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Remedies in International Human Rights Law (Chapter One)

Dinah L. Shelton
George Washington University Law School, dshelton@law.gwu.edu

Remedies in International Human Rights Law

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DINAH SHELTON

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Concepts and Theories of Remedies

The theoretical foundations of remedies are rarely discussed in international human rights law and practice. Yet, in order to construct and afford appropriate remedies, human rights law must develop not only a primary legal framework expressing the duties of states and other actors in this field, but a secondary theory of what duties exist when a primary duty is violated. In most legal systems, including the international legal system, the aims of compensatory justice and deterrence are most often cited as the foundation for the law of remedies. Restorative justice, retribution, and economic analysis recently have provided other theoretical models to approach the issue of responding to human rights violations. This chapter discusses the meaning of and theoretical approaches to remedies and the differences between private law and public law cases.

1.1 The Dual Meaning of Remedies

The word 'remedies' contains two separate concepts, the first being procedural and the second substantive. In the first sense, remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies. The second notion of remedies refers to the outcome of the proceedings, the relief afforded the successful claimant.[1]

In international and national law, other terms are often used to address the two aspects of remedies, in part because 'remedies' has no exact equivalent in French and other official UN languages. The various terms that are selected may be interpreted differently by international bodies, national judges, and authors.[2] In the law of state responsibility, 'reparation' is most frequently used in the context of inter-state claims, and it is maintained for that purpose in this volume. Reparation generally refers to the various means by which a state may repair the consequences of a breach of international law for which it is responsible. Reparation may include all of the acts which also serve to redress

[1] Remedies are 'the means by which a right is enforced or the violation of a right is prevented, redressed or compensated': *Black's Law Dictionary*, 6th edn. (1990), 1294.

[2] See S. Haasduk, 'The Lack of Uniformity in the Terminology of the International Law of Remedies' (1992) 5 *Leiden J. Int'l L.* 245. Reparations can mean either the act or process of providing a remedy or the remedy itself. There is a tendency to use 'reparations' as the generic term for 'the various methods available to a State for discharging or releasing itself' from international responsibility: J. de Arechaga, 'International Responsibility', in M. Sørenson (ed.), *Manual of Public International Law* (1968), 564. See also I. Brownlie, *System of the Law of Nations, State Responsibility* (1983), pt. I, 199.

individual harm from human rights violations: restitution, compensation, satisfaction, and guarantees of non-repetition, although some authors exclude satisfaction from measures of reparation.[3] Reparation is also sometimes used to refer only to monetary compensation.

Human rights instruments generally refer to the obligation of states to provide effective remedies for human rights violations. Redress is the term most commonly applied in the literature and national law to refer to the substantive remedies afforded victims of violations. In this book, the terms 'remedies' and 'redress' refer to the range of measures that may be taken in response to an actual or threatened violation of human rights. They thus embrace the substance of relief as well as the procedures through which relief may be obtained. Remedies may include an award of damages, declaratory relief, injunctions or orders, and attorney's fees and costs.

The variety of procedures that may be instituted to obtain redress for human rights violations gives rise to different terms for the person who files a claim: plaintiff, applicant, complainant, petitioner. To avoid confusion, the term 'victim' is used throughout to refer to one whose rights have been violated, although some survivors of human rights abuse prefer not to be characterized as such.[4] The agent or agency perpetrating the violation will be referred to as the 'wrongdoer' or 'perpetrator'. The deprivation caused by human rights violations is referred to as the human rights 'harm' or 'injury', reserving 'damages' for the award of monetary compensation to redress the wrong.

1.1.1 Access to Justice

The obligation to afford remedies for violations of human rights requires in the first place the existence of remedial institutions and procedures to which victims may have access. Refusal of access to the tribunals of a country is considered a primary manifestation of the concept of denial of justice.[5] Most legal systems today recognize the importance of safeguarding the right of access to independent bodies that can afford a fair hearing to claimants who assert an arguable claim that their rights have been infringed. Indeed, many writers include the element of enforceability in their definition of legal rights,[6] because the notion of rights entails a correlative duty on the part of others to act or refrain from acting for the benefit of the rights-holder.[7] Unless a duty is somehow enforced, it risks being seen as a voluntary obligation that can be fulfilled or ignored at will.

[3] e.g. B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (1973), 10.

[4] The word derives from the Latin word 'victima', designating a living sacrifice to the gods. See, generally, R. Elias, *The Politics of Victimization: Victims, Victimology and Human Rights* (1986). Human rights documents on remedies give a broad definition to the term victim. See *infra* Chapter 4.1.

[5] In 1758 Vattel wrote that justice may be refused in several ways: (1) by denial of justice or by refusal to hear the complaints of a state or its subjects or to allow the subjects to assert their rights before ordinary tribunals; (2) by pretended delays; (3) by a decision manifestly unjust and one-sided. Similar formulations followed from the Institut de Droit International and the 1930 Hague codification conference. See *infra* Chapter 3 at n. 222.

