

Reparation As Prevention: Considering the law and practice of orders for cessation and guarantees of non-repetition in torture cases

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Abstract

The relationship between reparation and prevention is a key feature of the jurisprudence of human rights bodies and courts. Given the limited jurisdiction of courts to decide on the facts before them, remedies of cessation and guarantees of non-repetition have focused on practices that respond to such facts. There has been less scope in the jurisprudence to consider broader institutional failings that may also impact on the practice of torture. However, given that individual complaints are a key means by which institutional failings are documented, the role of courts is vital. The efficacy of prevention as a reparation measure is dependent on courts determining that measures of cessation and guarantees of non-repetition are only partial solutions and must be complemented by a variety of other, broader quasi-judicial and non-judicial measures. However, cessation and guarantees of non-repetition are also important features of reparation awards in that they afford victims the opportunity to be proactively involved in the determination of policies aimed at prevention.

1. Introduction

The right to a remedy and reparation for the breach of human rights is a fundamental principle of international law,¹ recognised in numerous treaty texts and affirmed by a range of national and international courts. The principle has been underscored in a wide array of cases, including those that relate to torture and cruel, inhuman or degrading treatment or punishment (CIDPT). Reparation must reflect the gravity of the violation and be proportionate to the harm suffered. While most serious violations of human rights, including torture, are, by their nature, irreparable, the act of affording reparation is an important way in which the rights and dignity of the victim are acknowledged and may be restored.

In 2005, the United Nations General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the Basic Principles and

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¹ *Chorzow Factory Case*, Permanent Court of International Justice, Series A No 9 (1927), p.21.

Guidelines).² These Basic Principles are fundamentally important in drawing attention to the right to a remedy and reparation, and in consolidating and systematising the diverse procedural and substantive norms in this field. The Basic Principles list five principle forms of reparation: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

This article is concerned with the forms of reparation of satisfaction (which incorporates cessation) and of guarantees of non-repetition. In many ways, these particular forms of reparation are emblematic of what many survivors of torture want and need, at least as far as REDRESS has gleaned from years of working with, and assisting, survivors: they want the torture to end and, as they often have unresolved feelings of guilt for having escaped the torture when others were not so lucky, they want to ensure it does not happen to them in the future, or to others with the misfortune to be similarly situated. At the same time, these forms of reparation are the most controversial of the Basic Principles. From a technical perspective, a survivor bringing a claim for reparation for torture may feel very strongly that a court should adopt measures of cessation, particularly when the practice is widespread, as well as guarantees of non-repetition. Yet, unlike measures of restitution, compensation and rehabilitation, cessation and guarantees of non-repetition are, by their very nature, focused less on the violations perpetrated against the individual litigant and more on the institutional practices of the state that allowed the torture to occur in the first place. These measures are less concerned with past violations: they are future-oriented.

Considering the individual claims processes through which survivors seek to vindicate their rights, are survivors best placed to identify the most appropriate guarantees of non-repetition in terms of comparing the strength of one preventive measure over another? Certainly they are best able to articulate their experiences, the harm they suffered and their need for restitution, compensation and rehabilitation, but are they best suited to determine measures relating to cessation and guarantees of non-repetition?

Reparation has progressively been conceived as a ‘right’ of victims: as something that is theirs to assert and theirs to receive. Yet, the obligations of states to cease unlawful conduct and to protect against, or prevent, violations is distinct from, and arguably broader than, the victims’ right to a remedy and reparations. If the approach to cessation and guarantees of non-repetition stems from individuals’ claims for reparation, does this necessarily do a disservice to these broader goals? Human rights claims have been a principle vehicle by which unlawful practices have been outlawed; these claims have proved to be an important incentive for legal and institutional reforms. Most human rights courts have articulated state obligations of cessation and guarantees of non-repetition in a loose way, affording significant latitude to the state to determine the precise modalities for implementation. Yet, increasingly, and particularly in the field of torture, other, more consensual mechanisms, such as the preventive monitoring bodies established by the European Convention for the Prevention of Torture³ and the Optional Protocol to the Convention

² Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the United Nations General Assembly, Resolution 60/147, UN Doc. A/RES/60/147 (2005), 16 December 2005.

³ European Convention for the Prevention of Torture and inhuman or degrading treatment or punishment, CPT Doc. Inf/C (2002) Strasbourg, 26 September 1987. Text amended according to the provisions of Protocols No 1 (European Treaty Series No 151) and No 2 (European Treaty Series No 152), entered into force 1 March 2002.

against Torture and other cruel, inhuman or degrading treatment or punishment (OPCAT),⁴ provide for other possibilities.

This article considers the architecture of reparations, analysing how courts have dealt with the thorny issues of cessation and prevention of recurrence. The paper starts with a legal analysis of the obligation to prevent torture and CIDTP, a review of the principle mechanisms established to prevent torture and CIDTP, and an evaluation of how this obligation has been considered in the jurisprudence. The article then turns to remedies and reparation for torture, considering the relationship between reparation and prevention. It then analyses the measures of cessation and guarantees of non-repetition, considering how courts have dealt with such measures, including the types of actions that have been ordered. The article concludes with a consideration of the efficacy of dealing with prevention as a reparation measure, and questions whether it is more appropriately dealt with at the front end: before the torture occurs in the first place.

2. The Prevention of Torture and CIDTP: The nature of the legal obligations and their practical enforcement

2.1 *The legal framework for the prevention of torture and CIDTP*

One of the founding purposes of the human rights infrastructure is the prevention of further violations. The Universal Declaration of Human Rights, the first global statement on human rights, was agreed in the immediate aftermath of the Second World War, with respect for human rights recognised ‘as the highest aspiration of the common people.’⁵ Agreed around the same time, prevention also underpinned the Genocide Convention.⁶

Progressively ever since, human rights instruments have included positive obligations to prevent violations.⁷ A pivotal example is the Inter-American Convention on the Prevention of Violence against Women (the ‘Convention of Belém do Pará’), in which States Parties are required to

- apply due diligence to prevent, investigate and impose penalties for violence against women;
- include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;

⁴ Optional Protocol to the Convention against Torture and other cruel, inhuman or degrading treatment or punishment (OPCAT), adopted by UN General Assembly, Resolution 57/199, UN Doc. A/RES/57/199 (2002), 18 December 2002, entered into force 22 June 2006.

⁵ Universal Declaration of Human Rights, proclaimed by the UN General Assembly in Paris, Resolution 217 A (III), 10 December 1948. See ‘Preamble’, para. 2.

⁶ Convention on the Prevention and Punishment of the Crime of Genocide, approved by the UN General Assembly, Resolution 260 A(III), UN Doc. A/RES/260 A(III), 9 December 1948, entered into force 12 January 1951. See Article 1.

