



FREEDOM NOW

International Framework on the Right to Reparation

I. Introduction

- The right to remedy and reparation for violations of international law is a longstanding norm of international law,¹ and is guaranteed in numerous international human rights treaties.²
- There is no contemporary dispute, as a general matter, that victims of human rights violations have a right to an effective remedy and reparation.³

A. Terminology

- The international legal provisions on the right to reparation do not follow uniform terminology between instruments.
- In modern practice, the term “remedy” is loosely used to refer to forms of *procedural* redress, while the term “reparation” is often used to refer to forms of *substantive* redress, including restitution, compensation, rehabilitation, satisfaction, as well as other forms of injunctive relief.⁴
- Types of Reparation. Reparations may include providing any or all of the following types of relief: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. One of the comprehensive and authoritative sources defining each of the types of reparations is the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, which was adopted by the UN General Assembly in 2005. The *Basic Principles* defines the types of reparations as follows:
 - **Restitution.** Restitution “involves the re-establishment as far as possible of the situation which existed prior to commission of the internationally wrongful act.” (Principle 19) It includes restoring liberty, enjoyment of rights, identity, family life, and citizenship, or a return of employment or property.
 - **Compensation.** Compensation is defined as “the actual losses incurred as the result of the act,” insofar as such damage is not made good by restitution. (Principle 20) It often refers to monetary compensation for injuries with economically assessable damages.
 - **Rehabilitation.** Rehabilitation refers to medical and psychological care, as well as legal and social services. (Principle 21)

¹ See Permanent Court of International Justice, *The Chorzow Factory (Jurisdiction) Case*, 1927 P.C.I.J. (Ser. A) No. 9, at 21 (“[I]t is a principle of international law . . . that any breach of engagement involves an obligation to make reparation.”); see also International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, ICJ Reports 1949, available at <https://www.icj-cij.org/files/case-related/4/004-19490411-ADV-01-00-EN.pdf>.

² See, e.g., Universal Declaration of Human Rights, art. 8; International Covenant on Civil and Political Rights, art. 2; International Convention on the Elimination of All Forms of Racial Discrimination, art. 6; Convention against Torture, art. 14.

³ See International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations*, Revised Edition, (Oct. 2018), at 1, available at <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>.

⁴ See International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations*, Revised Edition, (Oct. 2018), at xiii, available at <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>.

- **Satisfaction.** Satisfaction is an obligation to correct an injury that cannot be made good by restitution or compensation, such as “an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality.” (Principle 22)
- **Guarantees of Non-Repetition.** These guarantees include not only official promises not to repeat the violation with respect to the victim, but also formal commitments to structural changes in policy and institutional reform that aim to change both the background structures that gave rise to the violation and to institute new structures to monitor and prevent future harm. (Principle 23). For example, such reforms may include, civilian control over military and security forces, strengthening judicial independence, protecting human rights defenders, promoting human rights standards within the civil service, law enforcement, the media, private industry, and social services.
- Note that while claims for **punitive damages** as a form of reparations have been raised before international courts, such as the Inter-American Court, courts so far have refused to recognize them as a form of reparations.⁵ Nevertheless, some experts have contended that punitive damages constitute a legitimate form of reparations under international law.⁶

B. International Legal Sources of the Right to Reparation

- Because the norm to provide reparations derives from numerous sources of international law, the exact application of the right may vary in scope depending on the type of violation, the relevant source of law, or the jurisprudence of the relevant system.

C. Road-map

- Although a complete picture of State obligations with respect to a breach of international law will include a discussion of both the right to remedy and the right to reparation, this talk will address the right to reparation.
- Additionally, the right to reparations also has unique applications in the context of international humanitarian law and when the violated party is a State. However, my specific focus will be on its application in human rights law.
- In the following, I provide an overview of the normative framework for the right to reparations under international law, and discuss how this framework has been interpreted and applied in practice.

II. International Law Sources on the Right to Reparation

A. Right to Reparation as a General Principle of International Law

- The most prominent early statement of the right to reparation in international law was made by the Permanent Court of International Justice, the predecessor to the International Court of Justice, in the *Factory at Chorzow Case*.
- The *Factory at Chorzow Case* concerned a dispute over an agreement between Germany and Poland signed after the First World War. Germany had agreed to transfer control of certain territory to Poland on the condition that Poland would not expropriate (“forfeit”) any property of Germany’s in that territory. However, Poland breached the agreement and expropriated two of the German companies in that territory.