[6] See M. Ginsberg, *On Justice in Society* (1965), 74; I. Jenkins, *Social Order and the Limits of Law* (1980), 247.

[7] W. Hohfeld, *Fundamental Legal Conceptions*, ed. W. Cook (1919), 38.

The notion of access to justice has undergone expansion with the development of international criminal law and the recognition that certain violations of human rights should be penalized under national law. This implies access to procedures that will investigate, prosecute, and punish violators and may include the right of victims to participate in criminal proceedings.[8] Human rights law establishes that states have a duty to the public to prosecute crimes against individuals' right to life and to personal integrity and to impose penalties that consider the grave nature of the crimes. There is an increasing move towards including victims in criminal proceedings, as seen in the provisions of the Rome Statute of the International Criminal Court. Prosecution then becomes recast as an essential component of the remedy owed victims of certain grave human rights violations. International tribunals have sometimes declared that other forms of reparations, such as compensation or disciplinary sanctions, are insufficient to remedy the harm caused by these violations.

1.1.2 Substantive Redress

Access to justice implies that the procedures are effective, i.e. capable of redressing the harm that was inflicted. In a seminal case of constitutional jurisprudence, citing to Blackstone's *Commentaries*, the United States Supreme Court declared that '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'[9] In 1961, Justice Guha Roy of India wrote: 'That a wrong done to an individual must be redressed by the offender himself or by someone else against whom the sanction of the community may be directed is one of those timeless axioms of justice without which social life is unthinkable.'[10]

The *Oxford English Dictionary* defines reparation as 'the action of restoring something to a proper or former state' and adds that it also includes 'the action of making amends for a wrong or loss, compensation.' It is intended to mend and provide the basis for ethical relationships among members of society.

As the following section discusses, substantive redress can have several aims, from victim-oriented *restitutio in integrum* and full compensation for pecuniary and non-pecuniary losses to deterrence of violations for the benefit of all members of society. The types of remedies will depend upon the nature of the case, but a growing consensus on minimum standards includes restitution where possible and compensation where not and a right to the truth. The Inter-American Commission on Human Rights has recognized the right 'to know the full, complete, and public truth as to the events that transpired, their specific circumstances, and who participated in them' as 'part of the right to reparation for human rights violations.'[11] The Inter-American Court, too, has insisted that for disappearances and extrajudicial executions, there is the right

[8] Raquel Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes' (2002) 35 *Vand. J. Transnat'l L.* 1399. On the duty to prosecute, see *infra* Chapters 4.4, 10 and 13.3.

[9] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137.

[10] Justice Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?' (1961) 55 *Am. J. Int'l L.* 863.

[11] Case 11.481, *Monsignor Oscar Arnulfo Romero y Galdamez v. El Salvador*, Inter-Am. Comm.H.R., report no. 37/00, paras. 147–8.

of relatives and society to 'be informed about everything that happened in relation to the violations,' as 'an important measure of reparations'.[12] Restitution for enforced disappearances includes locating the remains of the victim and handing them over to the next of kin.[13]

1.2 The Purpose of Remedies

1.2.1 Compensatory or Remedial Justice

The primary function of corrective or remedial justice is to rectify the wrong done to a victim, that is, to correct injustice.[14] As such remedies serve moral goals. Law and its institutions are the instruments through which fault is determined and its consequences are assessed in order to redress harm caused.

Aristotle described the conceptual framework for compensatory justice on which much of the modern law of remedies is based:

> What the judge aims at doing is to make the parties equal by the penalty he imposes, whereby he takes from the aggressor any gain he may have secured. The equal, then, is a mean between the more and the less. But gain and loss are each of them more or less in opposite ways, more good and less evil being gain, the more evil and the less good being loss. The equal, which we hold to be just, is now seen to be intermediate between them. Hence we conclude that corrective justice must be the mean between loss and gain. This explains why the disputants have recourse to a judge; for to go to a judge is to do justice . . . What the judge does is to restore equality.[15]

Thus, the essential features of compensatory justice are: (1) the parties are treated as equal; (2) there is damage inflicted by one party on another; (3) the remedy seeks to restore the victim to the condition he or she was in before the unjust activity occurred.

Remedies aim to place an aggrieved party in the same position as he or she would have been had no injury occurred. Even rights-violating conduct that causes no compensable harm or that brings an economic benefit to the victim is cause for complaint because it creates a moral imbalance between the victim and the wrongdoer and a moral claim concerning a wrong done.[16] In effect, all rights-infringing conduct assaults the dignity and equality of the victim.

Aristotle's compensatory justice ideal pertains to acts between individuals, not to unjust acts committed by 'society' against a group or a government against an individual. Nevertheless, the approach can also provide a basis for public law remedies. Violations of human rights are wrongs committed against the individual victim *and* against the social order, and may be considered particularly serious wrongs because human rights are 'maximally weighty moral claims',[17] powerful enough to

[12] *Myrna Mack-Chang Case* (2003) 101 Inter-Am.Ct.H.R. (ser. C), para. 274.