⁷ See, for example, Article 4 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, UN Doc. A/RES/3166(XXVIII), entered into force 14 December 1973; Article 11 of the Convention on the Safety of United Nations and Associated Personnel, UN Doc. A/RES/49/59, entered into force 9 December 1994; Article 15 of the International Convention on the Suppression of Terrorist Bombings, UN Doc. A/RES/52/164, entered into force 15 December 1997.

- adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;
- take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;⁸ ...
- and to undertake progressively a range of specific measures.⁹

Another key recent example is the International Convention for the Protection of All Persons from Enforced Disappearance, which incorporates numerous preventive obligations,¹⁰ including the obligation on States Parties to investigate and prosecute an individual who failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance.¹¹

Prevention also features high on the agenda of instruments dedicated to the prohibition of torture, recognising that

it is not enough for a State to adopt a passive attitude of abstention. The preventive aspect of the obligation requires a proactive approach involving the adoption of concrete measures to prevent, or at least limit, the risk of torture and ill-treatment.¹²

The UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment (UNCAT) requires States parties to ‘take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’.¹³ The UNCAT also requires States Parties to prevent

other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture..., when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity[.]¹⁴

It also requires States to

⁸ Inter-American Convention on the Prevention of Violence against Women (the ‘Convention of Belém do Pará’), adopted 9 June 1994, para.7(b)-(e). Available at <http://www.oas.org/cim/english/convention%20violence%20against%20women.htm>. Last accessed 16 January 2010.

⁹ Inter-American Convention on the Prevention of Violence against Women, para. 8. See fn.8.

¹⁰ Inter-American Convention on the Prevention of Violence against Women, Articles 6(1)(iii), 12(4), 22, 23, and 25. See fn.8.

¹¹ Inter-American Convention on the Prevention of Violence against Women, Article 6(1)(iii). See fn.8.

¹² Jean-Baptiste Niyizurugero and Patrick Lessène, *Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa: Practical Guide for Implementation* (Addis Ababa: Association for the Prevention of Torture, 2008), p.8. See also Niyizurugero and Lessène in this volume.

¹³ Convention against Torture and other cruel, inhuman or degrading treatment or punishment, adopted by the UN General Assembly, Resolution 39/46, UN Doc. A/RES/39/4610 December 1984, entered into force 26 June 1987, Article 2(1).

¹⁴ This provision is replicated in Article 6 the Inter-American Convention to Prevent and Punish Torture, adopted 9 December 1985, Organisation of American States Treaty Series No 67, entered into force 28 February 1987, Article 6. Available at <http://www.oas.org/JURIDICO/ENGLISH/Treaties/a-51.html>. Last accessed 16 January 2010.

keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.¹⁵

Prevention is also cited in the Istanbul Protocol¹⁶ as a legal obligation that States must respect to ensure protection from torture.

Several anti-torture conventions were created specifically to prevent torture. In the Americas, the Inter-American Convention to Prevent and Punish Torture¹⁷ was adopted in 1985 at *Cartagena de Indias*, Colombia, at the fifteenth regular session of the General Assembly of the Organisation of American States. It requires States Parties to ‘take effective measures to prevent and punish torture within their jurisdiction.’¹⁸ The Inter-American system was reinforced with the appointment, in 2004, of the Special Rapporteur on the Rights of Persons Deprived of their Freedom of the Inter-American Commission and, ultimately, with the adoption, in 2008, of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.¹⁹

In 1987, the Council of Europe agreed the European Convention for the Prevention of Torture and inhuman or degrading treatment or punishment.²⁰ This Convention established a specialised European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT), which undertakes fact-finding visits to places where persons are deprived of their liberty.²¹ The Committee is a non-judicial body, aimed at prevention, that works collaboratively and confidentially with States to strengthen the protection of persons deprived of their liberty. Similarly, the Robben Island Guidelines,²² developed at a workshop at the site where Nelson Mandela and other anti-apartheid activists were detained for many years, is a key text for the prevention of torture in Africa.²³ It sets out, *inter alia*, basic procedural safeguards for those deprived of their liberty, safeguards during the pre-trial process, conditions of detention, mechanisms of oversight, training and empowerment, and civil society education and empowerment. The guidelines also provide that states should

¹⁵ Inter-American Convention to Prevent and Punish Torture, Article 11. See fn.14. See also, General Comment 7 of the Human Rights Committee. UN Doc. HRI/GEN/1/Rev.6. Available at <http://www1.umn.edu/humanrts/gencomm/hrcom7.htm>. Last accessed 16 January 2010.

¹⁶ Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment, submitted to the United Nations High Commissioner for Human Rights, 9 August 1999, para. 10(a).

¹⁷ Inter-American Convention to Prevent and Punish Torture. See fn.14.

¹⁸ Inter-American Convention to Prevent and Punish Torture, Article 6. See fn. 14.

¹⁹ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Organisation of American States Doc. OEA/Ser/L/V/II.131 doc. 26.

²⁰ European Convention for the Prevention of Torture. See fn.3.

²¹ As of 4 August 2009, the Committee had made 272 visits to member states of the Council of Europe. Statistics are available on the CPT’s website at <http://www.cpt.coe.int/en/about.htm#Statistics>. Last accessed 29 November 2009.

²² Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (‘Robben Island Guidelines’), adopted by the African Commission on Human and Peoples’ Rights, Resolution 61 (XXXII) 02: Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002).

²³ See Niyizurugero and Lessène in this volume.

[e]stablish, support and strengthen independent national institutions such as human rights commissions, ombudspersons and commissions of parliamentarians, with the mandate to conduct visits to all places of detention and to generally address the issue of the prevention of torture, cruel, inhuman and degrading treatment or punishment, guided by the UN Paris Principles Relating to the Status and Functioning of National Institutions for the Protection and Promotion of Human Rights.²⁴

The African Commission's Special Rapporteur on Prisons and Conditions of Detention is also mandated to examine the state of prisons and conditions of detention, and to make recommendations for their improvement.²⁵

Alongside the development of regional preventive mechanisms, in 2006 the Optional Protocol to the UNCAT²⁶ (OPCAT) came into force. The structure of the OPCAT has benefited from the best practice of several regional mechanisms, in particular the CPT. At the same time, the Robben Island Guidelines, and the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, have incorporated into their standards aspects of the OPCAT. Central to the OPCAT is its provision for the establishment of 'a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.'²⁷ The Subcommittee on the Prevention of Torture and other cruel, inhuman or degrading treatment or punishment (SPT), established by the OPCAT, was created in December 2006. Similar to the Council of Europe's CPT, the SPT visits places of detention and makes recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and CIDTP. The OPCAT also calls upon States Parties to establish national mechanisms to prevent torture domestically through regularly examining the treatment of persons deprived of their liberty, making recommendations to improve this treatment and the conditions of detainees, and to prevent torture and CIDTP, as well as submitting proposals and observations concerning existing or draft legislation.²⁸ The SPT is also tasked with helping States to establish their national preventive mechanism, maintaining contact with national preventive mechanisms and helping to strengthen their capacities.²⁹

2.2 *Legal standards of prevention*

The legal standards encompassed in the prevention of torture and CIDTP have developed progressively. Some of the early conventions and declarations refer simply to the obligation to 'prevent' without providing further details as to the nature of the preventive obligation. For instance, the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture

²⁴ Robben Island Guidelines, para. 41. See fn.22.

