2009

The Jurisprudence of Human Rights Tribunals on Remedies for Human Rights Violations

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PUBLICATIONS DE L'INSTITUT INTERNATIONAL
DES DROITS DE L'HOMME
INSTITUT RENÉ CASSIN DE STRASBOURG

LA PROTECTION INTERNATIONALE DES DROITS DE L'HOMME ET LES DROITS DES VICTIMES

INTERNATIONAL PROTECTION OF HUMAN RIGHTS AND VICTIMS' RIGHTS

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THE JURISPRUDENCE OF HUMAN RIGHTS TRIBUNALS ON REMEDIES FOR HUMAN RIGHTS VIOLATIONS

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I. – INTRODUCTION

Today, the protection of human rights is generally recognized to be a fundamental aim of modern international law. In recent decades, almost every international organization, regional and global, has adopted human rights norms and responded to human rights violations by opening avenues of redress for individuals against oppressive action by member states. Consideration of human rights issues has reached into all organs and bodies of the United Nations, including the Security Council, which has identified serious human rights violations as threats to the peace. As a result, international human rights law has reduced the content of the reserved domain of state sovereignty. Today no state can credibly claim that its treatment of those within its territory or jurisdiction is a matter solely of domestic jurisdiction.

For all its revolutionary advances, however, human rights law has yet to develop a coherent theory or consistent practice of remedies for victims of human rights violations. While many groups have pressed for effective avenues of redress, others have claimed priority for "reconciliation" following periods of oppression or insisted on amnesty for violators. International human rights bodies that have jurisdiction to hear complaints often limit themselves to declaring findings of fact and law, sometimes recommending compensation of an unspecified amount be paid the victims of violations. While compensatory damages for both pecuniary and non-pecuniary injury are frequently afforded by regional human rights courts, non-monetary remedies are commonly awarded only by the

Inter-American Court of Human Rights. Human rights tribunals were long split over the awarding of attorneys fees and costs; the European Court of Human Rights has almost routinely awarded them to prevailing applicants while the Inter-American Court only recently allowed victims to recover the costs of litigating their cases before the Court and the Inter-American Commission.

The innovative nature of human rights litigation may account for the incoherence and inconsistency. Many human rights tribunals have been unsure about the extent of their power to afford remedies and have tended to focus on cessation of violations rather than redress for the victims. Another factor may be the lack of national judicial experience of most members of international tribunals. The most likely reasons, however, are the sudden development and unprecedented nature of international human rights law. Having emerged hesitatingly following the Second World War and then expanded rapidly in recent years, it displays an uneven proliferation of international complaints mechanisms and techniques that has created a mixture of remedies drawn from the traditional law of state responsibility, domestic legal systems, and the different views of judges about the role of tribunals in affording relief to victims of state abuse. As a result, it is rare to find a reasoned decision articulating the principles on which a remedy is afforded.

The remedial task is to convert law into results, to deter violations and restore the moral balance when wrongs are committed. The Latin maxim *ubi jus ibi remedium* (for the violation of every right, there must be a remedy) is not, and perhaps cannot be, strictly observed in practice. Rights have gone unremedied in the past and are likely to go unremedied in the future. Yet, in the literature, many scholars include the element of enforceability in their definition of legal rights (1), because a right entails a correlative duty to act or refrain from acting for the benefit of another person (2). Unless this duty is somehow enforced or enforceable, it is only a voluntary obligation that can be fulfilled or ignored at will. The aim of remedies, to vindicate interests that have been injured, thus requires that human rights law, representing fundamental interests, develop not only a primary theory of what duties are

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

(2) W. HOHFELD, *Fundamental Legal Conceptions* (W. Cook (ed.), 1919), 38.

owed, but a secondary theory of what duties exist when a primary duty is violated.

In practice, the human rights litigant typically seeks to have government conduct declared wrongful and to have a remedy imposed against the state, even where the act or omission is based on the will of the majority expressed in legislation. The range of remedies could proceed from relatively nonintrusive remedies, such as declaratory judgments and monetary damages, to injunctions, prohibitions and affirmative orders. The declaratory judgment merely pronounces a particular practice or condition to be illegal, leaving officials free to choose if and how to remedy the situation. The damage award assesses the harm that the misconduct has caused and imposes the cost upon wrongdoer. In general, tribunals should seek to create a hypothetical by aiming to produce the situation that would have existed if the wrongdoer had not violated the rights of the victim.

This course will review the power of international human rights bodies to indicate or award remedies to those who bring complaints to them. It looks first at the obligation of states to afford remedies in domestic law. It then examines the express and implied remedial powers of human rights institutions and then turns to the various types of remedies that have been afforded by the different bodies. It notes how these have evolved over time and suggests possible ways in which the law may develop in the future.