[13] *Bámaca Velásquez Case* (2002) 91 Inter-Am.Ct.H.R. (set. C), para. 79.

[14] On corrective justice as the basis fot tort litigation, see E. Weinrib, 'Understanding Tort Law' (1989) 23 *Val. U.L. Rev.* 485.

[15] Aristotle, *The Ethics*, trans. J.A.K. Thompson (1955), 148–9.

[16] Of course, some actions have broader import and may be punished as a crime against the general order.

[17] L. Lomasky, 'Compensation and the Bounds of Rights', in J. Chapman (ed.), *Compensatory Justice* (1991), 13, 24.

block utility-maximizing actions by others. Individuals, being committed to maximizing their own values, have projects that give directive force—i.e. meaning—to their lives, and with each individual having distinct projects and goals, the potential for conflict is clear, creating the need for an ordering principle that maximizes opportunities for all individuals. As one astute observer has commented, '[a]lthough neither you nor I has reason to be impartial between advancement of his own ends and advancement of the other person's ends, we each have reason to acknowledge the rationality from the perspective of each person of lending special weight to the values constituted by that individual's personal projects'.[18] Everyone therefore shares a reciprocal reason to value non-interference, and, consequently, a moral order that is characterized by mutual restraint. Non-interference with rights is valuable instrumentally to promote individual aims on the basis of personality, but it also is a basic demand of a self-directing person and indicative of respect for the inherent dignity of all persons.

Human rights law thus establishes a minimal order of forbearance or moral baseline to allow personal development through pursuance of individual goals and projects. When rights are violated, the ability of the victim to pursue self-determination is impaired because of an unwarranted act of interference. As the Inter-American Court indicated in the *Loayza Tamayo (Reparations)* decision, individuals lack true freedom if they cannot design life according to their own goals and strive to achieve their desires.[19] Life's options have a very high existential value and their denial or impairment gives rise to a sense of injustice and demands for rectification or compensation, either restoring precisely what was lost or something equivalent in value. A morally adequate response addresses itself in the first instance to restoring the position of the victim. The moral adequacy of a substitute remedy, usually money, will vary considerably but may allow the victim to further his or her legitimate projects or goals. In sum, rectification and compensation in the framework of basic rights serve to restore to individuals to the extent possible their capacity to achieve the ends that they personally value. As such, compensation may have an important rehabilitative effect, alleviate suffering, and provide for material needs.[20] A climate of impunity, in contrast, can leave serious negative consequences on individual survivors and ultimately on society as a whole.[21]

[18] *Ibid.* at 25.

[19] *Loayza Tamayo (Reparations)*, judgment of 27 Nov. 1998, (2000) 42 Inter-Am.Ct.H.R. (ser. C), para. 147. See also the separate opinions of Judges Cancado Trindade and Abreu Burelli, who emphasize the human needs and aspirations that go beyond economic worth. They point to affirmation in the Preamble of the American Declaration of the Rights and Duties of Man that 'the spiritual development is the supreme end of human existence and the highest expression thereof'. In their view, the determination of reparations in human rights law should take into account the totality of the human person and the impact of human rights violation on the individual's life.

[20] Those who work with torture survivors are quick to note, however, that no reparation of any kind can remove all the harm done. See the studies cited in Redress, *Survivors' Perceptions of Reparation* (2001), 26–9.

[21] 'Impunity interrupts the normal process of healing of the survivor of repression, the grief of the families of disappeared victims, and the process of social reparation. Impunity prolongs the psychopathological consequences of repression, both in the individual and in the society.' See R. Gurr and J. Quiroga, 'Approaches to Torture Rehabilitation: A Desk Study Covering Effects, Cost-Effectiveness, Participation, and Sustainability' (2001) 11 *Torture*, Supp. No. 1, 3.

1.2.2 Condemnation or Retribution

While justice is primarily about the vindication of the victim and not about the punishment of the perpetrator, the wrongdoer is held responsible for providing a remedy in order to serve a moral need. On a practical level collective insurance can as easily make the victim whole. The wrong is an essential element; it is the rights-infringing wrongful conduct that is the source of a claim. Otherwise a person's losses due to a falling tree would be legally equivalent to injury resulting from torture.

Remedies express opprobrium to the wrongdoer. This is usually incorporated in the application of punishment, sometimes as a vindication of society's interest in retribution, or it can take the form of fines or exemplary or punitive damages. Sanctions express the social conviction that disrespect for the rights of others impairs the wrongdoer's status as a moral claimant. Remedies and sanctions thus affirm, reinforce, and reify the fundamental values of society. They may also act as 'potent restraints' on any repetition of violations,[22] as discussed below.

Certain human rights violations are deemed so serious that society labels them criminal. Punishment of these offences does not constitute restitution to the victim, who cannot be 'un-tortured' but imposes a penalty on the perpetrator and restraints to avoid a repetition of the offence. It places society with the victim in condemning the wrong, avoiding the indifference to the victim that marks the acts of the perpetrator.