²⁵ See http://www.achpr.org/english/_info/prison_mand.html. Last accessed 29 November 2009.

²⁶ OPCAT. See fn.4.

²⁷ OPCAT, Article 1. See fn.4.

²⁸ OPCAT, Article 19. See fn.4.

²⁹ OPCAT, Article 11(b). See fn.4.

and Other Cruel, Inhuman or Degrading Treatment or Punishment³⁰ requires each State to ‘take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practised within its jurisdiction.’³¹ A similar provision appears in the Inter-American Convention to Prevent and Punish Torture³² and the UNCAT;³³ however, in the latter, ‘effective measures’ is replaced with ‘effective legislative, administrative, judicial or other measures’.

These and other standard-setting documents set out a number of custodial and procedural safeguards that contribute to the prevention of torture,³⁴ including, for example, safeguards in the context of arrest³⁵ and detention,³⁶ the prohibition of *refoulement*, the obligation to make torture a punishable offence, and obligations to provide education and training for law enforcement and other personnel, to review interrogation methods and conditions of detention, to investigate possible acts of torture both *ex officio* and on the basis of complaints, and to prohibit the invoking of evidence extracted by torture. However, the safeguards reflected in many such texts are not linked specifically with the notion of prevention and, arguably, are understood as fulfilling a number of purposes, including prevention, prohibition and reparation. This reinforces the view that prohibiting and prosecuting torture, and affording remedies and reparation to torture victims, contribute to the prevention of future or continuing instances of torture, in addition to the purposes they serve in addressing past acts.

Later conventions and standard-setting instruments, such as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the OPCAT provide no further interpretive guidance, focusing mainly on the establishment of mechanisms of

³⁰ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly, Resolution 3452(XXX), UN Doc. A/RES/3452(XXX), 9 December 1975.

³¹ Declaration on the Protection of All Persons from Being Subjected to Torture, Article 4. See fn.30.

³² Inter-American Convention to Prevent and Punish Torture, Article 6, para. 1.

³³ UNCAT, Article 2(1). See fn.13.

³⁴ See, for example, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No 2: Implementation of article 2 by States parties, CAT/C/GC/2, 24 January 2008. See also the UNCAT, which refers to the issuance of general instructions, and training of law enforcement personnel, on the prohibition of torture and CIDTP, and the systematic review of interrogation methods and practices, as well as arrangements for the custody and treatment of detainees, making torture a criminal offence, setting up systems for individuals to lodge complaints about torture and to have their case impartially examined by the competent authorities of the State concerned. See fn.13. The Standard Minimum Rules for the Treatment of Prisoners covers standards in the management of prison institutions and the treatment of prisoners, whereas the Basic Principles for the Treatment of Prisoners encourage, *inter alia*, the abolishment of solitary confinement. See fn.47 and fn.2. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, probably the most detailed standards, provide for the right of habeas corpus, communication with the outside world, and the prohibition of violence, threats or methods of interrogation that impair the detainee’s capacity of decision or his judgement. Also, they provide that ‘the duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law’. They also require prompt medical examinations, regular independent visits, and provisions to enable potential claimants to access complaints mechanisms. See fn.33.

³⁵ For example, ensuring that suspects are brought promptly before a judge and are able to challenge the legality of their detention. Other key safeguards include video-taping interrogations; regular access to legal counsel, relatives and doctors; and prohibition of solitary confinement.

³⁶ For example, use of arrest and detention registers; mandatory medical examinations at the time of arrest and release from police detention or transfer to prison; and use of only publicly recognised facilities.

prevention as opposed to clarifying standards or obligations of prevention. However, the Committees set up by such bodies, particularly the CPT, have gone far in developing standards in the course of their work.³⁷

2.3 *The consequences of the failure to prevent*

States are obliged to refrain from infringing upon an individual's right to be free from torture and CIDTP. They are equally obligated to secure and ensure individuals' right to be free from torture and CIDTP; this places an affirmative duty upon states to take positive steps to fulfil the obligation. As was indicated by the Trial Chamber in *Prosecutor v Furundzija*, the International Criminal Tribunal for the former Yugoslavia (ICTY) confirmed that the prohibition of torture imposes preventive obligations:

given the importance that the international community attaches to the protection of individuals from torture, the prohibition against torture is particularly stringent and sweeping. States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irremediably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture.³⁸

The failure to prevent torture or CIDTP can result in a violation of the obligation to prohibit such treatment if this obligation is understood as a fundamental condition precedent of the absolute prohibition of torture and CIDTP. The European Court, for example, has read certain positive obligations into the European Convention in order to ensure that it is 'practical and effective.'³⁹

In both the European and Inter-American systems, the obligation to prevent has been interpreted as part and parcel of the overall architecture of the human rights system: a fundamental component underpinning each obligation that is necessary to make the rights practical and effective. In the inter-American system, the obligation to prevent has been articulated in relation to Article 1 of the American Convention, as part of the fundamental obligation to respect rights:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.⁴⁰

³⁷ See, for example, CPT, 'The CPT standards: "Substantive" sections of the CPT's General Reports', CPT Doc. CPT/Inf/E (2002) 1 - Rev. 2006. Available at <http://www.cpt.coe.int/en/documents/eng-standards.pdf>. Last accessed 30 November 2009.

³⁸ ICTY Trial Chamber, IT-95-17/1-T, Judgment of 10 December 1998, 38 International Legal Materials 317, para. 148.

³⁹ See, for example, *A v. United Kingdom*, Judgment of 23 September 1998, European Court of Human Rights, para. 19-24.

⁴⁰ American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

The Inter-American Court of Human Rights has determined that the obligation to ‘ensure’ the free and full exercise of the rights recognised by the Convention implies the duty of the States Parties to organise the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must *prevent*, investigate and punish any violation of the rights recognised by the Convention and, if possible, attempt to restore the right violated and provide compensation, as warranted, for damages resulting from the violation.⁴¹

As has been indicated by the Court,

the State has a legal duty to take reasonable steps to prevent human rights violations This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party.⁴²

The ‘existence of a particular violation does not, in itself, prove the failure to take preventive measures’.⁴³ As was indicated by the European Court of Human Rights in the recent case of *Beganović v. Croatia*,

it goes without saying that the obligation on the State under Article 1 of the Convention cannot be interpreted as requiring the State to guarantee through its legal system that inhuman or degrading treatment is never inflicted by one individual on another or that, if it is, criminal proceedings should necessarily lead to a particular sanction. In order that a State may be held responsible it must in the view of the Court be shown that the domestic legal system, and in particular the criminal law applicable in the circumstances of the case, fails to provide practical and effective protection of the rights guaranteed by Article 3.⁴⁴

⁴¹ *Velasquez Rodriguez Case*, Judgment of 29 July 1988, Inter-American Court of Human Rights, Series C No 4 , para. 166.