II. – The Duty of States to Afford Remedies

There are close to one hundred human rights treaties adopted globally and regionally. Nearly all states are parties to some of them and several human rights norms have become part of customary international law. Yet, like all law, human rights law is violated. It has not ended governmental oppression and by itself cannot prevent or remedy all human rights abuses. Human rights law does have an impact, however, on the behaviour of persons inside and outside of government, having created an international climate less willing to tolerate abuses and more willing to support and use the institutions and organizations that have been designed to promote and protect human rights. The rising caseload of the European and Inter-American courts attests to the willingness and abil-

ity of victims to bring their own complaints against states that fail to comply with their international obligations. Appropriate remedies can have a dissuasive effect on those who would commit violations, as well as serving to redress the wrongs done to victims. Remedies are thus a significant aspect of ensuring the rule of law.

The right to a remedy when rights are violated is itself a right expressly guaranteed by global and regional human rights instruments. Most texts guarantee both the procedural right of effective access to a fair hearing and the substantive right to a remedy (3). Some international agreements explicitly call for the development of judicial remedies for the rights they guarantee, although effective remedies could be supplied by non-judicial bodies (4). The international guarantee of a remedy implies that a wrongdoing state has the primary duty to afford redress to the victim of a violation. The role of international tribunals is subsidiary and only becomes necessary and possible when the state has failed to afford the required relief.

Regional instruments generally contain provisions requiring legal remedies for violations of human rights. The commissions and courts have interpreted and applied these guarantees in several cases.

1. – *European norms and jurisprudence*

The European Convention on Human Rights modelled its general remedial provision – Article 13 – on Article 8 of the Universal Declaration of Human Rights. Article 13 provides:

> "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*".

The Committee of Ministers reinforced Article 13 with a recommendation adopted in 1984 that calls on all Council of Europe member states to provide remedies for governmental wrongs (5).

The remedy need not be judicial, but can include parliamentary and executive bodies (6), so long as the remedy is effective. The

(3) On access to justice, see Jeremy McBride, 'Access to Justice and Human Rights Treaties', *(1998) 17 Civil Justice Q. 235.*

(4) International Covenant on Civil and Political Rights, Article 2(3)(b).

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

(6) See e.g. *Klass v. Germany*, (1979) 28 Eur.Ct.H.R. (ser. A) and *Silver v. United Kingdom*, (1983) 61 Eur.Ct.H.R. (ser. A).

Court's jurisprudence, however, suggests that a state that does not make the Convention directly enforceable in its national law risks breaching Article 13.

The right to a remedy is closely linked with the requirement that domestic remedies be exhausted before an individual has recourse to the European Court of Human Rights. The linkage emphasizes the primary role of national institutions and the subsidiary functions of the European Court (7). In *Klass and others v. Germany* the European Court of Human Rights noted that Article 13, read literally, seems to say that a person is entitled to a national remedy only if a 'violation' has occurred; but a person cannot establish a violation before a national authority unless he or she is first able to lodge with such an authority a complaint to that effect. Thus, according to the Court, Article 13 guarantees an effective remedy 'to everyone who *claims* that his rights and freedoms under the Convention have been violated' (emphasis added), a ruling that the Court repeated in *Silver v. United Kingdom*, one of the few early cases where the Court found a violation of Article 13 (8). The Court said that '[a]n individual who has an arguable claim to be the victim of a violation of one of the rights in the Convention is entitled to a national remedy in order to have his claim decided and if appropriate to obtain redress'. (at para. 113). Although no single remedy may by itself entirely satisfy the requirements of Article 13, 'the aggregate of remedies provided for under domestic law may do so' (*ibid*).

In the *Case of Boyle and Rice*, (1986) Eur.Comm'n.H.R. Rep., para. 74, the European Commission on Human Rights set forth its criteria for considering a claim 'arguable'. It said that such a claim should:

(a) concern a right or freedom guaranteed by the Convention,

(b) not be wholly unsubstantiated on the facts, and

(c) give rise to a prima facie issue under the Convention.

(7) In *Akdivar v. Turkey*, judgment of 16 September 1996, Reports of Judgments and Decisions 1996-IV, 1210 (hereinafter Reports) the Court refers to the requirement of exhaustion of local remedies as a reflection of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights: para. 65, citing *Handyside v. United Kingdom* (1976), 24 Eur.Ct.H.R. (ser. A), 22, para. 48.

(8) As of 1993, 46 cases reaching the Court claimed a violation of Article 13. See Gro Hillestad Thune, 'The Right to an Effective Remedy in Domestic Law: Article 13 of the European Convention on Human Rights', in Donna Gomien (ed.), *Broadening the Frontiers of Human Rights, Essays in Honour of Asbjorn Eide* (1993), 79-95. Since that time, some 60 cases against Turkey have been brought alleging a violation of Article 13.