Some authors[23] support the notion that victims should be entitled to have the state punish the perpetrators as retribution for the harm inflicted on them, because civil remedies can never adequately compensate the victims for their suffering and loss. The writers posit that victims have ceded to the state their right to retribution in return for the state's protection and enforcement of criminal law. What the exact role of retribution is or should be in the system remains debated, however, particularly when the victims seek a role in exacting it. Retributive justice justifies punishment by looking backward to the just deserts rather than forward to deterrence. This makes many uncomfortable because anger, hatred, and revenge are not viewed as appropriate emotions despite the wrongs suffered. However, survivors of human rights abuses often do experience deep emotions of anger, hatred, and desire to punish. Some argue that it is healing to recognize and give voice to these emotions which are not irrational, but normal. Retributive feelings are part of self-respect, acknowledging that victims take their rights seriously. Anger is an appropriate response to immorality and injustice and represents a normal desire to see the wrong defeated. Retribution, like restitution, seeks restoration of moral autonomy between wrongdoer and victim and between wrongdoer and the community. Both have been altered and diminished by the commission of the violation and condemnation is appropriate.

Criminal punishment is also seen as preferable because 'lesser sanctions do not correspond to the severity of gross human rights violations.'[24] The kind and amount of punishment deserved by the perpetrator must be carefully considered, however.

[22] W. Soyinka, *The Burden of Memory: The Muse of Forgiveness* (1999).
[23] See Aldana-Pindell, *supra* n. 8 and authors cited therein.
[24] *Ibid.* at 1470.

Extreme penalties must be rejected because of the harm they do and because the practical problems of ensuring complete identity between crime and perpetrator are probably insurmountable. Retribution is not the same as *lex talionis*, because the purpose of the former is to restore morality, which becomes impossible if the punishment is also immoral due to its disproportionate or cruel nature.

Other support can be found for 'negative retributivism', described as imposing just deserts not for its own sake but because it has larger goals.[25] It acts as moral educator by teaching law-breakers that there are barriers to the acts they seek to commit. It also educates the larger community about the immorality of the offence. Finally, punishment conveys to criminals and others that they wronged the victim and thus implicitly recognizes the victim's plight and honours the victim's moral claims.[26] The commission of a criminal human rights violation conveys a message that the victim's rights are not sufficiently important to refrain from violating them in pursuit of another goal. Punishment has the expressive function of annulling this message. Retributism, like restitution, imposes punishment to negate the wrong and reassert the right. It thus has both symbolic and norm-creating qualities for both the victim and larger society, affirming values and establishing structures that create or sustain behaviour consistent with those values.[27]

1.2.3 Deterrence

Deterrence—which seeks to influence the behaviour of all potential actors, not just the future conduct of a particular defendant—is assumed to work because rational actors weigh the anticipated costs of transgressions against the anticipated benefits. Guido Calebresi distinguishes between general and specific deterrence.[28] The former seeks to measure the costs imposed by an activity without evaluating the moral value of the activity or the generator of it. It assumes that individuals decide how to behave by calculating the personal benefits of engaging in activities and balancing them against the costs that liability (general deterrence) will impose. It contemplates that different actors will respond to a liability rule in different ways. Specific deterrence, in contrast, evaluates particular activities, deciding which are wrongful or undesirable. These it prohibits *ex ante* and punishes *ex post*. As the prospect of punishment may affect future conduct, the question becomes one of how much deterrence is desired. If the 'price' of violations is set high enough, if anticipated damages accurately reflect the true cost of the violations and the sanction is certain, the 'product' will be priced

[25] See Benjamin B. Sendor, 'Restorative Retributivism' (1994) 5 *J. Contemp. Legal Issues* 323, 334; Tatjana Hornle, 'Distribution of Punishment: The Role of a Victim's Perspective' (1997) 3 *Buff. Crim. L. Rev.* 5.

[26] Cf. Allison Marston Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2000) 87 *Va. L. Rev.* 415, 426 and Andrew N. Keller, 'Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR' (2001) 12 *Ind. Int'l & Comp. L. Rev.* 53, 65. See also George P. Fletcher, 'The Place of Victims in the Theory of Retribution' (1999) 3 *Buff. Crim. L. Rev.* 51, 54 (exploring theory that the purpose of punishment is to defeat the wrong).

[27] N. Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (1995).

[28] G. Calabresi and A. D. Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harv. L. Rev.* 1089–1128.

off the market. This requires full and accurate compensation for each victim of each incident. The rational actor generates the cost-justified number of incidents when faced with the prospect of 'perfect' liability.

Like remedies in private law cases, human rights remedies must aim to deter wrongful behaviour.[29] To do this, it may be necessary to augment the level of the remedy when there is corporate or institutional rather than individual responsibility. The level of award that would serve to deter an individual is likely to be inadequate when the state is the defendant, because any compensation awarded will be paid from the public treasury which has resources far beyond those of individual wrongdoers. The level of the award or the nature of the remedy must be such that state actors are deterred and not permitted to purchase an option to continue violating human rights.