⁵ Velasquez Rodriguez, IACtHR, Ser. C, No. 7, 1990, pp. 9, 37-8.

⁶ Jo M. Pasqualucci, Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure, 18 MICH.J. INTLL. 1, at 43 (1996), available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1462&context=mjil>.

- In determining whether Poland had any obligation as a result of the breach of the agreement, the Permanent Court of International Justice stated: “It is a principle of international law and even a general conception of law that any breach of an engagement involves an obligation to make reparation in an adequate form.”⁷
- The Court even goes so far as to state that the right to reparation is so indispensable to international law that it is not necessary that this right is stated in a treaty itself, it is merely assumed to exist.⁸
- The right to reparation acknowledged in *Chorzow* has been reaffirmed in several subsequent judgements by the International Court of Justice,⁹
- Although *Chorzow* was decided in the context of a dispute between States, it has been applied by several human rights courts, such as the European Court of Human Rights¹⁰ and the Inter-American Court on Human Rights,¹¹ in the context of extending the right to reparation to individuals.

B. Right to Reparations under the Nine Core International Human Rights Treaties

- The origin of the right to reparations in human rights law comes from Article 8 of the UDHR, which states that: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”
- The ICCPR codifies this provision as a legally binding norm in Article 2(3)(a), stating “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.”
- The UN Human Rights Committee has interpreted the right to an “effective remedy” broadly. In the Committee’s 2004 General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, the Committee explicitly recognized that the right to an “effective remedy” provides for a right to reparation, including

“restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”¹²
- Five of the other human rights treaties also affirm the right to reparation in different forms.¹³
- Notably, the International Convention for the Protection of All Persons from Enforced Disappearance, in Article 24, provides a comprehensive definition of reparations, guaranteeing that

“victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation. The right to obtain reparation . . . covers material and moral damages and, where appropriate, other forms of reparation, such as: (a) restitution, (b) rehabilitation, (c) satisfaction, including restoration of dignity and reputation; (d) guarantees of non-repetition.

C. Right to Reparations under Regional Human Rights Treaties

1. **European Convention on Human Rights (“ECHR”)**

⁷ Permanent Court of International Justice, *The Chorzow Factory (Jurisdiction) Case*, 1927 P.C.I.J. (Ser. A) No. 9, at 21.

⁸ *Id.*

⁹ *Gabcikovo-Nagymaros Project Case (Hungary v. Slovakia)*, ICJ Report 1997, p. 7, paras 149–52; *Armed Activities on the Territory of the Congo Case (Democratic Republic of the Congo v. Uganda)*, ICJ Report 2005, p. 82, para. 259.

¹⁰ *Papamichalopoulos v. Greece (Article 50)*, ECtHR, Ser. A, No. 330-B, 1995, para. 36.

¹¹ *Velasquez Rodriguez*, IACtHR, Ser. C, No. 4, 1989, pp. 26–7, 30–1.

¹² UN Human Rights Committee, *General Comment No. 31, The Nature of General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 2004, para. 16.

¹³ *Convention against Torture*, art. 14; *Convention on the Elimination of All Forms of Racial Discrimination*, art. 6; *Convention on the Rights of the Child*, art. 39; *International Convention for the Protection of All Persons from Enforced Disappearances*, art. 24(4); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, art. 83.

- The ECHR, in 1953, was the first modern human rights instrument creating a court with competence to make legally binding decisions on cases awarding reparations.
- Article 13 of the ECHR guarantees the right to an “effective remedy” and Article 41 states that the European Court on Human Rights (“ECtHR”) shall afford “just satisfaction” if international law in the State Party allows only partial reparation to be made.
- Early on in the ECtHR’s jurisprudence, the Court largely limited its interpretation of its competence to award reparations to monetary damages. However, in recent years, the Court has begun to expand its interpretation to include broader injunctive relief.

2. American Convention on Human Rights (“ACHR”)

- The ACHR also guarantees the right to a legal remedy in Article 25, and in Article 63 the ACHR establishes the right to a remedy and fair compensation.
- The Inter-American Court on Human Rights has interpreted the right to reparations under the American Convention broadly.¹⁴

3. African Charter on Human and Peoples’ Rights (“ACHPR”)

- The ACHPR is unique in that it contains no clear provision on individual complaints and it lacks a general reference to the right to remedy for violations.
- Despite this lack of explicit reference to a right to a remedy, the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights have found that the ACHPR imposes the obligation on signatories to provide reparations to victims of violations of the Charter.¹⁵

D. Other Prominent International Instruments

1. Draft Articles on State Responsibility.

- Adopted in 2001, Article 31 establishes the international obligation of a state in breach of an international rule to make reparations for the injury caused as a result of such breach.
- Although the Draft Articles primarily focus on international responsibility between States, the Commentary to the Draft makes it clear that the principles apply in relation to all obligations “of the State and not only [to] those owed to other States.”¹⁶
- Recognizes restitution, compensation, and satisfaction as forms of reparations.

2. Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

- Adopted by the UN General Assembly in 2005, the *Basic Principles* in principles 2(c) and 11(b), affirms the right to adequate, effective, and prompt reparation for harms suffered as the result of violations.
- Recognizes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition as forms of reparations, providing a comprehensive definition of each.

¹⁴ See, e.g., Velasquez Rodriguez, IACtHR, Ser. C, No. 7, *Reparations and Costs* (1989); see also Inter-American Court on Human Rights, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, Series A No. 14, *Advisory Opinion OC-14/94* (Dec. 9, 1994).

¹⁵ The African Court on Human and Peoples’ Rights, in *Mtikila v. Tanzania*, found that it has the power to award reparations to the victims of human rights violations, and subsequently in 2015, in *Zongo and Others v. Burkina Faso*, the Court made its first reparations award.

¹⁶ Commentary to the Draft Articles on State Responsibility on Article 28, 2001, p. 87.

- The *Basic Principles* applies only to “gross violations” of international human rights law and “serious violations” of international humanitarian law.
- Although not formally defined in international law, “gross violations” and “serious violations” denote types of violations that affect in qualitative and quantitative terms the most basic rights of human beings, notably the right to life and the right to physical and moral integrity of the human person.
- It is generally assumed that genocide, slavery and slave trade, murder, enforced disappearances, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, deportation or forcible transfer of population, and systematic racial discrimination fall into this category.
- Deliberate and systematic deprivation of essential food stuffs, essential primary health care or basic shelter and housing may also amount to gross violations of human rights.¹⁷

3. **Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation**

- Adopted in 2007 at the International Meeting on Women’s and Girls’ Right to a Remedy and Reparation, the Nairobi Declaration affirms the right to reparations, particularly in the context of gender-based violations made during armed conflict.
- It innovates by emphasizing the right to be notified of the right to reparations as well as the right to full participation of victims in the stages of the reparation process, including design, implementation, evaluation, and decision-making.¹⁸

III. **International Law on Reparations in Practice**

A. Types of Reparations

1. **Compensation**

- Compensation is provided in the form of a monetary award.
- The *Basic Principles* confirm that monetary damages may be provided for:
 - Physical or mental harm or suffering
 - Lost opportunities, including employment, education, and social benefits
 - Material damage, such as property damage
 - Loss of earnings, including loss of future earnings
 - Moral damage, which is interpreted as non-material losses, such as pain and suffering, mental anguish, humiliation, and a sense of injustice.
 - Legal or other expert costs, including those required to bring the case claiming reparations
 - Cost of medical services or medicine, as well as psychological and social services.
- The victim or their representative often bears the burden of showing the amount (monetary cost) of damage caused by the violation.

¹⁷ In international humanitarian law, “serious violations” are to be distinguished from “grave breaches.” The latter refers to atrocious violations that are defined in international humanitarian law but only relating to international armed conflicts. The term “serious violations” is referred to but not defined in international humanitarian law. It denotes severe violations that constitute crimes under international law, whether committed in international or non-international armed conflict. The acts and elements of “serious violations” (along with “grave breaches”) are reflected in article 8 of the Rome Statute of the International Criminal Court under “war crimes.”

¹⁸ Nairobi Declaration, princ. 2(A)-(B).