The Court, however, rejected any particular test for Article 13 saying that each case should be determined on its particular facts. At the same time, it indicated that it saw a link between having an arguable claim and the Convention's requirement that the Commission declare inadmissible any 'manifestly ill-founded' complaint. In general, there is no right to a remedy for a manifestly ill-founded claim.

The Court has emphasized that the remedies provided must be adequate and effective (9) and has applied a 'generally recognized rule of international law' (10) that absolves an applicant from the obligation to exhaust domestic remedies where there are 'special circumstances'. Such circumstances may include the passivity of national authorities in the face of serious allegations of misconduct or infliction of harm by state agents, for example, where they have failed to undertake investigations or offer assistance.

In addition to requiring that remedies be afforded for arguable claims, the Convention requires that national remedies comply with the fair hearing guarantees of Article 6. The European Court interpreted the right to a fair hearing to include the right of access to justice in the case of *Golder v. United Kingdom*, (1975) 18 Eur. Ct. H.R. (ser. A) where the government's refusal to allow a prisoner to communicate with a lawyer in order to institute proceedings was found to violate an implicit Article 6 right of access to justice. According to the Court, there should be no hindrance in law or fact to the ability to institute proceedings, unless the action is justified by and proportionate to a legitimate aim (11). In general, an individual applicant 'must have a *bona fide* opportunity to have his case tested on its merits and, if appropriate, to obtain redress' (12). The tribunal hearing the case must be independent and impartial (13).

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(9) *Akdivar and others v. Turkey*, pp. 1210-13, paras. 65-76, citing *Ireland v. United Kingdom*, (1978) 25 Eur.Ct.H.R. (ser. A), p. 64, para. 159; *Aksoy v. Turkey*, judgment of 18 December 1996, Reports 1996-VI, pp. 2275-76, para. 51-53; *Mentes and others v. Turkey*, judgment of 28 November 1997, para. 57, 59 Reports 1997-VIII 2693.

(10) *Van Oosterwijck v. Belgium* (1980) 40 Eur.Ct.H.R. (ser. A), pp. 18-19, paras. 36-40.

(11) On the permissibility of immunities to limit litigation see *Fayed v. United Kingdom*, (1994) 294B Eur.Ct.H.R. (ser. A) where the principle of proportionality was applied to uphold an immunity conferred on those investigating the affairs of a company.

(12) *Leander v. Sweden*, (1987) 116 Eur.Ct.H.R. (ser. A).

(13) See *Findlay v. United Kingdom*, judgment of 25 February 1997, Reports 1997-I, p. 281; *Cirklar v. Turkey*, judgment of 28 October 1998; *Gautrin and others v. France*, judgment of 20 May 1998, Reports 1998-III, para. 58.

On the modalities of judicial procedure, states may impose reasonable restrictions, including statutes of limitations or a requirement of legal representation, to ensure the proper administration of justice (14). The right of access thus may be subject to limitations, particularly regarding the conditions of admissibility of an appeal; however, limitations must not restrict exercise of the right in such a way or to such an extent that the very essence of the right is impaired (15). They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved (16). Where representation by a lawyer is necessary in law or in fact, the state may be obliged to provide legal aid for indigent litigants to ensure their effective access to justice. In *Airey v. Ireland*, (1979) 32 Eur.Ct.H.R. (ser. A), the Court held that a lawyer must be provided where legal representation is compulsory or where the law and procedure involved are of a complexity to make legal advice indispensable. No cases thus far have discussed the adequacy of state-provided representation.

The distinction between denial of a remedy and denial of access to justice is important. It may be legitimate for a state to deny access to courts under Article 6 for claims that have no substantive basis in its national legal order, but if the lack of substantive protection arguably concerns a right guaranteed by the Convention and no other remedial process is established, the state may be in breach of Article 13. In a series of cases involving Turkey, the Commission and the Court addressed the relationship between the right of access to court, the fair hearing requirements of Article 6, and the right to an effective remedy in Article 13. Although a majority of the Commission found a breach of Article 6 in some of the Turk-

(14) Cf. *Stubbings v. United Kingdom*, (1997) 23 E.H.R.R. 213, *Hennings v. Germany*, (1992) 251A Eur. Ct.H.R. (ser. A).

(15) Cf. *Stubbings v. United Kingdom*, (1997) 23 E.H.R.R. 213, *Hennings v. Germany*, (1992) 251A Eur. Ct.H.R. (ser. A).