The theory of reintegrative shaming posits that properly designed expressions of community disapproval can reduce illegal behaviour.[30] Community disapproval of the acts can be powerful when offenders are shamed and then reintegrated into the community, through the provision of redress to the victims. Deterrence literature also shows a correlation between the certainty of consequences and the reduction of offences, but little correlation between the severity of punishment and reduced incidence of wrongdoing.[31]

1.2.4 Restorative Justice or Reconciliation

The restorative justice movement originated in innovative crime prevention techniques designed to find alternatives to punishment, recidivism, and lack of attention to the needs of victims.[32] Research suggesting that such programmes actually reduce crime[33] has led to interest in the application of restorative justice concepts to dealing with human rights violations. In the aftermath of conflict or repression involving mass violations of human rights, the requirements of peace reinforce the demands of justice.[34] Victims of violations do not forget and one function of government is to protect those within its jurisdiction. Further 'if justice is not addressed, it will be difficult to consolidate peace, as the process will lack credibility and popular trust; if injustice continues to prevail, it may re-ignite conflict, as unmet grievances continue to fester.'[35]

[29] C. Gregory, H. Kalven, and R. Epstein, *Cases and Materials on Torts*, 3rd edn. (1977), xxii–xxiii; R. Posner, *Economic Analysis of Law*, 2nd edn. (1977), s. 6.16, 154–7.

[30] John Braithwaite, *Crime, Shame and Reintegration* (1989).

[31] Nigel Biggar (ed.), *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (2003), 69.

[32] See Heather Strang, 'The Crime Victim Movement as a Force in Civil Society', in H. Strang and J. Braithwaite (eds.), *Restorative Justice and Civil Society* (2003).

[33] L. Forsythe, 'An Analysis of Juvenile Apprehension Characteristics and Reapprehension Rates', in D. Moore et al. (eds.), *A New Approach to Juvenile Justice* (1995); Wai Yin Chan, *Family Conferences in the Juvenile Justice Process* (1996); Braithwaite, *supra* n. 30; John Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts', in M. Tonry (ed.), *Crime and Justice, A Review of Research* (1999), 25, 27–35; G. Burford and J. Pennell, *Family Group Decision-Making Project, Outcome Report*, vol I, (1998); L. Sherman et al., *Experiments in Restorative Policing: A Progress Report on the Canberra Reinitegrative Shaming Experiments* (1998); L. Sherman et al, *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments* (2000).

[34] Biggar, *supra* n. 31 at 3.

[35] Rama Mani, 'Restoring Justice in the Aftermath of Conflict: Bridging the Gap between Theory and Practice', in Tony Coates (ed.), *International Justice* (2000), 264.

Restorative justice has a procedural aspect and a substantive one. In terms of process, restorative justice aims to bring together perpetrators and those affected by abuse and harm. Substantively, restorative justice emphasizes redress and reintegrating the offender, not punishing him.[36] Redress as a key element of restorative justice is associated with atonement, reconciliation, forgiveness, and reintegration, i.e. healing. In this model, apologies and expressions of remorse are important to the process.

Societal healing may occur when its various constituent groups recognize that they share a common history even thought they experience it differently. The social discourse created by ensuring remedies can produce common understanding through conveying authoritative information. The building of such understanding may come through various remedial programmes, such as truth commissions that articulate and understand present reality through considering the past. In Australia and Canada, many argue that reports on the status of indigenous peoples have meaningfully contributed to a national discussion about identity, history, culture, and reconciliation.[37] Michael Ignatieff is more sceptical: 'All that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse. In Argentina, its work has made it impossible to claim, for example, that the military did not throw half-dead victims in the sea from helicopters. In Chile, it is no longer permissible to assert in public that the Pinochet regime did not dispatch thousands of entirely innocent people.'[38] Even if this is all that truth commissions do, countering state lies is itself important to victims of human rights abuse.

Remedies can contribute to social healing by reintegration and rehabilitation of the victimized.[39] Victims of governmental abuse often are blamed for their victimization or avoided because of the horrific nature of the stories they have to tell. Bystanders' guilt may also lead to rejecting the victims. Not infrequently, the social reaction is indifference or avoidance leading to a silence that is detrimental to the victims, producing isolation and mistrust. Children of victims may adopt these reactions and themselves become victims over time. The need to readapt to normal society and return to pre-victim ways of being and functioning is crucial and a part of the legal notion of restitution, even if it is not entirely realizable. Cognitive recovery involves the ability to develop a realistic perspective of what happened, by whom, and to whom, and to accept the reality that events happened the way they did, in an impersonal unfolding. The Latin American Institute of Mental Health and Human Rights in Santiago, Chile, emphasizes that individual therapy is not enough, that victims 'need to know that their society as a whole acknowledges what has happened to them . . . Social reparation is thus . . . simultaneously a socio-political and

[36] Strang and Braithwaite, *supra* n. 32 at 1.

[37] Erin Daly, 'Reparations in South Africa: A Cautionary Tale' (2003) 33 *U. Mem. L. Rev.* 367, 403, citing the Canadian Royal Commission on Aboriginal Peoples. Others criticize that such reports may move the majority to reconsider past actions, but fall far short of reparations for those harmed.