- States must provide “fair and adequate” compensation to victims, and the Human Rights Committee has explicitly stated that States must provide appropriate compensation, which excludes purely “symbolic” amounts of compensation.¹⁹
- Calculating Damages
 - When calculating damages, compensation is granted for economically assessable harm arising from the violation. There are lots of different types of harms that for which compensation has been awarded. Below are highlights of some of areas.
 - *Loss of earnings*
 - In the case of unlawful detention, the International Court of Justice has recognized that compensation should include the amount of income that would have been received were the individual not detained.²⁰
 - Where there is a link between the violation and the loss of earnings, the Inter-American Court generally calculates lost earning based upon the victim’s earning before the violation. However, in *Cantoral Benavides*, the Court awarded lost earnings to the victim, who at the time of his detention was a biology student, with reference to the income he would have had in his profession had he not been detained and prevented from pursuing his studies.²¹ When there is no reliable information about the lost earnings, the Court will apply the minimum wage in national law.²²
 - The Inter-American Court has also provided compensation for lost earnings to family members of victims. In *Bamaca Velasques v. Guatemala*, the Inter-American Court awarded direct compensation to the wife of the disappeared victim for lost earnings, since she had “spent much of her time taking steps to determine the whereabouts of her husband as well as struggling against the obstructions and acts of denial of justice, which did not allow her to practice her profession.”²³
 - Similarly, the European Court will also make loss of earnings awards to indirect victims of human rights violations. In *Isayeva v. Russia*, the European Court awarded damages to the mother of a deceased victim after she demonstrated a causal link between her son’s death in violation of Article 2 of the ECHR and the loss by the mother of the financial support which he would have provided her had he continued living and working.²⁴
 - *Moral Damages* (including physical and mental harm)
 - The European Court orders compensation to victims for moral damages (non-pecuniary damage) when it finds that they have suffered anguish, distress, or other mental or physical harm.²⁵ Where the victims are disappeared or dead, the court has awarded moral damages to the victim’s heirs.²⁶ Mental harm need not necessarily be demonstrated by the victim, but may be presumed in the case of gross violations.²⁷
 - The Inter-American Court will award moral damages to victims in cases where the victim is imprisoned, tortured or abused, and will award moral damages to family

¹⁹ E.g., *Bozize v Central African Republic*, Communication No. 449/1990; *Mjica v Dominican Republic*, Communication No.449/1991); *Griffin v Spain*, Communication No. 493/1992.

²⁰ International Court of Justice, *Ahmadou Sadio Diallo v. Democratic Republic of the Congo* (Compensation), Judgment of June 19, 2012, para. 40.

²¹ Inter-American Court on Human Rights, *Cantoral Benavides v Peru*, Series C No. 88, Reparations, (Dec. 3, 2001) paras 47-49.

²² See Inter-American Court on Human Rights, *Villagran Morales et al. v. Guatemala*, Series C No. 95, Reparations, (May 26, 2001), para 79.

²³ Inter-American Court on Human Rights, *Bamaca Velasques v. Guatemala*, Series C No. 91, *Reparations*, (Feb. 22, 2002), para 54(a).

²⁴ European Court of Human Rights, *Isayeva v. Russia*, Judgment of February, 24, 2005, para 234.

²⁵ See e.g., European Court on Human Rights, *Orhan v. Turkey*, no. 25696/94, Judgment of 18 June 2002, para. 443, <http://hudoc.echr.coe.int/eng?i=001-60509>.

²⁶ European Court on Human Rights, *Ipek v. Turkey*, no. 25760/94, Judgment of 17 February 2004, para. 237.

²⁷ European Court on Human Rights, *Orhan v. Turkey*, no. 25696/94, Judgment of 18 June 2002, para. 443.

members in the case of disappearances.²⁸ For family members, the closer the familial relation to the victim, the higher the damages.²⁹

○ *Loss of Future Opportunity*

- The Inter-American Court has developed a framework, employing a concept called “the life plan,” for analyzing loss of opportunity that would otherwise be difficult to quantify.³⁰ The life plan is a form of “personal fulfillment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself Those options, in themselves have an important existential value . . . that this Court cannot disregard.” When violations of the American Convention “obstruct and impair the accomplishment of an anticipated and expect result” in one’s life plan, reparations should be awarded to compensate for the damages done to life plan.
- For example, the Inter-American Court applied the “life plan” framework in *Cantoral Benavides*, where it awarded the victim of wrongful detention scholarship money for education to pursue the studies that he would have completed were he not detained.³¹

2. Restitution

- Restitution involves non-monetary awards that attempt to place the victims in the position they occupied prior to the violation.
- This typically involves restoring a legal right or interest that was previously removed, and can involve providing amnesty status, guaranteeing freedom of movement, or restoring one’s employment, and returning wrongfully seized property.
- Examples restitution:
 - *Restoring the Right to a Fair Trial*. When an individual’s right to a fair trial has been breach, the restitution remedy would involve both vacating the judgment of the original trial and ordering a new trial. (e.g., Human Rights Committee in *Akwanga v Cameroon*)³²
 - *Restoring the Right to Liberty*. In the case of arbitrary or unlawful detention, a State may be obligated to provide reparations in the form of release of the individual from detention. (e.g., Inter-American Court in *Loayza Tamayo v Peru*)³³
 - *Restoration of Citizenship*. Restitution for a violation of the right to citizenship will include reinstatement of citizenship and the accompanying privileges, such as the right to return to one’s country of nationality. (e.g., African Commission in *Modise v Botswana*)³⁴

3. Rehabilitation

- Rehabilitation is somewhat underdeveloped in the law compared to other forms of reparation.
- The *Basic Principles* only describes rehabilitation as including “medical and psychological care, as well as legal and social services.”