⁴² *Velasquez Rodriguez Case*, para. 174 and 175. See fn.41.

⁴³ *Velasquez Rodriguez Case*, para. 175. See fn.41. This general principle is expressed, in relation to the prevention of genocide, in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, International Court of Justice, para. 430: ‘the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.’

⁴⁴ *Beganović v. Croatia*, Application No 46423/06, Judgment of 25 June 2009, European Court of Human Rights, para. 71. See also, *Okkali v. Turkey*, Application No 52067/99, Judgment of 17 October 2006, European Court of Human Rights, para. 66; *Urra Guridi v Spain*, Committee against Torture Communication No 212/2002, 17 May 2005, para. 6.7, in which the Committee against Torture considered that the pardons granted had the practical effect

In some instances, however, the Inter-American Court of Human Rights has implied a failure to prevent in instances in which an act of torture is proved.⁴⁵ It has also indicated that subjecting a person to official, repressive bodies that practice torture with impunity is, itself, a breach of the duty to prevent, even if that particular person is not tortured.⁴⁶

However, some of the standard-setting documents that refer to the obligation to prevent torture and CIDTP do not specify how prevention must occur, or they enumerate a range of possible measures framed as practical principles of ‘good practice’⁴⁷ as opposed to binding obligations. This, on occasion, has limited the specific legal consequences of the failure to prevent. Also, the failure to prevent torture or CIDTP has rarely been elaborated upon in individual complaints, other than in relation to the obligation to investigate. Individual complainants have tended to focus on substantiating instances in which torture has occurred and they, thereby, typically focus on the provisions that prohibit (as opposed to prevent) torture where these differ. In those instances (i.e. when the complainant has sought to rely on institutional failings to prove the failure to prevent torture or CIDTP), victims invariably have failed to provide the requisite proof to lead to the finding of a violation. Arguably, victims are least placed to document such failings. For example, in *Barakat v. Tunisia*, the complainant argued that, in addition to breaching the prohibition of torture, Tunisia breached its obligations under Article 11 of the UNCAT (i.e. to keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing cases of torture). However, in its concluding observations, the Committee considered that the documents communicated furnished no proof that the State Party had failed to discharge its obligations under this provision.⁴⁸

of allowing torture to go unpunished and encouraging its repetition, thereby violating Article 2(1) of the UNCAT, which requires that States take effective measures to prevent torture.

⁴⁵ See, for example, *Bámaca Velásquez Case*, Judgment of 25 November 2000, Inter-American Court of Human Rights, Series C No 70, para. 220: ‘As has been shown, Bámaca Velásquez was submitted to torture while he was secretly imprisoned in military installations... . Consequently, it is clear that the State did not effectively prevent such acts and that, by not investigating them, it failed to punish those responsible.’

⁴⁶ *Velasquez Rodriguez Case*, para. 175. See fn.41. Note, however, the different position taken by the International Court of Justice in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) case in which it cites Article 14(3) of the International Law Commission’s Articles on State Responsibility for support of the proposition that it is at the time when commission of the prohibited act begins that the breach of an obligation of prevention occurs (para. 431).

⁴⁷ The Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and approved by the Economic and Social Council, Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, provides that ‘The following rules are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions. In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations’ (para. 1-2).

⁴⁸ Committee against Torture, *Barakat v. Tunisia*, Communication No 60/1996, UN Doc. CAT/C/23/D/60/1996, 10 November 1999. See also *Dawda Jawara v. The Gambia*, African Commission on Human and Peoples’ Rights, Communication No 147/95 and 149/96 (2000), para. 56: ‘The complainant further alleges that detention of persons incommunicado and preventing them from seeing their relatives constitutes torture. The State has refuted this claim and has challenged the complainant to verify the truth from those who were detained. To date, the Commission has

2.4 Modes of liability

In general, a state is liable for human rights violations that can be imputed to it. However, in addition, an act that violates human rights that is not directly imputable to the state can still entail state responsibility. As was indicated by the Inter-American Court of Human Rights in the *Velasquez Rodriguez case*,

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.⁴⁹

Traditional international law considers states responsible only for actions and omissions of its own agents, and not for human rights violations between private parties. In recent years, this has begun to change.

In respect of private persons, the European Court of Human Rights has held that States are required to take positive measures to ensure that individuals are not ill-treated, in breach of Article 3, by private individuals.⁵⁰ In *A v United Kingdom*,⁵¹ the European Court found a violation of Article 3 when a step-father who had beaten his step-son to such an extent that the treatment amounted to inhuman and degrading treatment was acquitted of assault. Even though the treatment was perpetrated by one private person against another, the State was still responsible because there was not an adequate system of law in place to protect against such treatment. The Court determined that Articles 1 and 3 of the European Convention requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including ill-treatment administered by private individuals. In *MC v Bulgaria*,⁵² the Court found that Bulgaria had violated Article 3 because of the deficiency of its criminal law in effectively protecting women from sexual violence. Thus, whether violations are committed by state agents, armed groups or private persons, states have an obligation to prevent such violations and to respond effectively to them.

In *Dzemajl and Others v. Yugoslavia*,⁵³ the police, though present at the scene, failed to intervene to prevent the destruction of a Roma settlement. The Committee against Torture considered that

received no evidence from the complainant. In the absence of proof therefore, the Commission cannot hold the government to be in violation of Article 5.'

⁴⁹ *Velasquez Rodriguez Case*, para. 172. See fn.41.

⁵⁰ *A v. United Kingdom*, Reports 1998-VI. See fn.39.

⁵¹ *A v. United Kingdom*, Reports 1998-VI. See fn.39.

⁵² *M.C. v. Bulgaria*, Judgment of 4 December 2003, European Court of Human Rights, Report 2003-XII.

⁵³ *Hajrizi Dzemajl et al. v. Yugoslavia*, UN Doc. CAT/C/29/D/161/2000, UN Committee against Torture, 2 December 2002, para. 9.2. See also, UNCAT, General Comment No 2: Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2, 24 January 2008, para. 18: 'where State authorities or others acting in official capacity or under color of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with [the] Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.'

this lack of action constituted acquiescence in the sense of Article 16 of the UNCAT, which prohibits cruel, inhuman or degrading treatment.

