressure the Commission is likely to make right-of-center decisions on politically sensitive human rights issues. Its rather conservative makeup has been

a serious cause of concern and skepticism among most NGO activists, and it is generally regarded as being responsible for the Commission's passive, reluctant, and sluggish responses to highly divisive matters such as conscientious objection, migrant workers, and the National Security Law.

The NHRC is authorized to recruit up to 215 staff members. Under the relevant Presidential Decree, about 40% of its staff can be recruited from outside the bureaucracy, which is unprecedented in any other state agency. In particular, more of the higher posts in the Commission have been reserved for civilians than for career bureaucrats, including the secretary general, four out of five bureau directors, and nine out of nineteen section chiefs. The first secretary general is in fact a former NGO leader famous for her campaigns against sexual violence. The Commission began to recruit staff members last March and has filled about 170 posts to date. Nearly 60% of all the staff members are women. The recruitment process is still under way and will take a couple of months to finish.

Due to excessive delays in personnel recruitment, however, the Commission lost public confidence in its first few months. From 25 November 2001, the day it started operating, to early April 2002, when the first recruitment began, the Commission had to confine its duties to the mere compilation of complaints and ad hoc interventions in pressing policy matters. While individual complaints and policy issues were simply piled up unexamined, initial public expectations faded away and human rights NGOs became impatient. It should be stressed, however, that the delays were caused by the shortage of personnel rather than a lack of will, and are currently being kept at a tolerable minimum mainly thanks to the hard work of devoted and competent staffers.

Issues confronted by the Commission

Under the Commission Act, the NHRC has nine specific duties. They involve the investigation and remedy of complaints of human rights violations or discrimination; consultation and advice to the relevant state agencies as to the improvement of human rights related bills, statutes, institutions, policies, and practices under their control; investigative surveys of human rights conditions, advocacy for ratification of international human rights treaties and human rights education. Though diverse, these duties complement and reinforce each other.

Certainly it takes both time and experience to understand fully the characteristics and potential of the Commission. In order to speed up understanding and minimize trial-and-error, the Commission should encourage strategic discussions to develop goals and tasks so that it will not operate on an ad hoc basis and be engulfed by routine matters. In my opinion, the Commission failed to do this during its first formative year, though it worked very hard.

“The Commission should encourage strategic discussions to develop goals and tasks so that it will not operate on an ad hoc basis”

Some aspects of the Commission's work in its first year are as follows.

“The largest number of complaints has so far related to violations of detainee rights”

Complaints-handling

1) Complaints statistics

As of 1 November 2002, a total of 2937 complaints had been filed with the Commission. Of these, at least 70% fell outside of its jurisdiction. They were mostly complaints regarding police investigations, prosecutions, judicial judgements, parliamentary legislation and property disputes. Among valid complaints, human rights abuses by state agencies, local governments and welfare facilities occupy 80% or more. Fewer than 200 complaints were of discrimination, and among these, the majority consisted of complaints about the infringement of the right to equality by state agencies, local governments or welfare facilities. Complaints of discrimination in the private sphere—such as in employment, education, vocational training, use or provision of goods and services, for instance, housing and transportation—have accounted for less than a hundred so far. The relative paucity of discrimination cases is attributable to the fact that gender discrimination in general and in employment in particular is effectively addressed elsewhere, and also because social sensitivity to discrimination is still rather underdeveloped.

The largest number of complaints has so far related to violations of detainee rights, as the Commission Act has for the first time given inmates a right to make face-to-face complaints. Lately, face-to-face complaints involving prison matters alone have exceeded 150 per month. Members or staff of the Commission should visit detaining facilities to receive complaints face-to-face when internees request it. The Commission has received over 700 such requests, nearly all from prison inmates. Only a handful of such requests have been filed so far from internees in welfare facilities or army prisons, which implies that the Commission has failed to reach out to them. The Commission should make efforts to publicize this new right to all internees, wherever they are detained.

2) The 'rejection first' policy

Having begun recruitment in late March, the Secretariat started to review and investigate complaints from early April. By this time early complainants had become frustrated and discontent. Burdened by the sheer number of pending complaints, the Commission president decided to give priority to those complaints that could be rejected at first sight. For the subsequent four months, the two complaints-handling subcommittees were preoccupied with rejecting more than 700 cases, but meanwhile new complaints were being filed, leaving them hundreds still to reject. The greatest frustration is that so far less than 30 cases have been remedied, though in most cases they are milestones. The 'rejection first' policy is partly responsible for causing unnecessary disappointment and suspicion among complainants and observers.