²⁸ See Inter-American Court on Human Rights, *Velasquez Rodriguez v. Honduras*, Series C No. 7, Compensatory Damages (July 21, 2989), paras. 50-52.

²⁹ See Inter-American Court on Human Rights, *Loayza Tamayo v Peru*, Series C No. 42, *Reparations*, (Nov. 27, 1998), paras. 138-145 (awarding different damages for victim, children, siblings).

³⁰ Inter-American Court on Human Rights, *Loayza Tamayo v Peru*, Series C No. 42, *Reparations*, (Nov. 27, 1998), para. 150.

³¹ Inter-American Court on Human Rights, *Cantoral Benavides v Peru*, Series C No. 88, *Reparations*, (Dec. 3, 2001), paras. 60, 80.

³² Communication No. 1813/2008, CCPR/C/101/D/1813/2008, 19 May 2011, para. 9, <http://www.redress.org/downloads/documents/110322-mbongoakwangavcameroon.pdf>.

³³ Inter-American Court on Human Rights, *Loayza Tamayo v Peru*, Judgment, 17 September 1997, para. 84.

³⁴ African Commission, John K. Modise v Botswana, Communication 7/93_14AR, dispositif.

- In the context of victims of torture, the Committee against Torture in General Comment No. 3 elaborates that rehabilitation refers to acts that “restor[e] the function or the acquisition of new skills required as a result of the changed circumstances of a victim in the aftermath of torture or ill-treatment. It seeks to enable maximum possible self-sufficiency and function for the individual concerned”³⁵
- The Human Rights Committee on rehabilitation as a form of reparation.
 - In considering cases, UN Human Rights Committee has found that States have an obligation to provide rehabilitative services to victims of torture and ill treatment while in custody by affording necessary medical and psychological assistance going forward.
 - In *Raul Sendic Antonaccio v. Uruguay*,³⁶ the leader of opposition political party is arrested by State forces, detained by military personnel, and tortured. As a result of severe beatings by military personnel, the applicant developed a hernia. However, despite a medical order to perform an operation for his condition, military authorities refused to take him to a hospital. In addition to finding that the government wrongfully detained the applicant, the Human Rights Committee ordered the government to ensure that he receive “promptly all necessary medical care.” Similar facts in *Elena Beatriz Vasilskis v Uruguay*³⁷ and *Gustavo Raul Larrosa Bequio v Uruguay*.³⁸
 - In *Basnet v. Nepal*, a human rights lawyer and journalist is arbitrarily detained incommunicado and without trial in military barracks for 258 days in inhuman conditions, such as having to spend days lying on a thin mattress with his hands handcuffed behind his back and blindfolded. As reparation, the Committee orders both adequate medical and psychological treatment for the former detainee. Notably, the Committee also orders psychological medical treatment be provided to the applicant’s cousin, who filed the petition, due to the cousin’s distress from having to take over the family responsibilities of the applicant and from having authorities mislead, contradict, and lie to the cousin during his search for the applicant’s whereabouts.
 - The Human Rights Committee has not developed jurisprudence around what rehabilitative reparations would consist of other than general medical or psychological services.
 - In its concluding observations, the Human Rights Committee has recommended that States employ rehabilitative services for victims of violations other than torture and ill treatment, such as for victims of sexual or domestic violence,³⁹ forced prostitution,⁴⁰ victims of sexual trafficking, children subject to sexual exploitation, and for homeless children.⁴¹ However, these recommendations did not arise in the context of a contentious matter before the Committee.
- The Committee against Torture on rehabilitation as a form of reparation
 - In concluding observations, the CAT has recommended that, to comply with their international obligations, States provide victims of torture “medical, psychological and social rehabilitation.”⁴²
 - Additionally, for victims of sexual violence of non-state actors and the government armed forces, the CAT recommended establishing a “rehabilitation and assistance scheme for victims.”⁴³

³⁵ Committee against Torture, General Comment No. 3, para 11.

