

# Victims and Promise of Remedies: International Law Fairytale Gone Bad

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## I. INTRODUCTION

Victims deserve remedy for harm suffered. The logic of *ubi jus ibi remedium* should position victims as recipients and beneficiaries of available remedies. This is especially true because the notion of “a victim” is firmly established within international law theory and jurisprudence. Additionally, states by virtue of international human rights instruments undertake to provide remedies to victims. Alternatively, arguably such an obligation is automatically created if any international legal obligation has been breached. Development of human rights and new trends in accepting the international personality, in general, and of individuals in particular provides support for the idea that victims have been increasingly fostered within international and national legal arenas.

The aim of this Article is to examine such developments and the current availability of remedies for human rights violations in general. The Author will also examine the appropriateness of such remedies and opportunities to pursue them. The Article starts by identifying remedies in international law. This is followed by a case study and analysis of attempts by several national judiciaries to grapple with remedies prescribed by international law, against the background of international and national remedies. In the course of examining the reasons for an inadequate remedial structure, the Article will focus on several national cases. They will illustrate both objective and false dilemmas which national courts face when implementing the law of remedies for victims of international law violations.

## II. REMEDIES IN INTERNATIONAL LAW

### A. *Four-fold Structure of Remedies in International Law*

It might be prudent to start the analysis of remedies available to victims of breaches of human rights norms with preliminary, or rather precautionary, terminology clarifications of the term “remedy.” The legal term “remedy” in English denotes two different, though not entirely

separate, legal concepts.<sup>1</sup> Remedy can denote a procedural device by which a person can initiate or further a formal proceeding before a competent body—a legal action which can be brought before a court. The remedy used in this sense can be termed a “procedural remedy.” The other meaning refers to a measure the purpose of which is to undo the wrongfulness and illegality. These remedial measures usually comprise specific performance, restitution, compensation, prohibition of repetition of illegal conduct, and so forth. The remedy used in the latter sense will be referred to as a “substantive remedy.” The difference in meanings is not only relevant for delineating different legal concepts, but also because it is exactly the term “remedy” which acquires different meanings<sup>2</sup> when crossing the international-national barrier.<sup>3</sup> The general domestic setting of remedies addresses types of remedies available: specific performance, money damages, injunctions and the like. Whereas the international notion of domestic remedies usually refers to national formal legal proceedings suitable for obtaining redress before turning to international fora.

Additional categorization is needed when referring to international and domestic remedies, both procedural and substantive. Generally speaking, international substantive remedies are measures tailored to undo the harm done to those who possess international personality and a recognized legal interest to request the remedy. International procedural remedies are international legal actions available to states or persons.<sup>4</sup> International

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1. Christian Tomuschat, *Reparation for Victims of Grave Human Rights Violations*, 10 TUL. J. INT'L & COMP. L. 157, 168 (2002) (“In English, the word ‘remedy’ has a two-fold meaning. On the one hand it connotes a legal action which can be brought before a judicial or other body entitled to settle the dispute concerned; or it could mean a measure designed to make good for damages caused.”).

2. Eckart Klein, *Individual Reparation Claims under the International Covenant on Civil and Political Rights: The Practice of the Human Rights Committee*, in STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 27, 33 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999) (“While the English legal term *remedy* would cover not only the procedural right but also redress and reparation, a similarly broad meaning could not be given to the French term *recours*.”).

3. RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 43 (2002) (“Whether internal or international remedies are created will depend not only on the specific requirements of human rights and humanitarian law, but also on the manner in which these norms are incorporated into municipal law.”).

4. Other functions may also be ascribed to international remedies. In the opinion of Dinah Shelton, “International remedies serve an additional purpose. In the absence of a collective sanctioning or enforcement authority, the injured party claiming reparations

scholarship provides a basis for this four-fold remedial structure,<sup>5</sup> which can be further broken down with respect to judicial and non-judicial remedies.

This four-fold classification leaves each category standing in its own right. However, in order to assess the right a victim has to a remedy, each segment of the remedial structure needs to be defined before it can be determined whether a victim may transfer himself from one level to another. As this Article will show, such a transfer is possible only if explicitly provided for, either by international or national law. If that is the case, each remedial structure needs precise definition and demarcation. All four connotations of remedies are usually employed throughout human rights conventions without specific reference to meanings or possible contexts in which they might be used.

Decomposition of the remedial structure, resulting from separation and incoherence of international and national remedies and obscurity of its contents, has been at odds with the relevance of remedies, both for victims and states, as well as with the catalog of remedies as offered by U.N. bodies. Whereas for individuals the clear and complete remedial structure ensures the fullest satisfaction possible for the breach of their rights and the closure of the case, for states, remedies are part of international obligations and therefore may presumably be grounds for their international responsibility.<sup>6</sup> In terms of general language of international law, when a state breaches a primary obligation to respect and ensure human rights, it triggers a secondary duty to make reparations which arise from the same legal source.<sup>7</sup> Also, the state's remedial task is to establish the equilibrium as it existed before the breach occurred. However, the choice of remedy, or the content of the secondary rules on remedies, may considerably vary in terms of range and intrusiveness: "In the range of remedies, relatively non-intrusive remedies, such as declaratory judgments and damages, may give way to injunctions, prohibitions and affirmative orders."<sup>8</sup> The catalog of remedies available depends on the rights breached but even more so on the developing concept of human

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acts to uphold the public interest or legal order by punishing and deterring wrong-doing." DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 45 (1999).

5. See, e.g., PROVOST, *supra* note 3, at 43 ("The existence of an international right to a remedy does not necessarily lead to a corresponding right to an international remedy. Remedies may be internal as well as international, the latter usually playing a role complementary to the former.").

6. SHELTON, *supra* note 4, at 38 ("Yet the aim of remedies, to vindicate interests that have been injured, requires that human rights law, representing fundamental interests, develop not only a primary theory of what duties are owed, but a secondary theory of what duties exist when a primary duty is violated.").

7. Tomuschat, *supra* note 1, at 158.

8. SHELTON, *supra* note 4, at 55.

rights remedies and international law remedies, which tend to extend this catalog to its utmost limits.

### *B. European Human Rights System*

The European human rights system evidences both the decomposition of the remedial structure and its evolution. The European Convention on Human Rights<sup>9</sup> (ECHR) refers to remedies in Articles 13<sup>10</sup> and 35<sup>11</sup> but with different meanings and in different contexts. Article 13 is a substantive human right, which provides for an "effective remedy before a national authority." However, Article 35, which deals with the exhaustion of domestic remedies, refers to procedural remedies. Other substantive remedial forms are also referred to in Articles 5(5)<sup>12</sup> and 41,<sup>13</sup> as well as in Articles 3 and 4 of Protocol 7.<sup>14</sup> Article 5(5) explicitly

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9. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 41, Nov. 4, 1950, 213 U.N.T.S. 222, Europ. T.S. No. 5 [hereinafter European Convention on Human Rights] (entered into force Sept. 3, 1953).

10. *Id.* art. 13 ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.").

11. *Id.* art. 35 ("The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.").

12. *Id.* art. 5(5) ("Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.").

13. *Id.* art. 41 ("If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.").

14. Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 22, 1984, Europ. T.S. No. 117 ("When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."); *id.* art. 4 ("1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3. No derogation from this Article shall be made under Article 15 of the Convention.").

envisages compensation as a domestic substantive remedy for illegal arrest or detention, and in a similar fashion, Article 3 of Protocol 7 provides for compensation in cases of a reversed criminal conviction. Article 4 of Protocol 7 provides for the possibility of reopening the case following a fundamental defect during the criminal proceeding. On the other hand, Article 41 entrusts the European Court of Human Rights with jurisdiction to award international substantive remedies in the form of “just satisfaction” if the finding of violation by the Court was not followed by adequate national substantive remedy.