(16) *F.E. v. France*, judgment of 30 October 1998; *Fayed v. United Kingdom*, (1994) 294-B Eur.Ct.Hum.Rts. (ser. A), pp. 49-50, para. 65; *Bellet v. France*, (1995) 333-B Eur.Ct.Hum.Rts. (ser. A), p. 41, para. 31; and *Levages Prestations Services v. France*, 1996-V Reports of Judgments and Decisions, p. 1543, para.40. In the *F.E.* case, the applicant who had contracted AIDS due to tainted blood, had not had effective access to a civil court, because the French Court of Cassation had quashed the Court of Appeal's judgment without remanding the case, thus precluding any possibility of reconsideration of the merits of his claim for additional compensation in respect of the damage caused by his infection. The same Court had also refused to apply the *Bellet* judgment, delivered on 4 December 1995 by the European Court, which held that France had breached the European Convention in a similar case.

ish cases, dissenting opinions affirmed, instead, that Article 13 was violated because of a general failure in the remedial system. In their views, the applicants thus were not denied access to available remedies, because there were no remedies to which they *could* have access. The Court generally has found a violation of Article 13 (17).

Until recently, the European Court rarely looked at the adequacy of the remedies under Article 13, unless the facts indicated potential violations of the fair trial provisions of Articles 5 and 6. As the Court has received an increasing number of cases involving alleged violations of the right to life and to personal security, however, it has given more detailed indications of the nature of remedies that must be afforded by the Contracting Parties. The Court has specified, for example, that violations of the right to life 'cannot be remedied exclusively through an award of compensation to the relatives of the victim' (18). Since denial of the right to life involves 'one of the most fundamental in the scheme of the Convention', the remedies must be guaranteed for the benefit of the relatives of the victim. Where those relatives have an arguable claim that the victim has been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure. Thus, the requirements of Article 13 are broader than the procedural obligation under Article 2 to conduct an effective investigation. In *Aksoy v. Turkey*, judgment of 18 December 1996, Reports 1996-VI, the Court similarly established the link between the prohibition of torture in Article 3 and the Article 13 requirement of a remedy. According to the Court, the fundamental importance of the ban on torture means

(17) See e.g. *Kurt v. Turkey*, judgment of 25 May 1998; *Akdivar and others v. Turkey*, Application No. 21893/93, Decision of 19 October 1994. See also *Mentes and others v. Turkey*, Application No. 23186/94, Decision of 9 January 1995; *Cetin v. Turkey*, Application No. 22677/93, Decision of 9 January 1995; *Isiyok v. Turkey*, Application No. 22309/93, Decision of 3 April 1995; *Yilmaz v. Turkey*, Application No. 23179/94, Decision of 15 May 1995; *Ovat v. Turkey*, Application No. 23180/94, Decision of 3 April 1995; *Sahin v. Turkey*, Application No. 23181/94, Decision of 15 May 1995; *Asker v. Turkey*, Application No. 23184/94, Decision of 28 November 1994; and *Selcuk v. Turkey*, Application No. 23185/94, Decision of 3 April 1995.

(18) *Kaya v. Turkey*, Judgment 10 February 1998, Para. 86, citing *McCann and others v. United Kingdom*, (1995) 324 Eur.Ct.H.R. (ser. A), p. 47, para. 169. See also *Ergi v. Turkey*, judgment of 28 July 1998.

that Article 13 imposes, without prejudice to any other domestic remedy, 'an obligation on states to carry out a thorough and effective investigation of incidents of torture' (*Ibid.*, at para. 98) This duty arises whenever an individual has an 'arguable claim' of torture committed by state agents. It entails 'in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the individual to the investigatory procedure' (*Ibid*).

2. – *Inter-American norms and jurisprudence*

In the Inter-American system, Article XVII of the American Declaration of the Rights and Duties of Man guarantees every person the right to resort to the courts to ensure respect for legal rights and to obtain protection from acts of authority that violate any fundamental constitutional rights. The American Convention on Human Rights goes further, entitling everyone to effective recourse for protection against acts that violate the fundamental rights recognized by the constitution 'or laws of the state or by the Convention', even where the act is committed by persons acting in the course of their official duties (Article 25). The states parties are to ensure that the competent authorities enforce the remedies granted and, indeed, are obliged to respect and ensure the free and full exercise of all rights guaranteed by the Convention (Article 1(1)). These obligations are linked to the fair trial provisions of Article 8, which requires the state to provide a fair hearing before a competent, independent and impartial tribunal. Article 10 of the Convention further provides that every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice. The Inter-American Court has commented on the obligation of states to afford effective internal remedies, stating that:

> "*Under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1)*" (19).

(19) *Velasquez Rodriguez Case* (Preliminary Exceptions), (1987) 1 Inter-Am.Ct.H.R.(ser. C) para. 91.