³⁶ Communication No. 63/1979, UN Doc. CCPR/C/14/D/63/1979 (Oct. 28, 1981), available at <http://hrlibrary.umn.edu/undocs/newscans/63-1979.html>.

³⁷ Communication No. 80/1980, UN Doc. CCPR/C/18/D/80/1980 (Mar. 31 1983), available at <http://hrlibrary.umn.edu/undocs/newscans/80-1980.html>.

³⁸ Communication No. 88/1981, UN Doc. CCPR/C/18/D/88/1981 (Mar. 29 1983), available at <http://hrlibrary.umn.edu/undocs/newscans/88-1981.html>.

³⁹ Concluding Observations Ukraine, UN doc. CCPR/C/UKR/CO/6, 28 November 2006, para. 10; Concluding Observations Ireland, UN doc.

CCPR/C/IRL/CO/3, 30 July 2008, paras. 9, 16 and Concluding Observations Japan, UN doc. CCPR/C/JPN/CO/5, 18 December 2008, paras. 15, 23.

⁴⁰ Concluding Observations Lithuania, UN doc. CCPR/C/79/Add.87, 19 November 1997, para. 11.

⁴¹ *Id.*

⁴² Concluding Observations of the Committee against Torture: Chad, CAT/C/TCD/CO/1, (June 4, 2009), para 17.

⁴³ *Id.* at 20.

- The CAT has also found that victims of torture and ill treatment have a right to rehabilitation as a form of reparation.
 - In *Evloev v. Kazakhstan*, the applicant is arrested, detained, and tortured until he agreed to sign a confession for a murder. His torture includes being repeatedly beaten, threatened with sexual violence, bound with ropes and left on the floor, choked, having hot needles inserted under his nails, and having his family members threatened with violence. The CAT found that the State, in addition to failing to meet its obligation to investigate torture, was required to provide “full rehabilitation” to the victim.⁴⁴ (similar holdings in *S. Ali v. Tunisia*,⁴⁵ and *Gerasimov v. Kazakhstan*)⁴⁶
- The Committee on the Elimination of Discrimination against Women on rehabilitation as a form of reparation
 - Although not in the context of a direct violation caused by the State or a State official, the CEDAW Committee has found that States have an obligation to provide victims of domestic violence with rehabilitative services.
 - In *A. T. V. Hungary*, a woman who was subjected to severe physical and mental domestic violence by her husband was unable to receive assistance because Hungary lacked mechanisms in place to effectively protect her or other women in similar situations. The CEDAW Committee found that the lack of government services amounts to a violation of the Convention. The Committee found that victims are entitled to “safe and prompt access to justice, including free legal aid where necessary, in order to ensure them available, effective and sufficient remedies and rehabilitation”⁴⁷ Moreover, the Committee found that Hungary should “ensure that A. T. is given a safe home in which to live with her children, receives appropriate child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights.”⁴⁸
 - In the above case, the CEDAW Committee finds that adequate rehabilitation, at least in the context of domestic violence survivors, requires taking a holistic approach to reparation.
- Among the regional systems, only the Inter-American System has a developed practice of ordering government to enact specific rehabilitative measures as a form of reparation. (The EctHR generally factors the cost of rehabilitation into its compensation award).
 - In addition to awarding medical and psychological care as a means of rehabilitating one’s diminished life plan, the Inter American Court has also awarded other types of reparations, such as vocational and educational training on the theory that it would assist victims to reintegrate into their community and society following the violation and when violations have damaged the victim’s life project.
 - Additionally, in cases of large scale or systemic violations of the American Convention, the Inter-American Court has awarded rehabilitation in the form of ordering the implementation of housing programs, education policies, and infrastructure improvements.
 - In *Plan de Sanchez Massacre v. Guatemala*,⁴⁹ the Inter-American Court considered appropriate reparations for the Guatemalan military’s role in conducting a massacre of 268 individuals, the majority of whom were indigenous people of a single village. Given the effect of the massacre on the community in the village, the Court ordered several forms of rehabilitation that addressed restoring the community as a whole. These reparations included ordering the government to: implement within five years a housing program to provide adequate housing to the surviving

⁴⁴ See Committee against Torture, *Evloev v. Kazakhstan*, Communication No. 441/2010, UN Doc. CAT/C/51/D/441/2010, para 9.7, (Nov. 5, 2013), <https://undocs.org/CAT/C/51/D/441/2010>.