Therefore, the European Court of Human Rights has had to further develop the doctrines of effective remedy and just satisfaction in order to close the gap in the ECHR. These doctrines have undergone a considerable evolution. For almost thirty years, the Court has refrained from ordering specific measures under the just satisfaction clause, limiting itself to declaratory and pecuniary judgments.<sup>15</sup> The Court has also cautiously approached pecuniary judgments, and the first time the Court awarded pecuniary damages under the just satisfaction provision was in the *Ringeisen* case<sup>16</sup> in 1972. However, under the new system the Court has begun interpreting the just satisfaction clause so as to include the whole set of remedial measures ranging from preventive to restorative, from declaratory to specific performance measures.

As to the term just satisfaction in Article 41,<sup>17</sup> the Court seems to have interpreted this provision as incorporating both pecuniary damages, usually awarded under the Article, and other remedial measures:

It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent state a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Furthermore, subject to monitoring by the Committee of Ministers, the respondent state remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment.<sup>18</sup>

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15. See generally, SHELTON, *supra* note 4, at 154-58.

16. See generally, *Ringeisen v. Austria*, 1 Eur. H.R. Rpt. 504 (1972) (awarding just satisfaction for the non-material damage arising from the violation, whereas claims for compensation of material damage indirectly resulting from the breach were rejected. In its first compensation case, the Court awarded 20,000 DM).

17. This article was formerly Article 50. Numeration of articles in the ECHR was changed after adoption of Protocol No. 11, Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May, 11 1994, Europ. T.S. No. 155. (entered into force Nov. 1, 1998), as from the date of its entry into force on 1 November 1998.

18. *Scozzari v. Italy*, 2000-VIII Eur. Ct. H.R. 473, 528 (citation omitted).

In the context of international substantive remedies, Member States foster the just satisfaction clause in Article 41 because of their general obligation to enforce and implement judgments in cases to which they are parties. This obligation comes from Article 46 and has been expanded by the Committee of Ministers' Recommendation on the Re-Examination or Reopening of Certain Cases at Domestic Level Following Judgments of the European Court of Human Rights.<sup>19</sup> The just satisfaction clause in Article 41, as well as the Court's endorsement of any remedy it finds appropriate despite the silence of the Convention on the matter, have been linked to Article 46 by the Committee of Minister in the following manner:

Noting that under Article 46 of the Convention on Human Rights and Fundamental Freedoms ('the Convention') the Contracting Parties have accepted the obligation to abide by the final judgment of the European Court of Human Rights ('the Court') in any case to which they are parties and that the Committee of Ministers shall supervise its execution; Bearing in mind that in certain circumstances the above-mentioned obligation may entail the adoption of measures, other than just satisfaction awarded by the Court in accordance with Article 41 of the Convention and/or general measures, which ensure that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (*restitutio in integrum*).<sup>20</sup>

The conclusions of the Committee of Ministers rely on the general rules of remedies in international law as between the states, especially with respect to the concept of restitution.<sup>21</sup>

The European Court of Human Rights clearly defines the obligations to be enforced by the respondent state: parliamentary legislation, executive regulations; amendments to jurisprudence; construction of prisons; dissemination of rules; and so forth.<sup>22</sup> The variety of measures that may be employed by different state agencies include the expedition

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19. Eur. Consult. Ass., *Recommendation of the Comm. of Ministers on the Re-Examination or Reopening of Certain Cases at Domestic Level Following Judgments of the European Court of Human Rights*, 109th Sess., Doc. No. R (2000) 2 (2000), available at [http://www.coe.int/t/e/human\\_rights/execution/02\\_Documents/Rec2000\\_2.asp](http://www.coe.int/t/e/human_rights/execution/02_Documents/Rec2000_2.asp).

20. *Id.* (parentheses omitted).

21. Int'l L. Comm'n, *Work of its Fifty-Third Session*, art. 35, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (July 26, 2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 26, 28, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_2001\\_v2\\_p2\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_2001_v2_p2_e.pdf) (stating restitution, *restitutio in integrum*, is the measure designed to "to re-establish the situation which existed before the wrongful act was committed").

22. Eur. Consult. Ass., *General Measures Adopted to Prevent New Violations of the European Convention on Human Rights*, 960th Mtg., Doc. No. H/Exec (2006)1, (2006), available at [http://www.coe.int/t/e/human\\_rights/execution/HExec\(2006\)1\\_GM\\_960e.doc](http://www.coe.int/t/e/human_rights/execution/HExec(2006)1_GM_960e.doc).

or conclusion of pending proceedings; reinstatement of the applicant's rights; issuance of official statements by the Government on the applicant's innocence; modification of sentences by administrative measures, such as pardon, clemency, or non-execution of a judgment; the use of measures concerning restitution of, access to, or use of property; measures concerning the adaptation of proceedings; modification of criminal records or other official registers; special refunds; reopening of domestic proceedings; measures regarding the right to residence such as having the right granted or reinstated or non-execution of an expulsion measure; and employing other special measures such as having pictures destroyed or having meetings organized between parents and children.<sup>23</sup>

With respect to the obligation to provide national remedies, the Court has also considerably developed the concept of effective remedy before national authority in Article 13. The Court examines national remedies on two levels: (1) whether there are remedies established within national legal systems, i.e. whether remedies as such exist;<sup>24</sup> and (2) whether these remedies were applied *in concreto*.<sup>25</sup> Under Article 13, the states are expected to make a remedy available at the national level

to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision.<sup>26</sup>

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23. Eur. Consult. Ass., *Individual Measures Adopted to Prevent New Violations of the European Convention on Human Rights*, 960th Mtg., Doc. No. H/Exec (2006)2, (2006), available at [http://www.coe.int/t/e/human\\_rights/execution/HExec\(2006\)2\\_IM\\_960e.doc](http://www.coe.int/t/e/human_rights/execution/HExec(2006)2_IM_960e.doc).

24. *Silver v. United Kingdom*, 5 Eur. H.R. Rep. 347, 383 (1983) ("In the Court's view, to the extent that the applicable norms, whether contained in the Rules or in the relevant Orders or Instructions, were incompatible with the Convention there could be no effective remedy as required by Article 13 and consequently there has been a violation of that Article."). It is worth noting that in the subsequent proceeding initiated under Article 50 of the Convention, now Article 41, the Court refused to award damages for the violation of the right to effective remedy, thereby implicitly finding that the violation of the right to remedy does not require remedy other than the declaratory judgment. The Court relied on the phrase "if necessary" in the just satisfaction clause of Article 50. See *Silver v. United Kingdom*, 13 Eur. H.R. Rep. 582, 582, 584 (1991).

25. See generally *Klass v. Germany*, 2 Eur. H.R. Rep. (ser. A) 214, 237-41 (1978) (finding no violation of Article 13).

26. *Aydin v. Turkey*, 1997-VI Eur. Ct. H.R. 1866, 1895-97 (finding Turkish investigation procedures violated Article 13). See also, e.g., *Soć v. Croatia*, Eur. Ct. H.R., App. No. 47863/99, paras. 113-17 (2003) (finding an Article 13 violation) (publication not yet received), available at [http://www.iussoftware.si/EUJ/EUCHR/dokumenti/2003/05/CASE\\_OF\\_SOC\\_V.\\_CROATIA\\_09\\_05\\_2003.html](http://www.iussoftware.si/EUJ/EUCHR/dokumenti/2003/05/CASE_OF_SOC_V._CROATIA_09_05_2003.html); *Doran v. Ireland*, 2003-X Eur. Ct. H.R. 1, 17-21 (finding Article 13 violated by Irish remedial measures).