The new Disappearances Convention⁵⁴ goes further. Incorporating international criminal law principles of superior responsibility, it treats the failure to prevent as a crime and obliges states parties to, *inter alia*, take the necessary measures to hold those who commit a crime of enforced disappearance and their superior(s) criminally responsible if the superior:

- (i) knew or consciously disregarded information that clearly indicated that subordinates under his or her effective authority and control were committing, or about to commit, a crime of enforced disappearance;
- (ii) exercised effective responsibility for, and control over, activities that were concerned with the crime of enforced disappearance; and
- (iii) failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance, or to submit the matter to the competent authorities for investigation and prosecution.⁵⁵

3. Prevention as a Form of Remedy for Torture and CIDTP

3.1 *The right to a remedy and reparation for serious violations of human rights*

The right to a remedy and reparation has been affirmed by a range of treaties,⁵⁶ United Nations bodies,⁵⁷ regional courts,⁵⁸ as well as in a series of declarative instruments.⁵⁹ Despite the requirement that reparation reflect and respond to the nature and gravity of the breach, it is clear that the most serious violations of human rights are, by their nature, irreparable and that any remedy will be disproportionate to the harm suffered. Nonetheless, it is an international legal

⁵⁴ International Convention for the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006, not yet entered into force.

⁵⁵ International Convention for the Protection of All Persons from Enforced Disappearance, Article 6(1)(b). See fn.54.

⁵⁶ For example, the International Covenant of Civil and Political Rights (1966), Articles 2(3), 9(5), and 14(6); the International Convention on the Elimination of All Forms of Racial Discrimination (1965), Article 6; the Convention on the Rights of the Child (1989), Article 39; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) Article 14; and the Rome Statute for an International Criminal Court (1998), Article 75. It has also figured in regional instruments, e.g. the European Convention on Human Rights, Articles 5(5), 13, and 41; the American Convention on Human Rights (1969), Articles 25, 63(1) and 68; and the African Commission Special Rapporteur on Prisons and Conditions of Detention (1981), Article 21(2). See also the International Convention for the Protection of all Persons from Enforced Disappearance, 2006, not yet entered into force, Article 24; at the time of writing, the Convention has 73 signatures and 4 ratifications.

⁵⁷ See, for example, Human Rights Committee, General Comment No 31 (80) *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* 26/05/2004, UN Doc. No CCPR/C/21/Rev.1/Add.13, para. 15-17; United Nations Committee against Torture, General Comment No 2, *Implementation of Article 2 by States Parties*, UN Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007), para. 15.

⁵⁸ See, for example, *Velasquez Rodriguez Case*, para. 174. See fn.41. See also *Papamichalopoulos v. Greece* (Article 50), Application No 14556/89, Judgment of 31 October 1995, European Court of Human Rights, para. 36.

⁵⁹ Basic Principles and Guidelines on the Right to a Remedy and Reparation. See fn.2. See also the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the UN General Assembly, Resolution 40/34, UN Doc. A/RES/40/34, 29 November 1985; and the Universal Declaration of Human Rights, Article 8, see fn.12.

obligation that an internationally wrongful act be remedied to the fullest possible extent.⁶⁰ The aim of reparation is to eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed.⁶¹ Reparation can take many forms, and the content of the right to a remedy depends on the nature of the substantive right at issue. Reparation must be ‘effective’ in practice as well as in law.⁶² It has been repeatedly emphasised that the right to a remedy must be effective and not merely illusory or theoretical⁶³ and it must also be suitable to grant appropriate relief for the legal right that is alleged to have been infringed.

The right to a remedy and reparation is, itself, guaranteed and has been recognised as non-derogable. The United Nations Human Rights Committee has stated that

Article 2, paragraph 3, of the Covenant ... constitutes a treaty obligation inherent in the Covenant as a whole. Even if a state party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the state party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.⁶⁴

3.2 *The relationship between reparation and prevention*

In 2000, the UN Special Rapporteur on Torture emphasised the importance of

the inherent relationship between the right of torture victims to obtain reparation and the prevention or nonrepetition of further violations. ... The Special Rapporteur believes that reparation, beyond the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts, has an inherent preventive and deterrent aspect.⁶⁵

This relationship between reparation and prevention is consonant with some of the traditional theories of punishment and dispute resolution. In a general sense, the threat of punishment or actual punishment for violating the law can operate as a deterrent, against both the would-be perpetrator and the past offender. It can also instil in the public at large a sense of a rules-based system in which breach of the rules results in predictable consequences, be they monetary

⁶⁰ *Chorzow Factory Case*. See fn.1.

⁶¹ Responsibility of States for Internationally Wrongful Acts, UN General Assembly, Resolution 56/83, Annex.

⁶² *Aksoy v. Turkey*, Application No 21987/93, Judgment of 18 December 1996, European Court of Human Rights, para. 95. See also Council of Europe, Recommendation 6 (2004) of the Committee of Ministers to member states on the improvement of domestic remedies, adopted by the Committee of Ministers, 12 May 2004. Available at <https://wcd.coe.int/ViewDoc.jsp?id=743317>. Last accessed 16 January 2010.

⁶³ Inter-American Court on Human Rights, ‘Judicial Guarantees in States of Emergency (Article 27[2], 25 and 8 ACHR)’ Advisory Opinion OC-9/87, 8 Oct 1987, para. 24. See also *Cordova v. Italy* (No 1), Application No 40877/98, Judgment of 30 January 2003, European Court of Human Rights (2003), para. 58.

⁶⁴ Human Rights Committee General Comment No 29 on States of Emergency (Article 4), UN Doc. No CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 14.

⁶⁵ Interim report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/55/290, 11 August 2000, para. 28.

compensation to victims, prosecution of perpetrators, or some other remedy. Similarly, when a threat of real consequences is sufficiently predictable, it can potentially discourage breaches. Public or private remedial actions thereby reaffirm, at the societal level, a system, based on the rule of law, in which disputes are regulated by law and not revenge.

However, in contexts of widespread or systematic human rights violations perpetrated by or at the instigation, or acquiescence, of the state against its citizens, the system of rules that apply to ordinary crimes or disputes seems inapt and deficient. Far from affirming the strength of the law, the immense procedural, political and personal hurdles faced by victims of human rights violations when seeking to vindicate their rights serves to underscore the absence of the rule of law, particularly with regard to the category of untouchable defendants that hold, or exert, state power. In this sense, the sheer difficulty of obtaining a remedy and reparation in any form further entrenches impunity and creates the conditions in which violations are most likely to continue unabated. As Professor Orentlicher noted, in her Updated set of principles for the protection and promotion of human rights through action to combat impunity,

Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.⁶⁶

If the lack of remedy contributes to the recurrence of abuses, it follows that the existence of an adequate and effective remedy is a way in which future abuses can be forestalled. For this logical proposition to have any weight or meaning, however, the nature of the remedy must not relate solely to the individual circumstances of the violation, but must look further: to the causes of the violation.