[38] Michael Ignatieff, *Articles of Faith, Index on Censorship* (1996), 113.

[39] On the psychological impact of human rights violations, see Y. Danieli in *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (SIM Special Pub. No. 12), at 196; Y. Danieli, 'On the Achievement of Integration in Aging Survivors of the Nazi Holocaust' (1981) 14 *J. of Geriatric Psychiatry* 191; R.K. Kordon, L.I. Edelman, D.M. Lagos, E. Nicoletti, and R.C. Bozzolo, *Psychological Effects of Political Repression* (1988).

a psychological process. It aims to establish the truth of political repression and demands justice for the victims . . . both through the judicial process and through the availability of health and mental health services'.[40] In this context, compensation can become a symbolic act, signifying vindication and a government's admission of wrongdoing or apology. Money can represent the tangible confirmation of responsibility. Of course, other forms of remedy are also important to this goal, including, in particular, rituals and commemorations of those injured.

When restorative justice is the focus of remedies, it sometimes appears to sacrifice individual victims to the desire of the majority to forget hard truths. To avoid this, victims must be given their voice, the truth, symbolic and real compensation, and guarantees of non-repetition.[41] Of course, serious violations like torture also leave political, psychological, and sociological impacts on society as a whole and social reparation is needed[42] as well as measures to avoid the reality or image of impunity.

One potential use of restorative justice is at the community level where both government and civil society can play a role in mediating when the rights violations stem from groups in conflict. Symbolic modes of reconciliation as well as other forms of redress may be coupled with initiatives aimed at moving ahead, making use of local knowledge and capacity. The community restoration process can include identifying one or more issues, building ideas about why past conflicts arose concerning the issue, seeking ideas about overcoming the past, building a programme based on the ideas, taking action in accordance with the programme, learning from the experience and modifying the programme through repeating the process. The danger that must be avoided in such processes is simply to reduce the size of the societal unit to which individual rights and redress are subordinated, from the state as a whole to the local community. Collective coercion in the name of reconciliation at the expense of a few may be even greater in a local public gathering than when the national government is involved.[43] As Derrida posits: '[o]nce you grant some privilege to gathering and not to dissociating, you leave no room for the other, for the radical otherness of the other, for the radical singularity of the other.'[44] Some unity is necessary, but unifying strategies must be counterbalanced by recognition of multiplicity, dissociation, or contingency, and by subsidiary institutions at national, regional, and global levels. Such strategies and institutions may help ensure that the communitarian majority does not deny rights and remedies to those in the minority in order to achieve a *Stepford* peace.

[40] D. Becker, E. Lira, M.I. Castillo, E. Gomez, and J. Kovalskys, 'Therapy with Victims of Political Repression in Chile: The Challenge of Social Reparation' (1990) 40 *J. of Social Issues* 133, 147–8.

[41] M. McGuire, 'Victims' Needs and Victim Services: Indications from Research' (1985) 10 *Victimology: An Int'l J.* 539.

[42] I. Agger and S.B. Jensen, *Trauma and Healing Under State Terrorism* (1996); N. Sveass and N.J. Lavik, 'Psychological Aspects of Human Rights Violations: The Importance of Justice and Reconciliation' (2000) 69 *Nordic J. Int'l L.* 35.

[43] See George Pavlich, 'The Force of Community', in Strang and Braithwaite, *supra* n. 32 at 56.

[44] J. Derrida in J.D. Caputo (ed.), *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (1997), 14.

1.3 Economic Analysis of Remedies

The impact of 'law and economics' theories has been considerable in Western legal systems, from the common law systems of the USA, England, and Canada to civil law jurisdictions including Germany, the Netherlands, and Italy.[45] The creation of a Latin American Association of Law and Economics indicates the spread of the approach,[46] which uses economic models as theoretical constructs for analysing the laws and legal doctrines of society.[47] Although not universally accepted in all areas of the law, neoclassical economic theories provide a widely used alternative approach to assessing the nature and purpose of remedies.

Law and economics theory holds that the law should always be efficient. Economists have contributed to understanding the preventive and regulatory functions of liability, which may be as important to society as compensation is to the victim.[48] An activity that is profitable even after payment of all the costs it imposes on others is said to be efficient or economical. Therefore, unlike the corrective justice model, which primarily determines the consequences of a wrongful act, economic theory is said to help to define the substance of what constitutes the wrong.[49] The economic reasoning behind the theory is based on at least three fundamental assumptions: (1) that conditions of scarcity preclude the fulfilment of every human desire; (2) that in a condition of scarcity most individuals behave rationally most of the time to maximize the achievement of their various goals and desires; (3) that individuals are the best, even the only, judges of their own preferences, acting in their own self interest. These assumptions, together with an assumption of negligible transaction costs, lead economic analysts to conclude that individuals tend to bargain efficient results between themselves. As a result, a cost-benefit analysis can be used to predict whether a change in the law will lead to the desired response in those subject to it. An increase in costs will discourage behaviour that is undesirable.