In addition, in 2004 the Committee of Ministers of the Council of Europe, which monitors the enforcement of condemnatory decisions of the Court, adopted the Recommendation on the Improvement of Domestic Remedies.<sup>27</sup> In that document, they discerned several types of remedies: general and specific remedies, remedies following the pilot judgments<sup>28</sup> in which deficiencies of national legislative act have been established, and remedies against unreasonably lengthy proceedings—which, in the opinion of the Committee, should lead to more lenient sentencing in criminal cases. This untraditional and yet practical classification of remedies represents the interpretation of the effective remedy standard set out in Article 13, or interpretation of a substantive national remedy. The Recommendation further stated that remedies are problem-solving methods applied by a national authority and that these authorities do not necessarily have to be judicial authorities. The Committee, however, presumes that this interpretation does not infringe on the guarantee to the right to court as envisaged in Article 6(1) of the Convention.

On the other hand, the limits on Article 13 lie in its auxiliary and accessory character. Articles 13, 14, 15(2) and 18 of the ECHR provide an additional guarantee for the enjoyment of rights and freedoms only in connection with other complaints.<sup>29</sup> As authors Van Dijk and Van Hoof

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27. Eur. Consult. Ass., *Recommendation of the Comm. of Ministers to Member States on the Improvement of Domestic Remedies*, paras. 9-23, 144th Sess., Doc. No. R (2004) 6 (2004), available at <https://wcd.coe.int/ViewDoc.jsp?id=743317&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75#>.

28. The “pilot judgment” procedure was introduced as the result of the reform of the European human rights system following the adoption of Protocol 14 to the ECHR in order to deal with so-called cloned cases. The pilot judgment procedure represents the ECHR’s concept of “class action” since the violation is the result of legislative or executive action which is not in conformity with the European Convention. In order to avoid the whole string of cases dealing with the same issue, the ECHR will address the issue using the pilot judgment procedure.

29. *Klass*, 2 Eur. H.R. Rpt. at 238 (“Article 13 states that any individual whose Convention rights and freedoms ‘are violated’ is to have an effective remedy before a national authority even where ‘the violation has been committed’ by persons in an official capacity. This provision, read literally, seems to say that a person is entitled to a national remedy only if a ‘violation’ has occurred. However, a person cannot establish a ‘violation’ before a national authority unless he is first able to lodge with such an authority a complaint to that effect. Consequently, as the minority in the Commission stated, it cannot be a prerequisite for the application of Article 13 that the Convention be in fact violated. In the Court’s view, Article 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress. Thus, Article 13 must be interpreted as guaranteeing an ‘effective remedy before a national authority’ to everyone

point out, the status of Article 13 is “an odd one” because of its ancillary character and casuistry which underrate its effect.<sup>30</sup> Still, some authors, like Frowein, find Article 13 to be one of the most important guarantees and state that it is the provision that enabled the national enforcement of the Convention.<sup>31</sup>

The Court has interpreted obscure provisions of the Convention in many ways. These interpretations have embraced the whole range of measures imposed under Article 41 in connection with Article 46. The Court has ordered general and individual measures, other than compensation, by incorporating such measures into the operative part of its judgments. In contrast to the Court’s early decisions and the wording of the Convention,<sup>32</sup> the new remedial policies create a difficult task for national authorities. This approach may represent progress for human rights law. However, it may also leave national authorities in an uncomfortable position. Apart from compensation and just satisfaction, no other remedy is mentioned in the text of the ECHR. Therefore, states and national courts may be unaware of the other possible remedies which may be required of them. Given the variety of national remedies expected and international remedies awarded, the position of national authorities could be quite difficult in dealing with both pre-litigation remedies, Article 13, and post-litigation remedies, Article 41.

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who claims that his rights and freedoms under the Convention have been violated.” (quoting European Convention on Human Rights, *supra* note 9, art. 13)). In later practice the Court used the term “arguable claim” which is sufficient to trigger the application of Article 13. See, e.g., *Silver*, 5 Eur. H.R. Rep. at 381; *Kaya v. Turkey*, 28 Eur. H.R. Rep. 1, 50-51 (1999).

30. P. VAN DIJK ET. AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 697 (3d ed. 1998).

31. Jochen Frowein, *Article 13 as a Growing Pillar of Convention Law*, in *PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE, STUDIES IN MEMORY OF ROLF RYSSDAL* 545, 545 (Paul Mahoney et al. eds., 2000).

32. Tomuschat, *supra* note 1, at 163-64 (“[T]he European Court of Human Rights has recently made a number of considerable strides forward. The court had held for many years that its powers were limited to granting financial compensation in appropriate cases. However, it did not feel empowered to order the taking of measures seeking to undo harm caused. This cautiousness could put the court in a terrible dilemma in cases where an unlawful situation persisted during the relevant court proceeding.... Acknowledging the inadequacies of its jurisprudence, the European Court of Human Rights embarked on a new course in 1995.”).

*C. Human Rights Committee and ICCPR*

The International Covenant on Civil and Political Rights (ICCPR)<sup>33</sup> and the Human Rights Committee (HRC)<sup>34</sup> have guaranteed similar remedies and had similar jurisprudence in interpreting measures for redress as the European system. Article 2(3)<sup>35</sup> of the ICCPR provides for a substantive remedy in Article 2(3a) and a procedural national remedy in Article 2(3b). Similarly, Article 9(5) of the ICCPR explicitly guarantees an enforceable right to compensation in cases of unlawful detention<sup>36</sup> in the same manner as Article 5(5) of the ECHR. Article 14(5)(6) of the ICCPR provides for compensation for and revision of an unlawful criminal conviction. The Optional Protocol to the ICCPR further guarantees an international procedural remedy to individuals in Article 1. However, an international substantive remedy, as fashioned in Article 41 of the ECHR, cannot be found in the text of the Protocol. Still, the Human Rights Committee has made consequential orders within remedies and has made decisions granting not only compensatory monetary remedies but also injunctions, prohibitions, and orders for specific performance.

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33. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (entered into force Mar. 23, 1976).

34. The Human Rights Committee (HRC), or ICCPR Committee, was created by the International Covenant on Civil and Political Rights. The organization and functions of the HRC are regulated by Articles 28-45 of the ICCPR as well as by the Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 59, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 302 [hereinafter Optional Protocol] (entered into force Mar. 23, 1976). The committee's jurisdiction covers three types of procedures: states reporting procedures, interstate applications, and individual applications. Interstate applications are permitted provided states have accepted HRC jurisdiction in accordance with Article 41 of the ICCPR. Individual applications are permitted provided a respondent state has acceded to the Optional Protocol to the ICCPR.

35. ICCPR, *supra* note 33, art. 2(3) ("Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.").

36. ICCPR, *supra* note 33, art. 9(5) ("Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.").

This evolution is quite similar to that of the ECHR. However, with the HRC, there have been no amendments to its treaties, nor has there been the creation of an explicit provision giving the Committee jurisdiction to grant international substantive remedies. The HRC has relied instead on Article 5(4) of the Optional Protocol, and, more interestingly, on Article 2(3) of the ICCPR.<sup>37</sup>

In awarding remedies, the HRC specifies the international obligation that has been breached by a state before the case is brought before the Committee. Bringing together national and international substantive remedies, the HRC has expanded its jurisdiction by virtue of Article 2(3) of the ICCPR. It has thereby established special significance for this provision as a ground for awarding international substantive remedies. The HRC applies these remedies *proprio motu*.<sup>38</sup> Following the trend of the European Court of Human Rights, the HRC also has embraced a number of specific remedial measures to be undertaken in cases of violations of the Covenant.<sup>39</sup> The practice was recently confirmed by the HRC in its General Comment no. 31 (2004):

Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.<sup>40</sup>

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37. Klein defends this approach of the Committee by the lack of explicit prohibition for the Committee to order remedies in the Optional Protocol. See Klein, *supra* note 2, at 32 ("As far as the *jurisdictional competence* of the Human Rights Committee is concerned, the wording of the Optional Protocol, Article 5 *in juncto* Article 1, might suggest that the Committee has to confine itself to a finding as to whether the author of a communication is the victim of a violation of a right set forth in the Covenant. However, the quoted articles are far from clear. They do not state that the Committee is prevented from also expressing its view on the conclusions which should be drawn from the violation.") (footnotes omitted).