The Court has concluded that the obligation of Convention parties to ensure rights generally requires that remedies include due diligence on the part of the state to prevent, investigate, and punish any violation of the rights recognized by the Convention (20). The Commission has added that, in the case of disappearances, the obligation to investigate continues as long as the uncertainty over the final fate of the disappeared person persists (21). The case of *Gustavo Carranza*, decided 30 September 1997 (22), discussed the requirements of a full and fair remedy as guaranteed by Article 25 of the American Convention, holding that Argentina violated the Convention when its courts applied the political question doctrine and refused to decide a case on the merits. The petitioner, a judge removed from office in 1976 by the military government of Argentina, sought a judicial remedy and was denied access to the courts on the grounds that his dismissal constituted a political question. The petitioner sought and received a Commission determination that he had been wrongfully denied a remedy in the courts of Argentina, successfully arguing that the political question doctrine does not apply to a law or action of the executive in violation of the rights and guarantees of the Constitution, including the unconstitutional removal of judges from office.

The Commission elaborated on the requirements of Convention Articles 8 and 25. It interpreted Article 8 as requiring procedural due process to determine rights. It set forth the conditions that must be met to ensure the suitable defence of persons whose rights or obligations are under judicial consideration, including determination of the issue by a competent, independent and impartial judicial body. The Commission interpreted Article 25 to encompass the right to 'effective' judicial protection, not mere access to a judicial body. According to the Commission, this means that the tribunal 'must reach a reasoned conclusion on the claim's merits, establishing the appropriateness or inappropriateness of the legal claim that, precisely, gives rise to the judicial recourse'. The Commission held

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

(21) Report No. 25/98, Chile, IACHR, Annual Report of the Inter-American Commission on Human Rights 1997, OEA/Ser.L/V/II.98 doc. 7 rev. (1998) at 535.

(22) Report No. 30/97, Case, 10.087, *Gustavo Carranza v. Argentina*, Annual Report of the Inter-American Commission on Human Rights 1997, OEA/Ser.L/V/II.98, Doc. 7 rev. (1998) at 254.

that there was no effective legal remedy in the case and recommended that the petitioner be compensated for the violation.

The Inter-American Court addressed procedural aspects of the right to a remedy in *Genie Lacayo v. Nicaragua*, (1998) 30 Inter-Am.Ct.H.R (ser. C). The petitioner and the Commission alleged a violation of the right to a fair trial (Article 8), the right to judicial protection (Article 25), and the right to equal treatment (Article 24), stemming from judicial procedures following the death of a 16-year-old youth allegedly killed by the Nicaraguan military. Judicial action commenced approximately nine months after the event; after a further year of investigation, the civilian criminal court transferred jurisdiction to the military courts. The father of the deceased appealed the decision but the decision to transfer was upheld on appeal. During the subsequent military proceedings, according to the Commission, evidence disappeared, witnesses refused to appear, and pressure was placed on the prosecutor. The Commission asserted that for any crime in which there was evidence of involvement of a member of the military, the jurisdiction of military tribunals violates equal protection. In addition, it asserted that the military courts of Nicaragua, as constituted by the national decrees, 'created conditions conducive to the violation of the right to a fair trial, to due process and to equal treatment by granting broad margins of discretion and leaving it to the Army's High commanders to sanction those "involved" or to let them go unpunished'. The Commission questioned the impartiality of the military courts and the willingness of the government to investigate the killing. It also complained of the length of proceedings, in particular the failure of the Supreme Court of Nicaragua to render judgment on appeal from the military court for over two years.

The Court found 'abundant evidence' that the Nicaraguan military authorities obstructed justice and failed to cooperate with the investigations conducted by the Attorney General's office and the civilian court of first jurisdiction over the case. It also found that there was an unreasonable delay in rendering judgment on appeal to the Supreme Court, in violation of Article 8(1) of the Convention. On the other hand, it found that the decrees concerning military trials in Nicaragua did not violate the principle of equality nor diminish the independence or impartiality of the military tribunals. It made clear that in its view the fact that a case is heard in mili-

tary courts 'does not *per se* signify that the human rights guaranteed the accusing party by the Convention are being violated'.

The 1998 judgment in the disappearance case of *Blake v. Guatemala* (23), reinforced the links between Article 8(1), Article 25 and Article 1(1), emphasizing the need to combat impunity. The Court held that Article 8(1), which affirms the right of each person to a hearing by a competent, independent and impartial tribunal for a determination of rights, extends to the family of a victim. Together with Article 25 and Article 1(1), it ensures to each person that those responsible for violations of human rights will be judged and that the victims can obtain a remedy for damage suffered. The Court referred to the right to a remedy as one of the basic pillars not only of the American Convention, but of the rule of law and a democratic society (24). The state must use all the legal means at its disposal to combat the chronic repetition of violations and impunity, defined by the Court as the failure to investigate, prosecute, capture, adjudge, and condemn those responsible for the violation of rights protected by the American Convention. The Court held that Guatemala had the obligation to investigate the facts that led to the violations, identify and sanction those responsible, and adopt the measures in internal law necessary to assure compliance with its obligations.