3) The burden of proof

The Commission is worried that following the hundreds of rejections there may now be a sequence of dismissals due to lack of evidence. In particular, complaints involving prisons, the police and army are believed to be very difficult to prove because witnesses are few and tend to keep silent—in the case of inmates out of fear of reprisal, and in the case of colleagues out of false loyalty to their organization and comrades.

To cope with the problem of evidence in cases of human rights violations, the Commission is now seriously considering transferring the burden of proof to the respondent, that is, state agencies such as the police and correctional services. State agencies or local governments exercising public power have a constitutional duty to respect and ensure human rights. They are also bound by law to prevent their officials from violating the human rights of those under their custody or protection, be they facility inmates or criminal suspects. It follows therefore that such public agencies may be required to prove that they have done their best to fulfill their duties. If they do not do so they cannot claim their innocence or immunity. If this strategy fails for any reason, the future of complaints-handling is bleak, because complaints involving prison, police, or army officers can hardly be proven. In that case, inmate expectations would change into disappointment.

4) Remedial measures

Three questions have been raised regarding remedial measures. The first was whether the Commission may recommend remedial measures which victims do not want. This question was brought up because both the victim and the complainant of a disability discrimination case stated at a hearing that their goal was to obtain official apologies and reliable preventive measures rather than monetary compensation. The Commission decided in the affirmative on the ground that its procedure is more inquisitorial than adversarial.

The second issue raised was whether the Commission may recommend compensation for damages without specifying the amount. This was also resolved in the affirmative, however the wisdom of this decision is highly questionable, as it is likely to lead to new disputes over the proper amounts of compensation until a court intervenes. This decision appears without precedent in comparable complaints-resolving commissions at home and abroad. The Commission should give it second thought.

The third issue raised was whether the Commission may include among its remedial recommendations one that apologies be published in the mass media. The Constitutional Court has held that it is unconstitutional for courts or state agencies to order public apologies, on the ground that apologies, being moral by nature, should not be coerced. In other words, compulsory apologies have been prohibited as violating the constitutionally protected freedom of conscience. Because the Commission

“To cope with the problem of evidence in cases of human rights violations, the Commission is now seriously considering transferring the burden of proof to the respondent”

“The NHRC has the legal power to initiate consultations or express opinions on the human rights aspects of any bill, statute, institution, policy and practice”

cannot issue orders but only recommendations that the respondent is free to accept or refuse, it may be argued that mere recommendations to apologize should be acceptable. According to the Commission Act, however, the respondent should seriously endeavour to implement recommendations and in case it cannot, it should provide reasons for its failure. Based on this provision, the majority of members in the Commission found that recommendations for public apologies would be semi-coercive and therefore also prohibited them. Again, this is a questionable decision, because the Commission has as a result lost a useful tool for remedies.

Surveys of human rights conditions

In early July 2002, the Commission invited NGOs and experts to bid for nine survey projects on human rights in Korea, including one on prison conditions and one on the army. Two problems passed unnoticed in this matter. First, prison and army conditions are unsuitable for surveys conducted entirely by outside contractors, because neither NGOs nor experts have legal access to prisons or army camps. Unlike literature surveys or research projects, field surveys need to be conducted under the authority of the Commission. Secondly, the results of these surveys need to be published under the name of the Commission so that they can carry public authority. However, at present the Commission must attach the usual copyright disclaimer on the cover page of the survey report, which reads, “The analysis and contents of this report are not necessarily those of the Commission”. Certainly more authoritative accounts and analyses of human rights conditions are needed. The Commission’s authority to conduct human rights surveys should serve that purpose.

Policy advisory functions

The NHRC has the legal power to initiate consultations or express opinions on the human rights aspects of any bill, statute, institution, policy and practice. It has effectively intervened in such diverse areas as an anti-terrorism bill, the driver’s law and the nationality law, as circumstances have required. In the future, policy interventions need be more planned than reactive to outside pressures.