38. *Id.* ("While the first views have drawn their conclusions from the human rights violations without referring to any provision, the following views quote Article 2, para. 3, and later on, still more precisely, Article 2, para. 3(a). This is, today, a persistent pattern. The Committee develops from this provision the individual claims for reparation in all their variety.").

39. See, e.g., U.N. Human Rights Comm., *Communication No. 928/2000, Boodlal Sooklal v. Trinidad & Tobago*, ¶ 6, U.N. Doc. A/57/40, CCPR/C/73/D/928/2000 (Oct. 25, 2001) ("Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy entailing compensation and the opportunity to lodge a new appeal, or should this no longer be possible, to due consideration of granting him early release. The State party is under an obligation to ensure that similar violations do not occur in the future. If the corporal punishment imposed on the author has not been executed, the State party is under an obligation not to execute the sentence.").

40. U.N. Human Rights Comm., *General Comment No. 31*, ¶ 17, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

Standard practice of the HRC can be illustrated by its actions in the *Bodrožić v. Serbia* case.<sup>41</sup> In that case, the HRC found a violation of Article 19 of the ICCPR because the criminal conviction and damages the national courts of Serbia issued against the applicant amounted to infringement of the right to expression. The HRC held,

In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including quashing of the conviction, restitution of the fine imposed on and paid by the author as well as restitution of court expenses paid by him, and compensation for the breach of his Covenant right.<sup>42</sup>

Through this example, we can see that the HRC's general practice is to order a set of different remedial measures. Additionally, non-compliance with these measures may amount to continuing violation of the Covenant. As the Committee itself recognized,

In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.<sup>43</sup>

#### *D. Committee Against Torture and U.N. Convention Against Torture*

Another avenue for an individual to seek redress is through the Committee Against Torture and the U.N. Convention Against Torture (CAT). The competency of the Committee Against Torture in issuing adequate remedies has been prescribed in the U.N. Convention Against Torture. Unlike human rights treaties of a more general character, the CAT focuses exclusively on the prohibition of torture, namely, inhuman and degrading treatment, and has developed precise obligations and remedies. Unlike other human rights treaties, CAT provides for quite specific and clear national substantive and procedural remedies. Apart from Article 2 of the CAT, which is more general in nature, and Articles 4 to 7 thereof containing specific obligation for member states, Articles 12 to 14 clearly outline the character and type of national remedies that are

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41. U.N. Human Rights Comm., *Communication No. 1180/2003, Bodrožić v. Serbia & Montenegro*, U.N. Doc. CCPR/C/85/D/1180/2003 (Oct. 31, 2005).

42. *Id.* at ¶ 9.

43. *General Comment No. 31*, *supra* note 40, at ¶ 16.

obligations of a state under whose jurisdiction an alleged act of torture has occurred. National remedies are clearly structured: on the one hand there are procedural national remedies, the obligation to conduct a prompt and impartial investigation<sup>44</sup> and the right to complain before competent authorities,<sup>45</sup> and on the other hand, there are substantive national remedies, the right to redress and an enforceable right to fair and adequate compensation.<sup>46</sup> Other specific obligations are located in other provisions of the CAT, e.g. the right to contact the nearest appropriate representative of the State.<sup>47</sup> The Committee proceeds upon individual applications pursuant to Article 22, and its jurisdiction to issue remedies may only be found in paragraph 7 of this Article.<sup>48</sup> Further, the right to initiate the investigative inquiry on the territory of the member state represents a unique international procedural remedy. It may be launched by the Committee *proprio motu* in accordance with Article 20 provided that the conditions set out in Article 28 have been met.

The jurisdiction to order remedies for victims is more firmly embedded in the Convention Against Torture through Articles 12 to 14 than in the ICCPR. As such, the Committee Against Torture has clear authority. Moreover, it seems that the Committee Against Torture has quite modestly followed the trend of expanding remedies and stayed reasonably within the clear wording of the Convention. This is illustrated by the decision of the Committee Against Torture in *Ristić v. Yugoslavia*.<sup>49</sup>

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44. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 12, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 [hereinafter CAT] ("Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.").

45. CAT, *supra* note 44, art. 13 ("Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.").

46. CAT, *supra* note 44, art. 14 ("1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.").

47. Art. 6(3) of the CAT provides: "Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, to the representative of the State where he usually resides." CAT, *supra* note 44, art. 6(3).

48. Art. 22(7) of the CAT reads: "The Committee shall forward its views to the State Party concerned and to the individual." CAT, *supra* note 44, art. 22(7).

49. U.N. Comm. Against Torture, *Comm. No. 113/1998, Ristić v. Yugoslavia*, U.N. Doc. CAT/C/26/D/113/1998 (2001), (May 11, 2001) [hereinafter *Ristić*], available at <http://www1.umn.edu/humanrts/cat/decisions/yugoslavia1998.html>.

In that case, the applicant complained of the failure of the State to investigate the death of his son which occurred under controversial circumstances. National authorities found it was a clear case of suicide despite erroneous and contradicting forensic reports. Because national authorities failed to launch an adequate formal investigation, the applicant was thus effectively prevented from exercising any right to remedy envisaged in the Convention. The Committee concluded that the respondent state violated its obligations under articles 12 and 13 to promptly and effectively investigate allegations of torture or severe police brutality. As for the substantive remedies regarding redress and compensation, the Committee refused to award damages on the basis of Article 14; it was not clear whether the rights of the alleged victim or his family had been violated because a proper criminal investigation has not been carried out. Therefore, the Committee was reluctant to award moral damages for violations of substantive obligations arising from the Convention—in this case, Articles 12 and 13—without substantiating allegations of the victim on the national level.

The different approaches of the Committee Against Torture from the European Court on Human Rights and the HRC with regard to international remedies can be explained by two distinctive features of CAT. First, the Convention establishes a number of substantive remedies that require member states to implement standards within their national jurisdictions.<sup>50</sup> This gives the Committee enough space to comfortably assess the adequacy of remedies. Second, the Committee itself may initiate investigative proceedings *ex officio* in order to inquire into the allegations of torture. Still, it is worth noting that the Committee Against Torture has not followed the trend of other human rights bodies in expanding the catalog of remedies; the Committee's views on remedies have embraced nothing but what is explicitly mentioned in the Convention, and they have shown restraint with respect to remedies.

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50. For more information regarding the structure and principal aims of the CAT with respect to substantive obligations and remedies, see J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 1-4 (1998); Leland H. Kynes, *Letting the CAT out of the Bag: Providing a Civil Right of Action for Torture Committed by U.S. Officials Abroad, an Obligation of the Convention against Torture?*, 34 GA. J. INT'L & COMP. L 187, 194-96 (2005).

*E. General International Law: International Court of  
Justice and International Law Commission*

The practice of the International Court of Justice (ICJ) demonstrates a different approach to general international law on remedies when compared to the ECHR and the HRC. A classic international substantive remedy is found in the *Chorzów* case, where the ICJ stated “[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”<sup>51</sup> Further, Judge Rosalyn Higgins illustrates the correlation between the right and remedy in her separate opinion in the 2004 *Legality of Use of Force* case:

The power of the Court to identify remedies for any breach of a treaty, in a case where jurisdiction was based solely upon the treaty concerned, has been regarded as within the Court’s inherent powers in the *Corfu Channel* case.<sup>52</sup>

In *Avena and Other Mexican Nationals*, the ICJ confirmed its position in another case, the *LaGrand* case:

The Court would recall in this regard, as it did in the *LaGrand* case, that, where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court in order to consider remedies a party has requested for the breach of the obligation.<sup>53</sup>

The rule is that international substantive remedy is a part of the right and that international procedural remedy will be available if there is jurisdiction for the right itself.<sup>54</sup> On the other hand, when the Court postponed the reparation issue for a separate phase of the proceeding<sup>55</sup> or refused to award a remedy when perceived as contrary to a judicial function, it showed a decomposition of the Court’s remedial function.<sup>56</sup>

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51. *Factory at Chorzów* (F.R.G. v. Pol.), 1928 P.C.I.J. (ser. A) No. 13, at 29 (Sept. 13).