3. – *African norms and jurisprudence*

The African Charter has several provisions on remedies. Article 7 guarantees every individual the right to have his cause heard, including 'the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'. In addition, Article 21 refers to 'the right to adequate compensation' in regard to 'the spoliation of resources of a dispossessed people'. Article 26 imposes a duty on states parties to the Charter to guarantee the independence of the courts and allow the establish-

(23) *Blake v. Guatemala*, (Merits) judgment of 24 January 1998; (Reparations) judgment of 22 January 1999.

(24) *Blake v. Guatemala (Reparations), para. 63; Castillo Paez v. Peru, (1997) 34 Inter-Am. Ct.* H.R. (ser. C), paras. 82, 83; *Suarez Rosero v. Ecuador*, (1998) 35 Inter-Am.Ct.H.R. (ser. C), para. 65; *Paniagua Morales and others v. Guatemala*, (1998) 37 Inter-Am.Ct.H.R. (ser. C); *Loayza Tamayo v. Peru (Reparations)*, judgment of 27 November 1998, para. 169; *Castillo Paez v. Peru (Reparations)*, judgment of 27 November 1998, para. 106.

ment and improvement of appropriate national institutions entrusted with the promotion and protection of rights and freedoms guaranteed by the Charter. The African Commission has emphasized the need for independence of the judiciary and the guarantees of a fair trial, calling attacks on the judiciary 'especially invidious, because while it is a violation of human rights in itself, it permits other violations of rights to go unredressed' (25). In the same case, the Commission stated that Article 26 "clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual's rights against the abuses of state power".

III. – The Power of Human Rights Tribunals to Afford Remedies

There are two sources of authority for human rights bodies to afford remedies. The first is the express power granted by the instrument creating the institution. The second is the inherent power of any judicial or quasi-judicial body to redress the wrongs litigated before it.

1. – *Express authority to provide redress*

Close to a dozen international procedures allow victims to denounce violations of their human rights by a state party to the relevant treaty. Public and private procedures created by the UN Human Rights Commission address gross and systematic violations of internationally-recognized human rights, while thematic rapporteurs or working groups accept complaints or information about violations of specific human rights. Within the larger United Nations system, the International Labor Organization and UNESCO have developed human rights complaint procedures for violations of rights within their mandates. Human rights treaty bodies established pursuant to the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention against Torture may receive petitions within their specific jurisdictional limits.

(25) African Commission, Comm. No. 129/94, *Civil Liberties Org'n v. Nigeria*, AGH/207 (XXXII) Annex VIII 17, at 19.

The regional systems in Europe, the Americas, and Africa parallel and extend the global efforts.

None of the permanent United Nations treaty or internal bodies has express legal competence to order compensation or other remedies (26). The Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and other bodies that accept individual communications may make recommendations or express views to the state concerned. The recommendations sometimes call on the state to pay compensation or afford other remedies, but they do not specify amounts that may be due or other forms of redress. However, international supervisory organs generally 'have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to th[e] Convention'. Thematic rapporteurs and working groups exercise their mandates to make recommendations on remedies. The Working Group on Arbitrary Detention, for example, investigates cases of arbitrary deprivation of liberty, accepts communications from detained individuals or their families as well as governments and inter-governmental and non-governmental organizations. If the Working Group decides after investigation that the arbitrary nature of the detention is established, it makes recommendations to the government concerned and transmits these to the complainant three weeks after sending them to the government. On remedies, the language of the recommendation is identical in every case :

> *"Consequent upon the decision of the Working Group declaring the detention of... to be arbitrary, the Working Group requests the government of... to take the necessary steps to remedy the situation in order to bring it into conformity with the provisions and principles incorporated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights".*

In addition to institutions with general human rights jurisdiction, other permanent international tribunals are competent to adjudicate specific human rights matters. The Administrative

(26) The United Nations Compensation Commission was established to provide remedies to victims of the Iraqi invasion of Kuwait, but it is an ad hoc body and has jurisdiction over more than human rights violations. See U.N. Security Council Resolution 687 (1991) of 3 April 1991, U.N. Doc. S/RES/687 (1991), (1991) 30 I.L.M. 852 (1991) and Security Council Resolution 692 (1991) of 20 May 20 1991, (1991) 30 I.L.M. 864) (compensation is due for 'any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait': para. 16).

Tribunals of international organizations hear cases involving workers' rights, discrimination and sexual harassment. These tribunals have considerable remedial competence. The International Criminal Court may allow victims of international crimes to file claims for redress following prosecution of the accused and the court may order remedies directly against the person convicted or compensation to be paid from an international Trust Fund.