The deterrence rationale seems inherent in the market model and its cost-benefit analysis: damages are warranted as long as the cost to society of paying them will deter possible wrongdoers from imposing greater costs in the future. In this framework, compensatory damages, like criminal penalties, compel law violators to take account of the harm they inflict.[50] The amount of damages need not be compensatory in fact, if that term denotes some direct relationship between the damages paid and the

[45] Although traditionally distinct, the common law and civil law have seen convergence and transplants. The growth of European law may hasten this phenomenon. Thus, 'western legal system' is more recently used by comparative law scholars. B.S. Markesinis, *A Comparative Introduction to the German Law of Torts*, 3rd edn. (1994), 1.1.

[46] In Mexico and some other Latin American countries, the legal tradition is civil law in the private sphere, while public law doctrines have been influenced by United States common law.

[47] Robin Paul Malloy, *Law and Economics: A Comparative Approach to Theory and Practice* (1990), 3.

[48] See J.P. Brown, 'Towards an Economic Theory of Liability' (1973) 2 *J. Leg. St.* 323.

[49] See R. Posner, 'The Concept of Corrective Justice in Recent Theories of Tort Law' (1981) 10 *J. Leg. St.* 187, 193 ('the Aristotelian concept of corrective justice does not tell us who is a wrongdoer or who has vested rights; all it tells us is that a wrongful injury is not excused by the moral superiority of the injurer to the victim').

[50] *Ibid.* at 194.

victim's loss and its magnitude. Instead, damages are set at the appropriate level to deter the misconduct, a level that may be higher or lower than the actual losses of the victim. In most cases, however, economic analysis equates the value of damages with the value of harm.

If deterrence is the basis of an award of damages, an accurate assessment of the amounts due is important in inducing wrongdoers to exercise levels of precaution that reflect the magnitude of the harm they may generate. Damage liability that is less than the harm inflicted may encourage potential defendants to violate the law when it is inefficient to do so, assuming the law itself has insufficient 'compliance pull'. On the other hand, damage liability in excess of the harm inflicted will cause potential defendants to obey the law when it is inefficient to do so. A further factor also must be considered: not every wrongdoer expects to be caught and held liable for every incident. According to economic analysis, to make liability an effective market deterrent, it is necessary to inflate compensatory damages to correct the expectation of wrongdoers that they might escape from paying the full costs in every case. The proper deterrence measure thus may exceed the compensatory measure. In any event, a proper measure of one is not necessarily a proper measure for the other. Accuracy in damage awards alters the level of precautions based on the amount of the potential damage award.[51]

Economic analysis in general is open to criticism for its lack of a moral dimension, treating human rights as merely another form of social bargaining and trade. Social utility, its sole normative foundation, is insufficiently justificatory and thus open to serious question. As Robin Malloy observes:

> [b]y use of neoclassical economics, the conservatives reduce rights and obligations to numerical calculations and then proceed to balance countervailing claims by means of scientific equations. It is argued that an efficient result will maximize wealth and that wealth maximization produces the best attainable social arrangement. With the conservative vision of law and economics there is, therefore, no concept of inherent rights of the individual merely as a result of being a human being.[52]

Thus, slavery could be deemed permissible if efficient[53] and racial minorities treated as a neighbourhood 'nuisance' because of their depressive effect on land values. Judge Posner writes: 'In these circumstances some form of segregation would be wealth maximizing'.[54] In other words, in neoclassical economic analysis, injuries to life and health are 'costs', as are sums expended to prevent wrongdoing, against which they are balanced, and its reasoning seeks to maximize the value of conflicting activities, calling on society to choose or allow the most 'efficient' behaviour. Critics point out that, in legal traditions where the notion of obligation is stronger than the notion of right (e.g. China), bargaining in self-interest may not be a correct assumption, undermining the economic construct.

The neoclassical economic approach seems destined to allow wrongdoers to continue their harmful acts as long as they pay for the damage they cause; injuries are commensurable with money, a cost to the victim. Such a 'commodification' seems

[51] See L. Kaplow and S. Shavell, 'Accuracy in the Assessment of Damages' (1996) 39 *J. Law & Econ.* 191.
[52] Malloy, *supra* n. 47 at 60–1.
[53] R. Posner, *The Economics of Justice* (1983), 86, 102.
[54] *Ibid.* at 84–5.

inappropriate for human rights discourse and practice because rights violations are often incommensurable. Compensation can only provide something equivalent in value to that which is lost; rectification or restitution restores precisely that which is taken. If what is taken from the victim is a chosen, specific pursuit, then having money to pursue another aim is not the same. Where the choices and values are incommensurable, a loss is sustained for which full compensation is impossible. Money does not replace a lost loved one and 'most people would not exchange their lives for anything less than an infinite sum of money if the exchange were to take place immediately'.[55] Posner's answer is that courts cannot pay infinite awards and must award 'reasonable' compensation, ignoring the value of the deceased's life to herself or himself. This exchange, of rights violation for money, may be seen as conflicting with the notion of 'inalienable' rights, but cannot be avoided when the loss has occurred and is irreparable. Yet, as Mark Yudoff has observed, 'society's interest in human dignity is so great that the recovery may exceed any plausible estimate of economic injury'.[56] Non-monetary remedies thus should be devised that encourage persons to bring suit to deter violations. This requires restitution where possible and defraying the costs of litigation, in addition to compensating for actual harm.