52. *Legality of Use of Force* (Serb. & Mont. v. Belg.), 2004 I.C.J. 336 (Dec. 15) (separate opinion of Judge Higgins) (citation omitted), available at <http://www.icj-cij.org/docket/files/105/8446.pdf>.

53. *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12, 33 (Mar. 31) (citation omitted), available at <http://www.icj-cij.org/docket/files/128/8188.pdf?PHPSESSID=611e2b7dc0a931e33c1f3eb073a4c3da>.

54. *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. U.S.), 1986 I.C.J. 142 (June 27) (“In general, jurisdiction to determine the merits of a dispute entails jurisdiction to determine reparation.”).

55. *E.g.*, *Corfu Channel* (U.K. v. Alb.), 1948 I.C.J. 15 (March 25) (preliminary objections); *Corfu Channel* (U.K. v. Alb.) 1949 I.C.J. 4 (April 9) (merits); *Corfu Channel* (U.K. v. Alb.) 1949 I.C.J. 244 (Dec. 15) (assessment of the amount of compensation due from the People’s Republic of Albania to the United Kingdom of Great Britain and Northern Ireland).

56. *Northern Cameroons* (Cameroon v. U.K.), 1963 I.C.J. 3 (Dec. 2).

The jurisdiction of the ICJ to order remedies is based on the right of the Court to decide "the nature or extent of reparation" as provided in Article 36(2) of the Court's Statute. However, the wording of that provision seems to only include reparations.<sup>57</sup>

The Court's ambivalence in ordering specific remedies, either in the form of specific performance or injunctive relief, has not been brought about by Article 36 but rather by its pragmatic views on the adequacy of the remedy and its jurisdiction to act upon it. It may be safe to argue that the Court would have expanded international remedies but for the 1928 *Chorzów* case. In that case, the Court assumed jurisdiction to order restitution or specific performance on the grounds that it had acquired jurisdiction for interpretation and application of a treaty.<sup>58</sup> Some authors flatly dismiss doubts regarding the grounds and options the Court had for issuing remedies and labeled the choice as "the creative process [which] has been pragmatic, unselfconscious and somewhat unreflective."<sup>59</sup> Others retained their skepticism.<sup>60</sup>

The freedom with which the Court assumed jurisdiction to issue remedies has been further expanded by its willingness to issue specific

57. Statute of the International Court of Justice. art. 36(2), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 ("The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation.").

58. CHRISTINE D. GRAY, *JUDICIAL REMEDIES IN INTERNATIONAL LAW* (1987) ("But the scope of the Court's power to order other remedies such as restitution or specific performance under a compromissory clause like that in the *Chorzów Factory* case or under the Optional Clause is not clear. In a few cases the claimant state has requested the Court to order the defendant state to act in a certain way but until very recently in the *Iranian Hostages* case (and possibly not even then) the Court has never made such an order, nor has it ever discussed the power to do so.").

59. Ian Brownlie, *Remedies in the International Court of Justice, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS* 557, 558 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

60. GRAY, *supra* note 58, at 68 ("Therefore it remains unclear, even after the *Iranian Hostages* case, whether the generosity of the Court in asserting its jurisdiction to award damages does or should extend to making an order requiring or forbidding certain behaviour by states in cases where, as in the *Chorzów Factory* case, the Court has jurisdiction only to decide on the interpretation or application of a treaty, or where it has jurisdiction under Article 36(2) of the Statute of the Court.").

remedial measures. The debate over its jurisdiction to issue remedies and the correlation between the right and remedy has shifted to the power of the Court to choose the appropriate remedy, or more precisely, to move from declaratory judgments to judgments ordering specific performance or injunctive relief. In the *U.S. Diplomatic and Consular Staff* case,<sup>61</sup> the Court ordered Iran to immediately terminate the unlawful detention of diplomatic and consular staff, release hostages, place them under the protecting power, enable them to leave the country, and protect diplomatic property. In the *Arrest Warrant* case, the Court directed Belgium to cancel the arrest warrant of 11 April 2000.<sup>62</sup> Even advisory opinions tend to comprise quite specific remedial forms. In the proceeding regarding the immunity status of the U.N. Special Rapporteur of the Commission on Human Rights, the Court, in its advisory opinion, suggested an overreaching judicial remedy: "That Dato' Param Kumaraswamy shall be held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs."<sup>63</sup> In the advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court, after having found Israel responsible under international law for building the wall, concluded that

[I]t is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion.<sup>64</sup>

In the *Avena* case, following the conclusions in *LaGrand*, the Court concluded that the appropriate remedy would be a review and reconsideration of the convictions and sentences of the Mexican nationals.<sup>65</sup> In the *Avena* case, the nature of remedies was the crucial issue. As the reparation must correspond to the injury, the ICJ found that the appropriate national remedy should be a review and reconsideration of domestic cases by U.S. courts in order to determine whether the violation caused actual prejudice to the defendant. On the other hand, the Court found that

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61. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 44-45 (May 24), available at <http://www.icj-cij.org/docket/files/64/6291.pdf>.

62. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 33 (Feb. 14), available at <http://www.icj-cij.org/docket/files/121/8126.pdf>.

63. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, 90 (Apr. 29), available at <http://www.icj-cij.org/docket/files/100/7619.pdf>.

64. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 201-02 (July 9), available at <http://www.icj-cij.org/docket/files/131/1671.pdf>.

65. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 73 (Mar. 31).

annulment of a conviction or sentence would not provide the necessary and sole remedy, nor could the clemency proceeding replace a judicial remedy.<sup>66</sup> Though the Court framed the international remedy as an obligation of means to be fulfilled by the United States by means of its own choosing,<sup>67</sup> the Court, by setting the conditions and limits for the obligation to review and reconsider national criminal cases at hand, was just a step away from framing the national remedy required from the United States. This judgment exemplifies an international court's process of directing national remedies through framing international ones. Still, the Court did not take that step in this case as it did in the advisory opinion *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* in 1999.<sup>68</sup>

In the *Genocide* case, the Court, found Serbia responsible for failing to prevent genocide in Srebrenica and failing to punish responsible individuals for committing genocide. The remedy granted by the Court was specified as a duty to punish and transfer individuals accused of genocide to the ICTY. The remedies for all other previously mentioned cases could fall under the interpretation of the obligation *restitutio in integrum*, despite the silence of the Statute on the matter. The remedy in the last case certainly represents the order for specific performance with the aim to achieve a *sui generis* restorative remedy as the international substantive remedy. Interestingly, the *Genocide* case shows different remedial forms opted for by the Court: declaratory judgment with respect to the responsibility for not preventing the genocide massacre in Srebrenica and specific performance with respect to punishing individuals responsible for genocide.

Recent jurisprudence of the ICJ has continued the trend of developing remedial forms in international law that are more precisely outlined obligations. However, this has not occurred without inconsistencies. Though the discussion on different remedial forms may seem unnecessary,<sup>69</sup> available remedial options could echo the needs of victims as genuine holders of legal interests in many cases and possible direct or indirect beneficiaries of the Court's findings.<sup>70</sup> As such, they may be valuable.

66. *Id.* at 59-70 (extensively discussing the issue of remedies).

67. *Id.* at 62, 72.