Regional human rights bodies have been given the express power to designate remedies that the state must afford to the victims of human rights violations (27). The Statute of the Council of Europe, adopted by Western European nations in 1949, provides that every member must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms. Its system for the protection of human rights is based on the European Convention on Human Rights and Fundamental Freedoms and its protocols, plus the European Social Charter. Membership in the Council is *de facto* conditioned upon adherence to the European Convention. The European Court of Human Rights renders judgments in which it may afford 'just satisfaction' to the injured party, including compensation for both pecuniary and non-pecuniary damages (28).

The European Court has regularly declared that it is limited to ordering financial compensation and is not empowered to order other remedial measures because 'it is for the State to choose the means to be used in its domestic legal system to redress the situation that has given rise to the violation of the Convention' (29). While true, the Court's approach conflates means and result. The Court could decide that release of a prisoner wrongfully held is the appropriate remedy, in order to ensure that the applicant receives just satisfaction and leave the means by which that result is achieved to the state (e.g. judicial review, executive order, legislative action). The European Court adopted a narrow interpretation of its remedial powers probably because the individual was not the

(27) On regional systems generally, see Dinah SHELTON, 'The Promise of Regional Human Rights Systems' in B. WESTON and S. MARKS (eds.) *Fifty Years of Human Rights Law* (1999).
(28) *Ibid.* at Article 41.
(29) *Zanghi v. Italy*, (1991) 194 C Eur. Ct.H.R. (ser. A) at 48.

focus of the system at its inception (30). It has held to this view because in large part states have complied with the Court's judgments by changing laws and practices, although the changes have not always had retrospective effect to remedy the consequences of the violation to the applicant. Other states have not complied or have done so only after great delay and the risks are greater with the new member states of the system. The European Court's present approach has led to successive cases against the same state for the same breach, because the Court failed to direct the state to remedy the wrong in the first instance. It also has left several applicants without a remedy to repair the consequences of the violation (31).

The evolution of the European Community also has led its institutions, including the European Court of Justice, into the field of human rights. Individual claimants may plead for an award of damages or other remedies for violation of EC law, which, according to the European Court of Justice, includes respect for fundamental rights as an integral part of the general principles of law the Court is required to apply. For the nature of these rights, the Court looks to the European Convention on Human Rights (32). The approach of the Court was confirmed in nearly identical language in Arts. F and K.2 of the 1992 Maastricht Treaty which transformed the European Community into the European Union.

(30) 'The original purpose of the Convention was not primarily to offer a remedy for particular individuals who had suffered violations of the Convention but to provide a collective interstate guarantee that would benefit individuals generally by requiring the national law of the contracting parties to be kept within certain bounds. An Article 25 application was envisaged as a mechanism for bringing to light a breach of an obligation owed by one state to others, not to provide a remedy for an individual victim': David HARRIS, Michael O'BOYLE, and Colin WARBRICK, *Law of the European Convention on Human Rights* (1995) 33.

(31) See, e.g. *Incal v. Turkey*, a Grand Chamber decision of 9 June 1998. By a 12-8 vote, the Court decided that Turkey had violated the freedom of expression and right to a fair trial of the applicant. The consequence of the conviction included a substantial loss of civil rights. The applicant could not found an association or trade union, or become a member of trade union executive committee. He was also barred from founding or joining a political party and could not stand for election and was debarred from entering civil service. The applicant sought a restoration of his civil rights. The Court said it had no jurisdiction to order such measures.

(32) See e.g. *Hauer v. Land Rheinland-Pfalz* [1979] E.C.R. 3727, [1980] 3 C.M.L.R. 42, (1981) 3 E.H.R.R. 140. See generally, Nanette A. NEUWAL and Allan ROSAS (eds.), *The European Union and Human Rights (*1995); M.H. MENDELSON, 'The European Court of Justice and Human Rights', (1982) *1981 Y.B. Eur. Law 125.*

2. – *Inherent powers*

Inherent judicial powers to afford remedies have long been recognized in international jurisprudence and derive from the law of state responsibility, which requires a state to make reparations when it fails to comply, through an act or omission attributable to it, with an obligation under international law (33). The well-known ICJ formulation of the obligation to redress harm is stated in the *Chorzow Factory* case :

> "*Reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law* (34)".

Notably, the ICJ indicated that the basic principle of reparation articulated in the *Chorzow Factory* case applies to reparation for injury to individuals, even when the statute of a tribunal contains a specific jurisdictional provision on reparation (35).