Economic analysis need not be viewed as inescapably in conflict with remedial justice and the moral basis for remedies. Indeed, Posner argues that the Aristotelian concept of corrective justice is compatible with, even required by, economic theory.[57] Both approaches provide a theoretical foundation for *why* damages must be afforded the individual victim. Compensatory justice further indicates the minimum that must be done to restore the moral order, while economic analysis provides a basis for evaluating the upper range of remedies, *how* remedies should be determined in order to protect the societal as well as the individual interest. The economic approach considers the impact of violations on society as a whole, aiming to deter violations through the adjustment of damage awards. In the human rights context, such an approach can help in calculating the amounts needed to uphold a treaty regime by adequately deterring state misconduct. It suggests that international tribunals may need to consider awarding far higher amounts of damages than have heretofore been adjudged.

Economic analysis and market theories have another impact on remedies, in cases where the victim has suffered economic losses only. Unlike physical injury, imposition of economic loss is not always deemed unfair and deserving of remedial justice. Indeed, 'the philosophy of the market place presumes that it is lawful to gain profit by causing others economic loss.'[58] Opponents to economic recovery see it having adverse side effects on market competition and producing the waste of economic resources in a non-efficient allocation of losses.[59] It is also widely accepted that the state may set its economic policies and make choices without liability to those who may suffer injury as a consequence. Such individual losses are viewed as an ordinary

[55] Posner, *supra* n. 29, s. 6.12, 197.

[56] M. Yudof, 'Liability for Constitutional Torts and the Risk-Averse Public School Official' (1976) 49 *S. Cal. L. Rev.* 1322, 1379–80.

[57] Posner, *supra* n. 53 at 188.

[58] Goff, L.J., *The Aliakmon* [1985] 2 All ER 44 at 73 (CA), quoted in Efstathios Banakas, *Civil Liability for Pure Economic Loss* (1996), 2.

[59] Banakas, *ibid.*, 8.

risk of economic activity. Furthermore, it is often possible for an individual to contract protection against economic injury through insurance. Yet, individuals can also obtain health insurance against personal injury and life insurance in case of death and this fact does not undercut claims for attacks on physical integrity. It seems to be the nature of the loss and a predilection for market-based economic efficiency that pose problems. Morally there seems little distinction between state misconduct that harms an individual physically from that which deprives the individual of a livelihood.[60] 'In modern social and economic conditions, certain economic interests can be seen as emerging, alongside interests in personal safety, freedom, respect and property, as primary goods'[61] deserving of protection. Thus, German law, for example, imposes liability on public officials and the government for breach of an official duty to safeguard general economic interests.[62]

1.4 Conclusions

The remedial task is to convert law into results, to deter violations and restore the moral balance when wrongs are committed. 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. In the range of remedies, relatively non-intrusive remedies, such as declaratory judgments and damages, may give way 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. A damage award assesses the harm that the misconduct has caused and imposes the cost upon wrongdoer. All relief seeks to create a hypothetical: the situation 'as if' the wrongdoer had not violated the rights of the victim.

As compensation is the most common remedy, 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; 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 determine prior to controversy and that reasonably guarantee all individuals like treatment. Accurate assessment also is necessary because inadequate or excessive awards frustrate the compensatory, retributive, and deterrent functions of the law.

[60] In the private sector, even negligent conduct can sometimes be the basis of recovery for economic loss. See *Spring v. Guardian Assurance plc* [1994] 3 All ER 129, in which the House of Lords allowed the plaintiff's claim to go forward to recover from a former employer who negligently wrote an inaccurate letter of reference. The danger of serious and irreparable harm to the individual's future prosperity and happiness were deemed to outweigh the interests of the employer and the imposition of liability was thus seen as fair and justified. On the increasing justiciability of economic, social and cultural rights, see *infra* Chapter 2.

[61] Banakas, *supra* n. 58, 22.

[62] Erwin Deutsch and Tony Weir, 'Pure Economic Loss in German Law', in Banakas, *supra* n. 58, 82. According to BGB, § 839 combined with Basic Law, art. 34, compensation is due for all harm which the state's breached obligation was designed to prevent.

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 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.

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 some will go unremedied in the future. Yet, remedies such as injunctions that national judicial bodies were once reluctant to impose, because they were perceived to exceed the judicial power or believed to be simply unenforceable, are now taken for granted.

The theories of remedies just discussed have been applied by national and international courts throughout the world. The range of remedies the courts afford indicates a general concern for compensation, rehabilitation, deterrence, and punishment. The surveys of national and international decisions that follow show how these theories are put into practice.