68. See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, *supra* note 63 and accompanying text.

69. Brownlie, *supra* note 60, at 560.

70. Enrico Milano, *Diplomatic Protection and Human Rights Before the International Court of Justice: Re-Fashioning Tradition?*, 35 NETH. Y.B. INT'L L. 85, 132, 141 (2004) ("However, the remedial measures ordered by the Court in all of those disputes show

Since this Article refers only to remedies as issued by international bodies, reference to the International Law Commission (ILC) here seems necessary. In terms of the general rule on remedies for international law violations, Article 34 of the ILC Articles on State Responsibility prescribes the following: "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."<sup>71</sup> This Article comprises what has firmly been established in international law. Still, the position of an individual as a beneficiary of a remedy has never been a subject-matter of the work of the ILC.<sup>72</sup> Remedies for individuals, within the framework of general international law, have been dealt with indirectly through the rules of exhaustion of local remedies in the course of diplomatic protection and as a basis for state responsibility in cases of denial of justice.<sup>73</sup> However, these rules do not seem to establish the victim's right to claim and receive a remedy as a direct beneficiary of the right. Victims are treated rather as objects in international legal transactions. Further, the Report of the International Law Association (ILA) explicitly confirms that "Given that there is little evidence in international customary law for an individual right to a remedy for violations of human rights law and international humanitarian law, it still remains true that such a right must be provided for by an express provision."<sup>74</sup>

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that the Court is indeed taking into account the background of the political dispute involved, which is about the life of those convicted nationals, and it is willing to order remedies that address the legal rights of the individuals concerned. The Court's approach in that context undoubtedly marks a pro-active approach. . . . [T]here is much to suggest that the Court has entered, or perhaps was forced to enter, into a new 'age' of diplomatic protection where the rights of the state, individual rights and human rights are fully intertwined. It is inevitable that the first steps are tentative and over-cautious as the planet of individual rights, human rights and domestic legal systems is a planet ruled by different forces with which the Court has to become acquainted."

71. *Report of the International Law Commission to the General Assembly, supra* note 21, at art. 34.

72. Tomuschat, *supra* note 1, at 174 ("The ILC was of the opinion that the law of state responsibility would be sufficiently well-ordered by devising rules governing inter-state relationships. It was also decided that the responsibility of international organizations would be tackled at another time. However, at no time was attention focused on the individual in this connection.").

73. *See generally* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 202-27 (2005).

74. RAINER HOFMANN & FRANK RIEMANN, INT'L LAW ASSOC. COMM. ON COMPENSATION FOR VICTIMS OF WAR, BACKGROUND REPORT ON COMPENSATION FOR VICTIMS OF WAR 31 (2004), available at <http://www.ila-hq.org/pdf/CompensationforVictimsOfWar/BackgroundreportAugust2004.pdf> (last visited Feb. 9, 2008) (footnote omitted); *see also* Int'l Law Assoc. Comm. on Comp. for Victims of War, *Compensation for Victims of War*, 72 INT'L L. ASS'N REP. CONF. 761, 764 (2006) (final report accepting this position in its summary conclusions in somewhat less elaborate manner) ("Finally, there was no consensus as to whether the present state of international law, as it results from

According to these findings, it seems possible to claim that no general rule of customary international law exists which guarantees an individual right to remedy under international law in cases of violation of human rights. There is even less of a right in cases of grave human rights violations.<sup>75</sup> This creates a paradox in international law. The ease with which international bodies have merged rights and remedies cannot be reconciled with the idea that no individual right to reparation has come into existence. This objection may be a more general objection against human rights remedies: "Human rights remedies, even when successful, treat the symptoms rather than the illness, and this allows the illness not only to fester, but to seem like health itself."<sup>76</sup>

However, there may be an avenue to solve the paradox and claim that there is an emerging right to the remedy under customary international law, which may be invoked directly for the benefit of individuals rather than their national states. Contrary to Tomuschat's opinion,<sup>77</sup> there still seems to be room to interpret the ILC rules on state responsibility so as to include the victims as direct beneficiaries of the remedies for violations of human rights: "[P]erformance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the *beneficiaries* of the obligation breached."<sup>78</sup> Although there is

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applicable treaty and customary law, allows for any final conclusion as to the existence of a right to compensation, held and being enforceable by the individual victims of such violations of international law, as distinct from the universally accepted existence of the right of States to claim—in their own right—'compensation' for violations of international law norms the victims of which were their nationals.").

75. PROVOST, *supra* note 3, at 44 ("Given the nature of human rights as essentially individual rights, however, a substantive right to a remedy appears as a necessary element of the normative framework of human rights. Without such an element, the danger looms of that 'vain thing' of a right without a remedy threatening the reality of human rights as rights of individuals. Despite the desirable character of such a rule, there is little evidence to suggest that it has evolved into customary law.") (footnotes omitted); Tomuschat, *supra* note 1, at 183 ("At the present time there exists no general rule of customary international law to the effect that any grave violations of human rights creates an individual reparation claim under international law. As shown above, such a claim has no basis in practice as far as mass-scale injustices are concerned, whether they result from internal or international patterns of violations of human rights."); see generally, Christian Tomuschat, *Individual Reparations Claims in Instances of Grave Human Rights Violations: The Position Under General International Law*, in: STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 1-25 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999).

76. David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 118 (2002).

77. See Tomuschat, *supra* note 1 and accompanying text.

78. *Work of its Fifty-Third Session*, *supra* note 21, art. 48 (emphasis added).

no standing for the victim to raise such a claim directly, it still might be considered as a step further in recognizing the victim's direct interest in a remedy.<sup>79</sup> If human rights bodies were in position to expand their jurisdiction to order remedies not provided for in treaties, the question is how victims could benefit either from the theory underlying expansion of jurisdiction or from the expanded jurisdiction itself.

#### *F. Human Rights Commission and U.N. Documents*

Further developments in the law of remedies are evinced in several U.N. documents which focus on the remedies. The most comprehensive catalog of remedies has been offered in 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 (Basic Principles),<sup>80</sup> which comprises almost thirty different remedies. An interesting feature of *Basic Principles* is its starting point and focus: the remedial structure has been set up as a whole, regardless of the character and source of the norm or right which has been violated.<sup>81</sup> The starting position is the last step to be undertaken, namely remedies. This structure suggests that all remedies are always available to all victims of all human rights violations. The broad and all-encompassing approach, if coupled with the broad definition of victims—which arguably may include both direct and indirect victims<sup>82</sup>—may open a vast horizon of possibilities for claims.

In defining potential beneficiaries of remedies, it is useful to look at how U.N. documents conceptualize victims. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Declaration)<sup>83</sup> defines victims as “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or

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79. See Milano, *supra* note 70, at 106.

80. 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, G.A. Res. 60/147, Annex, ¶¶ 15-23, U.N. Doc. A/Res/60/147/Annex (Dec. 16, 2005).

81. Tomuschat, *supra* note 1, at 160 (“Bassiouni produced a final report in January of 2000, which answers all prayers, as victims would be granted all conceivable rights.”).

82. E.g., Heidi Rombouts & Stef Vandeginste, *Reparation for Victims of Gross and Systematic Human Rights Violations: The Notion of Victim*, 2000-2003 THIRD WORLD LEGAL STUD. 89, 112 (2003) (“[L]egal and social analysis indicates, in our view, that under any human rights mechanism, the notion of victim should be defined as broadly as possible. Anyone who has been sufficiently directly affected by a human rights violation should be considered a victim. This recognition of victim status may in itself constitute some sort of reparation.”).

83. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. GAOR Supp. No. 53, U.N. Doc. A/RES/40/34 (Nov. 29, 1985).

substantial impairment of their fundamental rights through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.”<sup>84</sup> Basic Principles identifies victims as “persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.”<sup>85</sup> These two definitions are *ratione personae* practically identical: persons, both individuals and groups, who endure different kinds of suffering and impairment, regardless of their personal stance toward the violation and intent to pursue any proceeding, are qualified as victims. The difference is in the basis of these violations. The Declaration relies upon the criminal law of member states, i.e. violation of domestic law which incurs international responsibility. Basic Principles refers exclusively to international human rights law as a source of the obligation, thus making this *ratione materiae* difference between the two documents relevant.