4. Cessation and Guarantees of Non-Repetition

The Basic Principles and Guidelines refer to the need to take ‘effective measures aimed at the cessation of continuing violations.’⁶⁷ Cessation, referring to the need to secure the end of the wrongful conduct, typically applies to breaches in which the wrongful act is of a continuing character. The breach of an obligation to prevent may be considered a continuing violation or wrongful act. Such a characterisation would depend on whether the effect of the breach is ongoing.⁶⁸ In respect of the obligation to prevent torture, the clearest example of this issue relates to the practice of enforced disappearance, in which the failure to inform family members of the whereabouts of their loved ones would constitute a continuing form of torture or CIDTP. Other

⁶⁶ Diane Orentlicher, Report of the independent expert to update the Set of principles to combat impunity Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 1.

⁶⁷ Basic Principles and Guidelines, Principle 22(a). See fn.3.

⁶⁸ For example, *Trail Smelter* arbitration, in which the obligation was breached for as long as the pollution continued to be emitted and, indeed, was progressively aggravated by the failure to suppress it.

examples include unlawful environmental degradation, or occupation of territory, or continued unlawful and/or arbitrary detention.⁶⁹

However, cessation can also apply to circumstances in which there are repeated breaches and in which, on the basis of past actions, a future breach is deemed to be likely.⁷⁰ The obligation of cessation falls within the section of the Basic Principles and Guidelines that deals with ‘satisfaction’, and makes clear that special steps must be taken to end ongoing or continuing violations, which are different and additional to the steps that need to be taken to repair violations that have ended.

The International Law Commission’s Draft Articles on State responsibility for internationally wrongful acts⁷¹ (ILC Draft Articles) consider the obligation of cessation and assuring non-repetition as a separate and distinct legal consequence of the internationally wrongful act (in addition to the obligation to afford reparations).⁷² Article 30 of the ILC Draft Articles (relating to cessation and non-repetition) provides that ‘The State responsible for the internationally wrongful act is under an obligation: (a) To cease that act, if it is continuing; [and] (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.’ Similarly, the updated principles to combat impunity⁷³ treat separately guarantees of non-recurrence of violations (which may include reform of state institutions), the repeal of laws that contribute to (or authorise) violations of human rights, and civilian control of military and security forces and intelligence services, from the right to reparation (Principles 35-38 and 31-34).

Guarantees of non-repetition, the fifth form of reparation mentioned in the Basic Principles and Guidelines, are recognised as a fundamental component of reparations, particularly with respect to continuing or systematic abuses. Yet, as with cessation, guarantees of non-repetition are listed in the ILC Draft Articles on state responsibility as a separate and distinct legal consequence of an internationally wrongful act. Article 30 of the ILC Draft Articles deals with cessation and non-repetition as opposed to Article 34, which lists the appropriate forms of reparation (restitution, compensation and satisfaction). The official commentary of the ILC Draft Articles states that such assurances and guarantees would better be treated ‘as an aspect of the continuation and repair of the legal relationship affected by the breach’.⁷⁴ Similarly, the updated principles to combat impunity treat guarantees of non-recurrence of violations as separate from reparations.⁷⁵ Dinah Shelton has suggested that the inclusion of cessation within the concept of reparation in

⁶⁹ See *Assanidze v. Georgia*, 2004-II 221, (2004) 39 European Human Rights Reports, p.653. Available at <http://cmiskp.echr.coe.int/tkp197/search.asp?> Last accessed 30 November 2009. Here, the Court stated that ‘by its very nature, the violation found in the instant case did not leave any real choice as to the measures required to remedy it. In these conditions, considering the particular circumstances of the case and the urgent need to put an end to the violation of Article 5, para.1 ... , the Court considers that the respondent State must secure the applicant’s release at the earliest possible date’, para. 203.

⁷⁰ See the detailed commentary of the International Law Commission’s Draft Articles, *Yearbook of the International Law Commission* (2001), Volume II Part Two, p.89, para. 3.

⁷¹ ILC Draft Articles, annexed to General Resolution A/RES/56/83, 28 January 2002. See fn.70.

⁷² See also Dinah Shelton, *Remedies in international human rights law* (Oxford: Oxford University Press, 1999), p.149.

⁷³ See Diane Orentlicher, Report of the independent expert to update the set of principles to combat impunity, UN Doc. E/CN.4/2005/102 and Addendum 1. See fn.66.

⁷⁴ See commentary to Article 30, International Law Commission Articles on State Responsibility. For the text of the Articles and commentaries see Official Records of the General Assembly, Supplement No 10 (A/56/10), Chapter V.

⁷⁵ See Basic Principles and Guidelines, Principles 31-38. See fn.2.

the Basic Principles and Guidelines ‘seems to imply that in the absence of a victim there is no duty of cessation. It undermines the rule of law which is the basis of the obligation to cease any conduct that is not in conformity with an international duty.’⁷⁶

Guarantees of non-repetition should be available when there is a risk of repetition of the wrongful act and when re-establishment of the prior situation is not considered sufficient. The ILC Draft Articles on state responsibility provide that guarantees of non-repetition are a possible consequence of illegal acts, though they are of an exceptional character.⁷⁷ However, such guarantees are a regular feature of human rights jurisprudence,⁷⁸ particularly in cases of serious violations of human rights. The types of measures that have been afforded have been equally far-reaching. They are particularly important in respect of serious violations of human rights where returning to the *status quo ante* is insufficient to quell the abuse.⁷⁹

Reparations awards aimed at guarantees of non-repetition have recognised that impunity encourages chronic repetition. In this respect, awards have included the requirement to take positive measures to combat impunity, not only as it concerns past violations, but also the prospect of violations that may take place in the future. Thus, awards have also ordered that effective preventive or deterrent measures be established.⁸⁰ The African Commission has, for example, required Mauritania to ‘carry out an assessment of the status of [degrading practices] in the country with a view to identify[ing] with precision the deep-rooted causes for their persistence and to put in place a strategy aimed at their total and definitive eradication.’⁸¹

4.1 Review and/or reform of legislation contributing to human rights violations

The Basic Principles and Guidelines stress the importance of ‘reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious

⁷⁶ Dinah Shelton, ‘The United Nations Principles and Guidelines on Reparations: Context and Contents’, in Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (ed.), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Antwerp and Oxford: Intersentia, 2005), pp.11-34.

⁷⁷ See ILC Commentary 91, para. 12. See fn.70.

⁷⁸ The UN Human Rights Committee has regularly included in its views the recommendation that States take measures to ensure that the violation does not recur. See, for example, *Bleier v Uruguay* (30/78), Un Doc. CCPR/C/15/D/30/1978 (1982), para. 15; *Gustavo Raul Larrosa Bequiro v. Uruguay* (88/1981) UN Human Rights Committee, Supplement No 40 at 173, UN Doc. A/38/40 (1983), para. 13(d); Case No 124/1982 (*Tshitenge Muteba v. Zaire*), available at <http://humanrights.law.monash.edu.au/undocs/newscans/88-1981.html>, last accessed 30 November 2009.