⁴⁵ Communication No. 291/2006, UN Doc. CAT/C/41/D/291/2006, para 15.8 (Nov. 21, 2008), <https://undocs.org/CAT/C/41/D/291/2006>.

⁴⁶ Communication No. 433/2010, UN doc. CAT/C/48/D/433/2010, paras. 12.8, 14 (May 24, 2012), <https://undocs.org/CAT/C/48/D/433/2010>.

⁴⁷ CEDAW Committee, *Ms A. T. V. Hungary*, Communication No. 2/2003, para 9.6(II)(g), (Jan. 26, 2005).

⁴⁸ *Id.* at para. 9.6(I)(b).

⁴⁹ Series C No. 116, Reparations and Costs, paras. 105-10, (Nov. 19, 2004)

victims who live in the village and who need it; provide individual, collective, and family psychiatric treatment; and implement a development program that (a) studies the local culture of the community to inform the development, (b) improves the road system to and within the village, (c) improves the sewage and water system of the village, (d) supplies additional teachers for the village, and (e) establishes a health center with trained personnel in the village. With respect to the services provided, the Court ordered that rehabilitation be offered with informed consent of the victim, in their own language or via interpretation, and that it be otherwise culturally competent and specifically specialized to meet the victims' needs.

- In *Mendoza et al. v. Argentina*,⁵⁰ the Inter-American Court considers the appropriate reparations for giving life-sentences to minors in the State's juvenile justice system. The Court found that the psychological impact of life sentences on minors was traumatic, and accordingly ordered the State to provide immediate, free, specialized medical, psychological, and psychiatric care to the applicants, if they request it. Additionally, because of the harm of the State's violation caused "severe impairment of opportunities for personal development, in a way that is irreparable or very difficult to repair", the Court found that it was appropriate to order the State to provide the applicants with educational or formal training options that they request, including university education, providing them with a comprehensive scholarship while they are studying.
- To extrapolate from the above case law, several themes concerning rehabilitation emerge. Adequate rehabilitation should: (1) include necessary medical and psychological services; (2) include free legal support when necessary; (3) be administered institutionally through government programs to address the specific needs of victims, such as survivors of domestic violence or torture; (4) be prompt, accessible, and safe; (5) be holistic in its approach, potentially including basic social support such as housing, development, and financial assistance; and (6) respect the integrity, autonomy, and cultural history of the victim(s).

4. **Satisfaction**

- Generally, refers to symbolic measures that a State may take, involving public acknowledgment of wrongdoing, truth seeking, and public accountability.
- Examples described in the *Basic Principles*:
 - Verification of the facts and public disclosure of the truth, in so far as it is not against the interest of the victim.
 - Investigation of the whereabouts of the disappeared.
 - Public apologies, including an acceptance of responsibility.
 - Inclusion of an accurate account of violations that occurred in future training and in educational materials at all levels.
 - Holding commemorative ceremonies.
 - Creating public memorials.

5. **Guarantees of Non-Repetition**

- Guarantees of non-repetition, under the right to reparation, constitutes more than a verbal and public affirmation that the violation will not occur again. A guarantee of non-repetition requires that a State take steps to remedy systemic defect leading to the violation. A successful guarantee of non-repetition will involve changes that genuinely decrease the risk of a future violation.
- Examples from the *Basic Principles* include:

⁵⁰ Series C No. 260, Preliminary Objections, Merits and Reparations, paras. 1, 310-318.

- Ensuring future civilian control of military and security forces.
- Strengthening the independence of the judiciary.
- Educating all sectors of society on human rights and international human rights law.
- Removing or reforming laws contributing to gross violations of international human rights law.
- Promoting mechanisms for preventing violations.
- As shown by the examples, guarantees of non-repetition often involve more general changes to the government and government practice. Accordingly, guarantees of non-repetition will generally arise when a State is engaged in a persistent pattern of human rights violations.

B. State Obligation to Provide Reparation

1. **Scope of State Responsibility**

- The obligation falls upon States to provide reparation for their violations of international human rights commitments.
- Conventionally, a State's human rights obligations are understood to extend, at minimum, throughout the State's territory. However, international consensus has increasingly recognized that a State's human rights obligations extend to any person within the State's "jurisdiction," even if that falls outside the State's territory, as traditionally understood.
- Most recently, the Human Rights Committee, in its General Comment No. 36, interpreted a State's jurisdiction, for the purposes of human rights obligations, to extend to "all persons over whose enjoyment of the right to life [the State] exercises power or effective control."⁵¹ The Committee continues to explain that the State is responsible for the human rights implications of actions that are a reasonably foreseeable result of its actions.⁵²
- A similar interpretation of the scope of States' human rights obligations has been made by the Inter American Court in its Advisory Opinion on the Environment and Human Rights.⁵³
- Accordingly, the duty to provide a reparation follows from a breach of international human rights law with respect to individuals in the State's territory or, if not within the territory, within the State's power or effective control.