International tribunals have inferred from this foundation an inherent power to afford remedies. Indeed, in its judgment concerning the *Chorzow Factory (Indemnity) Case*, the Permanent Court of International Justice called the obligation to make reparation for breach of an engagement 'a general principle of international law' and 'a general conception of law' (36). Since it is a principle of international law that every violation of an international obligation creates a duty to make reparation, an international tribunal with jurisdiction over a dispute has jurisdiction to award reparations upon determining that a breach of international law has occurred. In the *LaGrand* judgment, the International Court of Justice asserted this competence, stating that : "[w]here jurisdiction exists

(33) CHENG relies on legal reasoning in claiming that reparation is due for any legal wrong: 'It is a logical consequence flowing from the very nature of law and is an integral part of every legal order': B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals* (1953), 170.

(34) *Factory at Chorzow Case, supra* n. 4, at 47.

(35) *Application for Review of Judgment No. 158 of the UNAT*, Advisory Opinion, 1973 ICJ Rep. 197-198 (July 12), citing *Case Concerning the Factory at Chorzow (Merits)(Ger. v. Poland)*, 1928 PCIJ, ser. A, No. 17 (Sept. 13).

(36) *Factory at Chorzów (Germany v. Poland)* 1928 P.C.I.J. (ser. A) No. 17 at 29 (September 13).

over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation (37)." International courts thus may apply and develop international law to determine the scope, nature, modality, and beneficiaries of reparations (38), accepting or rejecting the applicants' claims in whole or in part (39). There is no reason in principle why this inherent power should not exist in human rights tribunals that have competence to hear and decide individual complaints.

Conclusions

As compensation is the most common remedy provided for human rights violations, every legal system should strive for certainty in calculating damages to avoid under – or over-compensating a victim. Uncertainty and arbitrariness in awards undermines respect for the law. Indeed, legal certainty represents one of modern jurisprudence's central concerns, as the law searches for order and predictability. The rule of law implies that society administers justice by fixing standards that individuals may know and understand prior to controversy and that reasonably guarantee all individuals

(37) *La Grand (Germany v. United States of America), Merits*, judgment of 27 June 2001, para. 48, citing the *Factory at Chorzow, Jurisdiction, ibid.*, p. 22. The inherent power of the Court to award reparations was also affirmed in, *inter alia, Fisheries Jurisdiction (FRG v. Iceland) (Merits)*, 1974 ICJ Rep. 175, at 203-05, paras. 71-76 (July 24); and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (Merits)*, 1986 ICJ Rep. 14, at 142 (June 27). Brownlie notes that the presumed power of the Court to award damages has gone unquestioned. Ian Brownlie, 'Remedies in the International Court of Justice' in, *Fifty Years of the International Court of Justice* 557, 558 (Vaughan Lowe & Malgosia Fitzmaurice, eds., 1996).

(38) In the *Chorzow Factory Case* the Court found that its jurisdiction extends to method of payment, beneficiaries, and other aspects of reparation. *Chorzow Factory Case (Merits), supra* n. 8 at 61-62. Later, in the *Corfu Channel Case*, the Court decided that it had competence to assess the actual amount of damages due in any case where it had competence to say that there was a duty to pay compensation. *Corfu Channel Case, supra* n. 4 at 23-24. The Court relied on the principle of effectiveness in finding that it was required to set the amount. "If, however, the Court should limit itself to saying that there is a duty to pay compensation without deciding what amount of compensation is due, the dispute would not be finally decided. An important part of it would remain unsettled." Id. at 26. See also *Loayza Tamayo Case (Reparations)*, 42 Inter-Am. Ct. Hum. Rts. 1, para. 86 (2000).

(39) See, e.g., *Loayza Tamayo Case, supra* n. 19 at paras 155-158, wherein the Court invoked the principle of proportionality to determine the scope of reparations, while in the earlier *Velasquez Rodriguez Case*, it applied principles of equity to determine indemnification for non-monetary harm. *Velasquez-Rodriguez Case (Reparations)*, 7 Inter-Am. Ct. Hum.Rts. 1, para. 27 (1989). In both cases, the court denied some reparations claims of the applicants.

like treatment. Accurate assessment also is necessary because inadequate or excessive awards frustrate the compensatory, retributive and deterrent functions of the law.

The prevalence of compensation as a remedy should not diminish consideration of the need for other kinds of redress. When rights are infringed, someone has been victimized because of an unwarranted act of interference and can therefore justifiably reclaim his or her prior position. This focus on the victim demands provision of something equivalent in value to that which was lost, or restoring precisely that which was removed. The primary goal of human rights remedies thus should be rectification or restitution rather than compensation. When rights are violated, the ability of the victim to pursue self-determination is impaired and it is not justifiable generally to assume that compensation restores the moral balance *ex ante*. A morally adequate response addresses itself in the first instance to restoring what was taken.