⁷⁹ This has been recognised to be the case, for example, with violence against women, where the remodelling of society to eliminate pre-existing structural inequalities that have led to, or encouraged, the violence is necessary. See, for example, Principle 3(H) of the Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, adopted at the International Meeting on Women’s and Girls’ Right to a Remedy and Reparation, held in Nairobi from 19 to 21 March 2007; this Declaration provides that ‘Reparation must go above and beyond the immediate reasons and consequences of the crimes and violations; [it] must aim to address the political and structural inequalities that negatively shape women’s and girls’ lives.’ Available at www.dd-rd.ca. Last accessed 30 November 2009.

⁸⁰ See, for example, the Inter-American Court case of *Massacre of Plan de Sánchez* in which the Court ordered the construction of a monument in Mapiripán to remember the massacre as a measure of non-repetition benefiting future generations.

⁸¹ *Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples’ Rights, Communication No 54/91, 61/91, 98/93, 164/97-196/97 and 210/98 (2000), para. 142.

violations of international humanitarian law'.⁸² Reform of laws and institutions also features prominently within the updated set of principles for the protection and promotion of human rights through action to combat impunity;⁸³ these principles refer to the need for the 'repeal of laws that contribute to or authorize violations of human rights and/or humanitarian law and enactment of legislative and other measures necessary to ensure respect for human rights and humanitarian law, including measures that safeguard democratic institutions and processes',⁸⁴ noting that legislation and regulations 'that contribute to or legitimize human rights violations must also be repealed or abolished.'⁸⁵

While United Nations treaty monitoring mechanisms typically refrain, in their views, from recommending precise courses of action to remedy a breach, in a right to life case concerning Colombia, the Human Rights Committee, by way of preventive action, recommended that Colombia 'ensure that the right to life is duly protected by amending the law.'⁸⁶ The Inter-American Court of Human Rights has regularly ordered states to repeal, adopt and amend laws. In the *Loayza Tamayo case*, regarding the detention and torture of Ms María Elena Loayza-Tamayo under terrorism legislation, the Court noted that 'the State of Peru shall adopt the internal legal measures necessary to adapt Decree-Laws 25,475 (Crime of Terrorism) and 25,659 (Crime of Treason) to conform to the American Convention on Human Rights.'⁸⁷ The European Court of Human Rights has, in some of its more recent judgments, indicated general measures that the State should adopt, including the repeal or amendment of offending domestic laws.⁸⁸ This is an important departure from its previous jurisprudence, in which it focused specifically on the rectification of past wrongs.

4.2 Institutional reforms

Institutional strengthening is a regular feature of measures aimed at guarantees of non-repetition, particularly in cases involving torture and other prohibited ill-treatment. The Basic Principles and Guidelines underscore the importance of, *inter alia*, (i) ensuring effective civilian control of military and security forces; (ii) ensuring that all civilian and military proceedings abide by

⁸² Basic Principle and Guidelines, Principle 23(h). See fn.32

⁸³ Basic Principles and Guidelines, E/CN.4/2005/102/Add.1 of 8 February 2005. See fn.2.

⁸⁴ Basic Principles and Guidelines, Principle 35(b). See fn.2.

⁸⁵ Basic Principles and Guidelines, Principle 38. See fn.2.

⁸⁶ Human Rights Committee, *Pedro Pablo Camargo v. Colombia [Guerrero v.Colombia]*, Communication No 45/1979, UN Doc. CCPR/C/OP/1 at 112 (1985), para. 15.

⁸⁷ *Loayza Tamayo Case*, Reparations, Article 63(1) American Convention on Human Rights, Judgment of 27 November 1998, Inter-American Court of Human Rights, Series C No 42, para. 192(5). See also, *Castillo Petruzzi et al. Case*, Judgment of 30 May 1999, Inter-American Court of Human Rights, Series C No 52, para. 222; *Bámaca Velásquez Case*, Judgment of 22 February 2002, Inter-American Court of Human Rights, Series C No 91, para. 85 and 87; *Barrios Altos Case*, Judgment of 14 March 2001, Series C No 75; *Villagrán Morales case*, Judgment of 26 May 2001, Series C No 77, para. 98.

⁸⁸ Valerio Colandrea, 'On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdovic Cases', (2007) *Human Rights Law Review* 7(2), p.411. See, for example, *Broniowski v Poland* and *Sejdovic v Italy*, in which the European Court attributed the violations to a 'systemic problem connected with the malfunctioning of domestic legislation and practice': *Broniowski v Poland*, Application No 31443/96, Judgment of 28 September 2005, European Court of Human Rights, para.189, and *Sejdovic v Italy*, Application No 56581/00, European Court of Human Rights, Judgment of 2 March 2006, para. 44.

international standards of due process, fairness and impartiality; (iii) strengthening the independence of the judiciary; and (iv) protecting persons in the legal, medical and health-care professions, the media and related professions, and human rights defenders.⁸⁹

The Inter-American Court of Human Rights has regularly ordered States to create certain mechanisms to avoid further violations. For example, in the *Myrna Mack Chang case*, regarding the extrajudicial execution of Ms Chang, the Inter-American Court noted in respect of Guatemala that

the activities of the military forces and of the police, and of all other security agencies, must be strictly subject to the rules of the democratic constitutional order and to the international human rights treaties and to International Humanitarian Law. This is especially valid with respect to the intelligence agencies and activities. These agencies must, *inter alia*, be: a) respectful, at all times, of the fundamental rights of persons; and b) subject to control by civil authorities, including not only those of the executive branch, but also, insofar as pertinent, those of the other public powers. Measures to control intelligence activities must be especially rigorous because, given the conditions of secrecy under which these activities take place, they can drift toward committing violations of human rights and illegal criminal actions, as occurred in the instant case.⁹⁰

Institutional strengthening has also focused on (i) the need to demobilise and dismantle illegal armed groups and to reintegrate children that have participated in armed conflict; (ii) the need to ensure that individuals implicated in human rights violations no longer serve in positions in which they continue to exert authority or control, such as in the police, military or in public office;⁹¹ (iii) the importance of establishing effective complaints processes;⁹² (iv) the creation of DNA databases to facilitate the identification of disappeared persons;⁹³ and (v) the importance of keeping proper records about detainees to avoid incommunicado detention.⁹⁴

4.3 Training

The Basic Principles and Guidelines mention that reparations can include ‘providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces’ and ‘promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media,

⁸⁹ Basic Principles and Guidelines, Principle 23(a)-(d). See fn.2.

⁹⁰ *Myrna Mack Chang Case*, Judgment of 25 November 2003, Inter-American Court of Human Rights, Series C No 101, para. 284.

⁹¹ See, for example, Human Rights Committee, concluding observations: Argentina, CCPR/CO/70/ARG (2000), para. 9.

⁹² See, for example, Orentlicher, *Updated impunity principles*, Principles 36(d). See fn.66.