The Commission’s opinions of a recommendatory nature are likely to prevail in most cases, even though they lack binding force, because state agencies normally respect the rational judgments of other state agencies, unless they have convincing counter-arguments or their vital interests are at stake. It is important in the latter case that the Commission shows its commitment to having its opinions respected by doing the necessary lobbying and allying itself with concerned NGOs.

Public hearings

The NHRC may hold public hearings to receive testimony from a wide variety of persons and agencies, including victims and experts. The Commission has to date arranged just one public hearing, which lasted only a few hours because it heard opinions rather than facts. The public hearing function needs to be activated more frequently to obtain information. Public hearings are useful for a balanced view of sensitive human rights issues. Sometimes they could continue for weeks or months, and in fact such large-scale public hearings should precede strategic policy interventions. It is also important to remember that large-scale public hearings are natural companions to research and surveys of complicated human rights situations.

Submission of opinions to the courts

The NHRC is authorized to submit written opinions to courts trying a human rights case without its permission. Courts are also empowered to request the Commission to submit an expert opinion. To exercise this power judiciously, the Commission has to know, above all, what cases are in the court dockets and then carefully select a manageable number of representative cases. Until now, however, the full list of human rights cases pending in lower courts and the Constitutional Court has been unavailable to the Commission. As a result, it failed to intervene in three important human rights cases decided by the Constitutional Court. They questioned, respectively, the constitutionality of statutory censorship of “unsound” content in cyberspace, the strip search practice of the police, and the law-abiding oath required of national security criminals as a prerequisite to conditional release.

The Commission has discussed whether it can officially express opinions or comment on decisions of the Constitutional Court, and concluded in the negative. Arguments in favour of the Commission’s announcement of reasoned regrets were twofold: first, because the Commission has the power to submit an expert opinion to the Constitutional Court it is natural that it would make a critical statement in cases where its opinion is ignored; secondly, because the Commission is expected to speak for international as well as domestic human rights law, it may occasionally be the duty of the Commission to publicly criticize the Constitutional Court in relation to a human rights issue. However, such arguments were rejected on the grounds that all state agencies are legally bound by the decisions of the Constitutional Court. It is noteworthy that whereas members from the bench or the bar unanimously supported the negative position, members representing NGOs warned of the danger of accepting the unconditional supremacy of the Constitutional Court.

“Large-scale public hearings should precede strategic policy interventions”

Problematic decisions by the Commission

Conscientious objection

“The very first day the Commission started to perform its duties, it received a complaint about the discrimination of conscientious objectors in penal administration”

The very first day the Commission started to perform its duties, it received a complaint about the discrimination of conscientious objectors in penal administration. The complainant argued that Jehovah’s Witnesses inmates serving sentences for conscientious objection were discriminated against in conditional release.

Every year, over 500 Witnesses in Korea are imprisoned for their refusal to take up arms during military service. Because they are generally sentenced to three years imprisonment—the maximum punishment prescribed for disobeying orders under the Military Criminal Code—the total number of Witnesses in Korean prisons has always exceeded 1500. Both the militarist Korean state and the intolerant society have closed their eyes and ears for decades to the collective plight of these religious pacifists.

It was in the spring of 2000 that this old issue at last succeeded in drawing the attention and dedication of a number of human rights attorneys and advocates. They argued before a military court that criminal punishment of conscientious objection violates the freedom of conscience and faith, and demanded that the practice be stopped. The military court seemed to be moved and hesitated for weeks but finally adhered to its usual sentencing practice.

Abandoning hopes of influencing the military court, the attorneys changed their strategy and urged conscripted Jehovah’s Witnesses to reject military service from the start—rather than to disobey orders during military service—so that they could be tried by civilian courts. The change in litigation strategy worked, with two significant results. First, the courts lowered the sentence to 18 months, which is the minimum period. Secondly, one of the trial judges involved was convinced of the unconstitutionality of the current system of compulsory military service, in which no alternative means of military service is offered to conscientious objectors, and officially applied for the judgment of the Constitutional Court.

Under these new developments, those Jehovah’s Witnesses still serving three-year sentences began to sense injustice. It was particularly painful for their parents to see latecomers conditionally released in advance, because of the sentence differences. Upon close examination, it was found that Jehovah’s Witnesses had been granted conditional release upon serving 27 months, on the grounds that those convicts who disobeyed military orders should be imprisoned for a period one month longer than the compulsory military service period, which is currently 26 months. It turned out that Witnesses were not discriminated against in conditional releases. While conscientious objectors are conditionally released without exception after serving 75% of their sentence, 80% or more of

other convicts with a three year sentence have been conditionally released after serving more than 80% of their sentence. In other words, Jehovah's Witnesses or conscientious objectors have been favoured in the administration of conditional releases. Most members of the Commission lost confidence before these statistics.