In drafting and adopting the Basic Principles, the drafters put them through several stages and readings, two of which deserve special attention. In 1993, Mr. Theo Van Boven as a Special Rapporteur of the Commission on Human Rights prepared the Final Report and Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms,<sup>86</sup> which served as the basis for further developments of the Basic Principles. The second stage, evinced in the 2000 final report of the Special Rapporteur, M. Cherif Bassiouni, introduced the definition which eventually found its place in the 2005 Basic Principles, namely: “A person is ‘a victim’ where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including

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84. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, ¶ 1, U.N. Doc. A/Res/40/34/Annex (Dec. 11, 1985).

85. G.A. Res. 60/147, *supra* note 80, ¶ 8.

86. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Protection of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violation of Human Rights and Fundamental Freedoms*, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993) (prepared by Theo van Boven).

physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights."<sup>87</sup>

The intention of the drafters of both documents was to define victimhood as extensively as possible. They restricted the definition to only *ratione materiae*, e.g. domestic criminal law in the first place, and gross violations of international human rights in the second. The broad approach may have been created in an attempt not allow states to circumvent the rights of victims by invoking a restrictive victim clause. However, this attempt may have been in vain because of the vague and imprecise definition of victim. The other restrictions in obtaining a remedy are external. They dictate how the recognized legal interest may be emptied through restrictive rules on standing before international and national fora, and may place restrictions on the right to recover when a lack of nexus exists between the right and remedy.

In contrast to the large number of remedies offered by the Basic Principles, other international instruments have not been as generous with regard to the types of remedies available. The general trend of enhancing the jurisdictions of courts to grant remedies, together with an increasing variety of remedial forms, seems to have been accepted by international courts.<sup>88</sup> However, it has not been accepted to the degree announced in the Basic Principles. Other international instruments have not embraced a generic and broad understanding of the right to remedy, regardless of the specific content and context of the particular provision providing for a remedy. The remedy-based approach of human rights announced in Basic Principles merges different normative meanings of remedies and stands for the proposition that "in general terms, then, an 'effective remedy' includes the right to bring claims before a judicial system capable of resolving allegations of human rights abuses, issuing judgments and granting enforceable awards of compensation."<sup>89</sup> However, not all international instruments have interpreted the right in such broad terms.

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87. U.N. Econ. & Soc. Council [ECOSOC], *Civil and Political Rights, Including the Question of: Independence of the Judiciary, Administration of Justice, Impunity*, Annex, ¶ 8, U.N. Doc. E/CN.4/2000/62/Annex (Jan. 18, 2000) (prepared by M. Cherif Bassiouni).

88. Such a trend does not seem to be very comprehensively embraced by all international courts, arbitrations, and bodies. Schreuer demonstrates the reluctance of the International Centre for Settlement of Investment Disputes (ICSID) tribunals to order non-pecuniary judgments, despite the fact that legal framework of ICSID arbitrations is in this respect quite similar to other international courts. See Christopher Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 ARB. INT'L 325, 325-32 (2004).

89. Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 48 (2002); see also Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 451, 482 (1990).

*G. Addressees of the Obligation to Provide Remedy*

The potential addressees of the obligation to provide remedies are multiplied by the increase of both procedural and substantive remedies. One discovers a multitude of potential respondents against whom victims may possess a legal interest through remedies. Additionally, these addressees are not necessarily always states as the ultimate holder of international responsibility. In certain cases, a state is only a subsidiary addressee. For example, the principle of criminal accountability primarily addresses criminals. States which have a duty to prosecute criminals undertake a duty which puts them in a position of an addressee. The multiple potential addressees responsible for the rehabilitation of victims can be seen in civil remedies and the right to compensation. If compensation is an appropriate remedy, there is no clear answer to who should shoulder the burden of that compensation.

Additionally, the Basic Principles refer exclusively to gross violations of human rights. As such, an international procedural remedy is not likely to be available to a victim because a "mass," "gross," or "systematic" violation of human rights has not been judicially recognized. The vast, unconquered territory of international remedies certainly may leave national courts in a difficult situation and victims without a remedy. The Article will now move to a discussion of the dilemmas national courts must face in their responses to international remedies.

### III. NATIONAL COURTS AND REMEDIES

When implementing international law into national legal systems, national courts and agencies perform a remedial function that has specific features. This is because of the concreteness of the remedy required and definite character of the obligation imposed. Also, constitutional requirements, on the one hand, and different and evolutive approaches to remedies by international institutions, on the other hand, might lead national courts to perform remedial functions on *ad hoc* basis, rather than in a systematic manner. Other factors, such as deference to the executive, the political questions doctrine, and incapacity of courts to handle international legal issues, can contribute to differential treatment of remedies by a domestic judiciary.

*A. Damages vs. Specific Performance: Problems in  
Implementing the CAT Views*

In a criminal case before an appellate court in Serbia which lasted for almost ten years,<sup>90</sup> the court examined both the sentencing judgment and the human rights aspects of the decision. Though concurring with the trial court in its qualification of the criminal offense and responsibility, the appellate court disagreed on the issue of criminal sanction. It found that the length of the proceeding should have been given weight in assessing the sentence. Because the length of the criminal proceeding violated the rights of the accused and his right to a fair trial within a reasonable time, the court *ex officio* commuted the sentence of imprisonment to parole. Here, the national court sought and found the remedy for the violation of human rights by recognizing its role as the addressee in a quite precise manner: not only did the court invoke Article 6(1) of the ECHR and jurisprudence regarding the standard of “reasonable time,” but it also explicitly relied on the Committee of Ministers’ Recommendation on the Improvement of Domestic Remedies.<sup>91</sup> The court concluded:

Having found that the requirement of the reasonable time has been violated in this case, strict criminal sanction of imprisonment is not a justifiable measure under criminal law, pursuant to the Recommendation of the Committee of Ministers REC (2004)6 on the Improvement of Domestic Remedies, which finds that where the criminal proceedings have exceeded a reasonable time, this may result in a more lenient sentence being imposed.<sup>92</sup>

The court here dutifully followed all instructions on remedies even before they were imposed and, in an exceptional manner, invoked the Council of Europe’s recommendation in this respect.

There are other cases in which national courts do not respond so obediently in awarding remedies for violations of human rights. This is especially true in restorative measures such as commuting the sentence. Many courts, in trying to reconcile the limitations of their own jurisdiction and the internationally imposed obligation, mismatch the remedial forms. In the case of *Ristić v. Yugoslavia* before the U.N. Committee Against Torture, mentioned above,<sup>93</sup> the CAT found a violation of the remedial provisions of the Convention and ordered specific performance—conducting an investigation—as the remedy. The CAT found the legal basis for this remedy in the substantive provisions of the

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90. Okružni sud u Subotici (Srbija), Krivično odeljenje [District Court in Subotica (Serbia), Criminal Law Chamber], Judgment No. Kž. 266/05, Aug. 15, 2005 (on file with author) (translated by author).

91. *Recommendation of the Committee of Ministers to Member States on the Improvement of Domestic Remedies*, *supra* note 27.

92. See Judgment No. Kž. 266/05, *supra* note 90, at 3.

93. See *Ristić*, *supra* note 49 and accompanying text.

Convention, which clearly outline the obligation of national authorities to perform investigations when there is reasonable ground to believe that an act of torture has been committed in any territory under their jurisdictions. However, the Committee refused to assess reparations:

With regard to allegations of a violation of article 14, the Committee finds that in the absence of proper criminal investigation, it is not possible to determine whether the rights to compensation of the alleged victim or his family have been violated. Such an assessment can only be made after the conclusion of proper investigations. The Committee therefore urges the State party to carry out such investigations without delay.<sup>94</sup>

When the case returned to the national courts with a request for implementation, the first instance court in Serbia awarded damages for the violation of human rights.<sup>95</sup> However, it refused to order investigation or mandatory publication of the CAT's decision in daily newspapers because it found these requests inadmissible before a civil court. The damages awarded represent a national remedy for failure to implement the decision of the CAT and failure to conduct an impartial investigation after the adoption of the decision. They do not represent enforcement of international remedy as required by the Committee. Interestingly, the Supreme Court of Serbia in affirming the judgment of the lower court gave full account of the Convention and its remedial structures and fully concurred with the decision of the CAT. It emphasized Article 22 as the basis for jurisdiction to proceed on the matter, as well as Articles 12 to 14 which deal with remedial functions. As the civil court did not have jurisdiction to order the remedy requested, the Supreme Court decided to substitute the international remedy of specific performance with the national remedy of reparation.<sup>96</sup>

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94. *Id.* ¶ 9.9.