2. **Circumstances often Triggering State Responsibility**

There are several types of situations where infringements of international human rights obligations may trigger a State's obligation to provide reparations:

- The human rights violation is committed by a State body or agent. This is the prototypical case.
- The violation is committed by a non-State actor under the effective control, authorization, acquiescence, or complicity of State agents, or where the non-State actor is supported by the State to exercise elements of governmental authority.⁵⁴
- A private party commits an act interfering with an individual's enjoyment of their human rights, but where the State responsibility may nonetheless attach. This event occurs where the State maintains an

⁵¹ UN Human Rights Committee, *General Comment No. 36 on the Right to Life*, para. 63.

⁵² *Id.*

⁵³ Inter-American Court on Human Rights, *State Obligations in Relation to the Environment in the Framework of the Protection and Guarantee of Rights to Life and Personal Integrity*, Series A No. 23, Advisory Opinion, paras. 73-81, http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf (in spanish).

⁵⁴ Articles on State Responsibility for Internationally Wrongful Acts, UN General Assembly, UN Doc. A/56/10 (2001), arts. 5, 8, 11.

obligation to take reasonable steps to protect human rights, but fails to do so. Often this arises with respect to a State's obligation to investigate alleged acts that impair the enjoyment of human rights.

3. Characteristics of State Responsibility

a. *All Necessary Measures*

- States must adopt all legislative and other measures necessary to comply with its international obligations and to give effect to the rights protected in international law.
- This obligation includes ensuring that victims of violations receive reparations.
- As the Inter-American Court and Commission have made clear, in order to comply fully with its duty to give effect to human rights, a State must ensure human rights through its entire "legal, political and institutional system,"⁵⁵ and to organize "the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of legally ensuring the free and full enjoyment of human rights."⁵⁶

b. *Complementary Obligations*

- The reparatory measures adopted by States should be part of a broader implementation of States' human rights duties, and States may not substitute their fulfilment of some obligations for others.
- For example, in addition to providing effective remedies for violations, States also have an obligation to take legislative measures to give effect to rights, to investigate the truth about human rights violations, to provide remedies for violations, and to bring perpetrators of violations to justice.⁵⁷
- A State must discharge all of the above responsibilities, and may not substitute the performance of one obligation for the others.
- Accordingly, in the context of reparations, a State must still provide full reparations for a violation even if the government has taken other steps with respect to fulfilling its duties, such as criminally investigating and punishing the perpetrator and instituted legislative reform.

c. *Unconditional Obligations*

- Additionally, a State's duties are unconditional, meaning that the performance of one does not depend on the performance of another or upon action taken by the victim, such as the submission of a complaint.
- In the context of reparations, for example, a State's obligation to investigate and punish a human rights violator still remain, even if a victim waives their right to reparation.⁵⁸
- Additionally, victim reparations should be performed independently of a government's fulfilment of its investigation to investigation, prosecute, and punish perpetrators. A civil proceeding should be available to victims independently of the criminal proceeding.⁵⁹ It is a violation of the victim's rights to reparations to delay civil proceedings pending a criminal judgment.

⁵⁵ Inter-American Commission on Human Rights, *Chumbivilcas (Peru)*, Case 10.559, Report 1/96 (1996), para. V(3).

⁵⁶ Inter-American Court on Human Rights, *Velasquez-Rodriguez v. Honduras*, Series C No. 4, Judgment, para. 166.

⁵⁷ See, e.g., Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, UN Doc. E/CN.4/1994/7 (1994), paras. 688, 711.

⁵⁸ See Inter-American Court on Human Rights, *Garrido and Baigorria v. Argentina*, Series C No. 39, Reparations, para. 72.

⁵⁹ See Committee against Torture, *Evloev v. Kazakhstan*, Communication No. 441/2010, UN Doc. CAT/C/51/D/441/2010, para 9.7, (Nov. 5, 2013), <https://undocs.org/CAT/C/51/D/441/2010>.