Nevertheless, conscientious objectors are discriminated against in one important respect. The basic criterion for conditional release is the percentage of the sentenced period served, which differs depending on the crime type, past criminal records, prison behaviour ratings, and so on. In the case of conscientious objectors, however, release has come after the obligatory service period plus one month more. In other words, the government has applied a unique criterion to conscientious objectors in its administration of conditional release. It is nonsense, however, to equate the military service period with the imprisonment period, and the veteran soldier with the convicted criminal. Nevertheless, the majority of Commission members were inclined to dismiss the case. Lest such a decision should adversely affect the ongoing campaign for the introduction of a substitute service system, however, they agreed to postpone making a final decision. The Commission was recently freed from an obligation to decide on this case because the complainant dropped the complaint, having sensed the adverse atmosphere. Nevertheless, the Commission needs to establish a taskforce or special subcommittee to address this matter in a comprehensive and responsible manner. It would be a grave mistake if the Commission thinks it has dispensed with this thorny issue by bypassing this one complaint.

Consecutive segregation periods while imprisoned

Most complaints from prisoners involve abuses of disciplinary power and tools of restraint, as illustrated by a typical case that took place in Busan Penitentiary last May. An inmate allegedly committed suicide in a disciplinary segregation cell. He was in his mid-thirties, had already served over four years, and was only eight months away from release. Normally no sane inmate would attempt suicide in this situation.

However, according to the story later related by his brother, the prisoner was in extraordinarily dire circumstances. First of all, he was disciplined as many as 15 times during his 52 months in jail. Rumour has it that after blowing the whistle on intramural drug trafficking he became unpopular among ward officials and was frequently locked in the segregation cells. Secondly, by the time he killed himself, he had been kept under disciplinary segregation for four months and would have had to endure another four months there, because he had been prescribed a total of eight months for four different accounts of bad behaviour. Thirdly, at the time of his death, he had been kept handcuffed and chained for four days. That he could not even help but eat like a dog must have damaged his dignity beyond repair. Apparently these triple factors compelled him to suicide.

“ The government has applied a unique criterion to conscientious objectors in its administration of conditional release ”

“Prison authorities routinely enforce consecutive periods of disciplinary segregation regardless of the total time that may elapse”

Once placed into disciplinary cells, Korean inmates are prohibited from going out for physical exercise, meeting family and friends, reading books and newspapers, writing letters or petitions, watching television, and purchasing goods from canteens. In short, disciplinary segregation cells are the highest security confinement within prisons. The maximum period of disciplinary segregation under Korean law is two months. But the law is silent as to what should happen if an inmate is subject to a second, third or fourth two-month period of disciplinary segregation. This issue is of utmost practical importance in Korean prisons, where segregation is the most frequently utilized means of discipline. Prison authorities routinely enforce consecutive periods of disciplinary segregation regardless of the total time that may elapse. This unrestricted practice of consecutive segregation periods results in extreme cases of indefinite deprivation of sunlight and speech, amounting to slow murder. Consecutive enforcement of disciplinary segregation is also incompatible with the legal provision limiting the maximum length of disciplinary isolation to two months, because its rationale must be that these things are the most basic necessities of life, and deprivation of them should never exceed that period.

It was a grave mistake of the Committee of Standing Members, therefore, when—while entrusted with emergency relief power—it voted last February against granting emergency relief to an inmate who had been under disciplinary segregation for more than six consecutive months. Relying on the legality of consecutive enforcement of multiple sentences of imprisonment, the Committee effectively ruled that consecutive enforcement is legally acceptable if each disciplinary measure is lawful. The Committee failed to distinguish between consecutive imprisonment, which allows a prisoner his or her rights to sunlight, physical exercise, and conversation, and consecutive segregation, which should be disallowed because sunlight, exercise and all forms of communication are denied.