⁹³ *Case of Molina-Theissen vs. Guatemala. Reparations*, Article 63(1) American Convention on Human Rights, Judgment of 3 July 2004, Series C No 108, para. 91(b).

⁹⁴ *Case of Juan Humberto Sánchez vs. Honduras*. Judgment of 7 June 2003, Series C No 99, para. 189. See also *Bulacio v. Argentina*, Judgment of 18 September 2003, Inter-American Court of Human Rights, Series C No 100.

medical, psychological, social service and military personnel, as well as by economic enterprises'.⁹⁵

The Inter-American Court has regularly ordered States to include specialised human rights and training for the police and armed forces. In the *Gutiérrez Soler case*, the Inter-American Court ordered the State to

implement, in the training courses for military criminal court and law enforcement staff a program to analyze the Inter-American System for Human Rights Protection precedents on the limits of the jurisdiction of the military criminal courts, as well as the right to due process and to judicial protection, as a way to prevent the investigation and trial of human rights violations by such jurisdiction[.]⁹⁶

The Inter-American Court also ordered the State to implement a programme to train doctors, judges and prosecutors on the United Nations Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) to prevent future acts of torture.⁹⁷

The duty to prevent has been interpreted by the Inter-American Court as requiring training and education on legality issues and on restrictions relating to the use of force in general situations, armed conflict and terrorism, as well as on the due obedience concept, and legislative and institutional reforms.⁹⁸ The Council of Ministers of the Council of Europe, in overseeing the implementation of European Court decisions, has also called upon States to adopt training programmes for police, security forces, judges and prosecutors, among other state officials.⁹⁹

⁹⁵ Basic Principles and Guidelines, Principle 23(e) and (f). See fn.2.

⁹⁶ *Gutiérrez-Soler v. Colombia*, Judgment of 12 September 2005, Inter-American Court of Human Rights, Series C No 132, para. 106.

⁹⁷ *Gutiérrez-Soler v. Colombia*, para. 110. See fn.96.

⁹⁸ *La Cantuta v. Peru* (Merits, Reparations and Costs), Judgment of 29 November 2006, para. 221-242. See also, *Chumbipuma Aguirre et al. v. Peru (Barrios Altos Case)*, Judgment of 30 November 2001, Inter-American Court of Human Rights, Series C No 87, para. 31, 41-45. See also, *Case of the Miguel Castro Castro Prison v. Peru*, Judgment of 25 November 2006 (Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C No 160, para. 435-454; see, for example, *Hilaire, Constantine and Benjamin et al. Case*, Judgment of 21 June 2002, Inter-American Court of Human Rights, Series C No 94, para. 212-214; and *Myrna Mack Chang Case*, Judgment of 25 November 2003, Inter-American Court of Human Rights, Series C No 10, para. 281-282. See also, *Case of the Pueblo Bello Massacre v. Colombia* (Merits, Reparations and Costs), Judgment of 31 January 2006, Inter-American Court of Human Rights, Series C No 140, para. 264-279.

⁹⁹ See, for example, Interim Resolution CM/Res DH (2007) 107 concerning the judgments of the European Court of Human Rights in the case of Velikova and seven other cases against Bulgaria relating to the ill-treatment inflicted by police forces, including three deaths, and the lack of an effective investigation (adopted by the Committee of Ministers 17 October 2007); Interim Resolution Res DH (2005) 21 concerning the issue of conditions of detention in Greece, raised in the cases of *Dougoz against Greece* (Judgment of 6 March 2001) and *Peers against Greece* (Judgment of 19 April 2001, adopted by the Committee of Ministers 7 April 2005); Interim Resolution CM/Res DH (2008) 69 on the execution of the judgments of the European Court of Human Rights of cases concerning the Actions of the security forces in Turkey - Progress achieved and outstanding issues (General measures to ensure compliance with the judgments of the European Court of Human Rights in the cases against Turkey concerning actions of members of the security forces, listed in Appendix II). See also follow-up to Interim Resolutions DH (99) 434, DH (2002) 98 and DH (2005) 43, adopted by the Committee of Ministers 18 September 2008.

4.4 *Engagement and consultation of victimised groups*

Another aspect that has been highlighted is the need to include and consult with civil society and victims, and to ensure an adequate representation of women and minority groups in such consultations. The Updated principles on impunity note that ‘concerted efforts must be made to ensure that women and minority groups participate in the public consultations for the elaboration, application and evaluation of reparation programs’.¹⁰⁰ This is further emphasised in the Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, which recognises the need to support women’s and girls’ empowerment by taking into consideration their autonomy and participation in decision-making. Processes must empower women and girls, or those acting in the best interests of girls, to determine for themselves what forms of reparation are best suited to their situation. Processes must also overcome those aspects of customary and religious laws and practices that prevent women and girls from being in a position to make, and act on, decisions about their own lives.¹⁰¹

5. Conclusions

The relationship between reparation and prevention is a key feature of the jurisprudence of human rights bodies and courts. Given the limited jurisdiction of courts to decide on the facts before them, remedies of cessation and guarantees of non-repetition have focused on practices that respond to such facts. Courts considering reparations awards have tended to focus on the particular problem areas that gave rise to the violations in the instant cases; there has been less scope in the jurisprudence to consider broader institutional failings that may also impact on the practice of torture in the countries concerned. Indeed, most of the commentary on the need for institutional reforms is derived from internationally recognised principles and from the statements and reports of monitoring bodies whose work is external to individual complaints.

In considering the efficacy of dealing with prevention as a reparation measure, it is evident that the role played by courts in determining measures of cessation and guarantees of non-repetition can only be a partial solution and must be complemented by a variety of other, broader quasi-judicial and non-judicial measures, designed to work alongside state efforts to prevent torture and other prohibited ill-treatment. The adage that prevention is better than cure is certainly apt, though it seems that having this ‘cure’ consider measures of prevention in addition to forms of reparation is another way to arrive at the goal of ending torture. Given that individual complaints are a key means by which institutional failings are documented, the role of courts is vital. The fact that the duty of states to end violations, and deter future violations, is broader than the obligation of states to afford a remedy and reparation for the harm caused, is, in this sense, immaterial.

Another reason why cessation and guarantees of non-repetition are important features of reparation awards is that they afford victims the opportunity to be proactively involved in the determination of policies aimed at prevention. There are other ways in which to accomplish this; nevertheless, the individual litigant seeking a remedy has as great a stake in measures to guarantee non-repetition as others potentially affected. This is one way by which their

¹⁰⁰ Updated set of principles, Principles 32 and 35. See fn.66.

¹⁰¹ Nairobi Declaration, 1(D). See also 2(A), (B), and (G). See fn.79.

recognition and involvement as stakeholders of prevention is guaranteed. It is also one way in which the prevention project can be concretised, forcing policy makers to contend with the individuals that have suffered harm, as opposed to developing systems and plans in the abstract.