The plenary Commission is expected to deal with the issue of consecutive segregation soon, because of the suicide case. It should recommend to the Ministry of Justice to stop the correctional practice of consecutive segregation exceeding two months in total. The Commission should do everything in its power to intervene with a view to reforming prisons by guaranteeing prisoners rights, including conducting public hearings, prison conditions surveys, inspection visits and complaints-handling. A task force or a special subcommittee is also required in this case.

Discrimination in repatriation to North Korea

From time to time, the Commission has to deal with politically sensitive complaints. One such case involved government policy towards converted former long-term prisoners. The complainant, a former spy dispatched from North Korea, was captured and sentenced to lifetime imprisonment. In 1985, he yielded to

tenacious and terrible conversion methods and signed a document called a 'letter of conversion' renouncing the pro-North communist ideology. As a result, he was released in 1987. In 1999, he publicly revoked the conversion in the hope of returning to North Korea, but in 2000 the government rejected his application for repatriation on the grounds that he did not fall under the category of unconverted long-term ex-prisoners because he converted while he was serving his sentence. Citing the case of another long-term ex-prisoner who was allowed to return to North Korea despite having revoked an earlier conversion, the complainant argued that the government had discriminated against him and thereby violated his right to equal protection under the law.

“In most cases, ideological conversions were the result of physical and psychological torture”

Upon close examination, it turned out that the repatriated convert in the earlier case had signed an official conversion document while he was detained in a security surveillance camp, after being released from prison. The Ministry of Justice's position was that he was qualified to return to North Korea because he remained unconverted during the entire period of his sentence. The fact that he later converted at a security surveillance camp should not have affected his status as an unconverted ex-prisoner because surveillance camps are not prisons, at least in theory. But looking at the facts of the case, this person had converted in 1982 and reneged in 1999. He lived in South Korea after his conversion for three more years than the complainant in the recent case. The reasons and motives for their conversions and revocations were identical. They converted out of fear and despair. In most cases, ideological conversions were the result of physical and psychological torture; shameful violations of the freedom of thought. The prisoners revoked these conversions to recover their self-esteem and be reunited with their families.

Moreover, the general conditions of security surveillance camps were worse than ordinary prisons because the former were specially designed to detain unconverted, pro-North communists. Security surveillance camps were regarded to be beyond the reach of the rule of law. Considering these facts, it seems groundless to distinguish between those who converted while in prisons and those in post-prison surveillance camps for repatriation.

Before making the forced conversion, the complainant had already served in prison for long enough to be eligible for the status of unconverted long-term ex-prisoner. If the state regretted having violated his freedom of conscience and thought, it should have helped him return to his family and live a normal life in North Korea. Instead, it made an extremely formal and bizarre distinction between the two converts and discriminated against those who converted while in prison regardless of the actual period served.

The Commission rejected the case on the formal ground that the complaint was filed two months after the statutory deadline, which is prescribed as within one year after the cause of the

“What is most needed at this point is an environment in which lively reflective and strategic discussions are encouraged to flourish”

complaint occurred, with certain exceptions. This was an unfortunate decision, as the Commission should have taken the human rights aspects of the issue seriously. Those who are separated from their beloved families and homeland have a right to return to them, whether they are converts or non-converts.

Conclusion

The Korean NHRC was received enthusiastically by the mass media and NGO community as an essential part of a liberal and democratic state in this age of international human rights law. With less than 20 billion Won (approximately US\$16 million) in budget, it endeavors to inspire the spirit of human rights into all state agencies in Korea.

Without the Commission, human rights complaints would be less heard, more dispersed, and more costly to resolve. Now that all human rights issues and complaints sooner or later find their way to the Commission, both experience and expertise can rapidly develop and accumulate inside the single state agency. It has already dealt with dozens of interesting cases otherwise likely to be scattered and skipped over. Considering that it is a new and relatively small organization, the Commission has already made remarkable achievements.

However, the Commission has failed to reach its full potential. Given its very competent and devoted staff, it would perform excellently if its organizational culture were changed to be more horizontal and cooperative. What is most needed at this point is an environment in which lively reflective and strategic discussions are encouraged to flourish. Above all, such discussions should prevail during the plenary meetings of the Commission so that its members can develop and share a heightened sense of direction. This is the key to the future success of the Commission.

The Asian Human Rights Charter on enforcement of rights and the machinery for enforcement (www.ahrchk.net/charter)

- 15.1 Many Asian states have guarantees of human rights in their constitutions, and many of them have ratified international instruments on human rights. However, there continues to be a wide gap between rights enshrined in these documents and the abject reality that denies people their rights. Asian states must take urgent action to implement the human rights of their citizens and residents.
- 15.4a The judiciary is a major means for the protection of rights. It has the power to receive complaints of the violation of rights, to hear evidence, and to provide redress for violations, including punishment for violators. The judiciary can only perform this function if the legal system is strong and well-organized. The members of the judiciary should be competent, experienced and have a commitment to human rights, dignity and justice. They should be independent of the legislature and the executive by vesting the power of their appointment in a judicial service commission and by constitutional safeguards of their tenure. Judicial institutions should fairly reflect the character of the different sections of the people by religion, region, gender and social class. This means that there must be a restructuring of the judiciary and the investigative machinery. More women, more under-privileged categories and more of the Pariahs of society must by deliberate State action be lifted out of the mire and instilled in judicial positions with necessary training. Only such a measure will command the confidence of the weaker sector whose human rights are ordinarily ignored in the traditional societies of Asia.
- 15.4.b The legal profession should be independent. Legal aid should be provided for those who are unable to afford the services of lawyers or have access to courts, for the protection of their rights. Rules which unduly restrict access to courts should be reformed to provide a broad access. Social and welfare organizations should be authorised to bring legal action on behalf of individuals and groups who are unable to utilize the courts.
- 15.4c All states should establish Human Rights Commissions and specialized institutions for the protection of rights, particularly of vulnerable members of society. They can provide easy, friendly and inexpensive access to justice for victims of human rights violations. These bodies can supplement the role of the judiciary. They enjoy special advantages: they can help establish standards for the implementation of human rights norms; they can disseminate information about human rights; they can investigate allegations of violation of rights; they can promote conciliation and mediation; and they can seek to enforce human rights through administrative or judicial means. They can act on their own initiative as well on complaints from members of the public.
- 15.4d Civil society institutions can help to enforce rights through the organization of People's Tribunals, which can touch the conscience of the government and the public. The establishment of People's Tribunals emphasizes that the responsibility for the protection of rights is wide, and not a preserve of the state. They are not confined to legal rules in their adjudication and can consequently help to uncover the moral and spiritual foundations of human rights.

In this issue of *article 2*

Focus: Reparation for victims of human rights violations

Gabriela Echeverria, International Legal Adviser, REDRESS

- The draft Basic Principles and Guidelines on the Right to Remedy and Reparation: An effort to develop a coherent theory and consistent practice of reparations for victims

Carla Ferstman, Legal Director, REDRESS

- The right to reparation at the International Criminal Court

Paul Dalton, Programme Coordinator,

International Rehabilitation Council for Torture Victims

- Some perspectives on torture victims, reparation and mental recovery

And

- The draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law

Also

Professor Kwak Nohyun, non-standing member,

National Human Rights Commission of Korea

- The National Human Rights Commission of Korea: An assessment after one year

article 2 is published by the Asian Legal Resource Centre (ALRC) in conjunction with *Human Rights SOLIDARITY*, a publication of the Asian Human Rights Commission (AHRC).

ALRC is an independent regional non-governmental organisation holding general consultative status with the Economic and Social Council of the United Nations. ALRC seeks to strengthen and encourage positive action on legal and human rights issues at local and national levels throughout Asia.

ALRC invites submissions to *article 2* by interested persons and organisations concerned with implementation of human rights standards in the region.

Editorial Board

Basil FERNANDO
Nick CHEESMAN
Bruce VAN VOORHIS
Sanjewa LIYANAGE
KWAK Nohyun
Lin CHEW
Philip SETUNGA
WONG Kai Shing

Annual Subscription Fee* for 1 year

Hong Kong HK\$ 250
Asian Countries US\$35
Outside Asia US\$ 50

*Subscription fee includes 6 issues of *article 2* and 6 issues of *Human Rights SOLIDARITY* per year.



Asian Legal Resource Centre
Unit 4, 7 Floor,
Mongkok Commercial Ctr.,
16 Argyle Street, Kowloon
Hong Kong SAR, China
Tel: +(852) 2698-6339
Fax: +(852) 2698-6367
E-mail: editor@article2.org
Website: www.article2.org