95. Prvi opštinski sud u Beogradu [First Municipal Court in Belgrade], Judgment No. P.2236/04, Dec. 30, 2004 (affirmed by the Supreme Court of Serbia on February 8, 2006) (awarding total amount of damages to parents of the victim, as a just satisfaction for violation of individual rights, in amount around €12,000).

96. Vrhovni sud Srbije [Supreme Court of Serbia], Judgment No. Rev. 66/06, Feb. 8, 2006 (petition for revision submitted by the State Union of Serbia and Montenegro denied).

*B. Declaratory Judgments vs. Specific Performance: Choice of a  
Remedy by the International Court of Justice*

*1. Genocide Convention Case: A Vanished Victimhood*

Though it may be too soon to assess the national impact of the ICJ judgment in the *Application of Convention on the Prohibition and Prevention the Crime of Genocide* of February 26, 2007, it may be useful to look into the consequences and reactions of national courts with respect to the ordered remedies. As mentioned, the ICJ found Serbia responsible for not preventing the genocide in Srebrenica, for not punishing those responsible for committing genocide, and for failing to implement provisional measures order of the ICJ. The remedies for these breaches are two-fold. The first set of remedies consists of the duty to carry out obligations of a more general nature “Serbia shall immediately take effective steps to ensure full compliance with its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide to punish acts of genocide as defined by Article II of the Convention, or any of the other acts proscribed by Article III of the Convention.”<sup>97</sup> Additionally, the remedy included specific performance “to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal.”<sup>98</sup> The failure to transfer Ratko Mladić to the ICTY, who has been indicted for genocide and complicity in genocide before the ICTY, *per se* constituted the breach of the obligation to punish under the Genocide Convention.<sup>99</sup> The second set of remedies is of declaratory and non-compensatory character:

[The Court] *finds* that, as regards the breaches by Serbia of the obligations referred to in subparagraphs (5) and (7) above, the Court’s findings in those paragraphs constitute appropriate satisfaction, and that the case is not one in which an order for payment of compensation, or, in respect of the violation referred to in subparagraph (5), a direction to provide assurances and guarantees of non-repetition, would be appropriate.<sup>100</sup>

Therefore, in the opinion of the ICJ, finding a violation is just satisfaction for the breach of the Genocide Convention. Declaratory

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97. *Application of Convention on the Prohibition and Prevention of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, 2007 I.C.J. 91, 170, *available at* <http://www.icj-cij.org/docket/files/91/13685.pdf?PHPSESSID=d6c988361c33e4962b3b1015fd82492e>.

98. *Id.*

99. *Id.* at 169 (“Serbia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal.”).

100. *Id.* at 170.

judgment in itself is a remedy.<sup>101</sup> The Court even went further, to say that compensation would not be an appropriate remedy.<sup>102</sup> Apart from the Court's own explanation for this approach, which lies in the unproven nexus between the unlawful act and damage—which may be at odds with the finding of responsibility despite its “obligation of means” character—there might be other possible justifications for this approach. These include the ability to overcome a difficult political burden created by the lengthy and complex proceeding; to cease the dispute through reparations; to avoid difficulties in assessing the damages; and to prevent collective punishment. It is, however, difficult to understand the theory underlying the restrictive remedial approach when the case involved a number of victims of genocide. Still, the complete silence on remedies might also provide some insight into and proof of the irrelevance of victims and their victimhood in the international arena.

Declaratory judgments, as shown above, are the rule rather than the exception in the jurisprudence of the ICJ. In terms of national implementation, declaratory judgments do not require enforcement of remedies before domestic courts (though, it could be argued that national courts are prevented from denying, and therefore from reversing, the findings of the ICJ). Apart from the *negative* or *passive* aspect of implementation, national courts do not seem to be the addressee of the ICJ rulings. Still, the victims, whose plight was the subject-matter of the case, are presumably redressed through the declaratory judgment.

Additionally, the gravity of the crime seems to be at odds with the remedy awarded in the case. The declaratory remedy was chosen for the illegal acts affecting victims, whereas specific performance was imposed for undoing wrong, which could be arguably construed as indirect satisfaction for victims. Despite the victims' weak non-procedural position in the case and the low probability for redistribution of compensation—which, if it had been directly awarded, would have been owed to the applicant State—the victims still were left without any promise of an international remedy, although the harm suffered by them was fully adjudged and declared.

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101. *Id.* at 165-66.

102. *Id.* at 165 (“Since the Court cannot therefore regard as proven a causal nexus between the Respondent’s violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide . . .”).

The declaratory judgment in the *Genocide* case arguably bars any nationally pursued claims for damages by the victims on the basis that the just satisfaction of the international remedy was fully awarded by the ICJ. Due to the fragmented remedial structure of international law, it is possible that international responsibility may be decided and international remedies exhausted still with an option to pursue national remedies in the national legal framework. As we can see from previous cases, it would not be impossible for a national court to award a national remedy for an international wrong, even if the remedy has not been explicitly ordered by an international body.

## 2. Vienna Convention Cases: Victims Lost in a Neverland of Remedies

The problems in implementing the ICJ rulings containing specific performance as a remedy are well illustrated by a set of proceedings against the United States concerning the implementation of three ICJ decisions in the matter concerning Article 36 of the Vienna Convention on Consular Relations. In addition, a number of other U.S. cases illustrate the hurdles related to establishing and enforcing rights and remedies of foreigners. Most cases deal with enforcing rights and remedies under the Consular Convention or rulings containing international remedies<sup>103</sup> ordered by international bodies, such as the ICJ<sup>104</sup> and Inter-American Court of Human Rights.<sup>105</sup>

Both state and federal U.S. courts have routinely denied enforcement of international remedies or granted national remedies for the violation of the Vienna Convention on Consular *Relations* with respect to foreigners. In national cases affecting aliens whose legal interest was the subject matter of the claim before the ICJ, U.S. courts have refused to transpose international remedies into national procedural and substantive remedies. In the *Avena and Other Mexican Nationals*, the ICJ ruled that violation of individual rights under the Vienna Convention required “review and reconsideration” of national cases as a remedy.<sup>106</sup> Though the ICJ stressed

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103. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006); *Medellín v. Dretke*, 371 F.3d 270 (5th Cir. 2004) *cert. granted, then dismissed*; *Torres v. Oklahoma*, 962 P.2d 3 (Okla. Crim. App. 1998); *Breard v. Greene*, 523 U.S. 371, 376 (1998); *Medina v. Texas*, 529 U.S. 1102 (2002) *cert. denied*; *LaGrand v. Stewart*, 133 F. 3d 1253 (9th Cir. 1998).

104. *Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 I. C. J. 12 (Mar. 31); *LaGrand Case (F.R.G. v. U.S.)*, 2001 I. C. J. 466 (June 27); *Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I. C. J. 248 (Apr. 9) (provisional measures).

105. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999). *Javier Suarez Medina v. United States*, Case 12.421, Inter-Am. C.H.R., Report No. 91/05, OEA/Ser.L/V/II.124, doc. 5 (2005).

106. *Avena*, 2004 I.C.J. at 60 (“It follows that the remedy to make good these violations should consist in an obligation on the United States to permit review and

that “review and reconsideration” was the obligation of means rather than the obligation of result and a specific performance remedy to be chosen by the United States “on its own choosing,” the ICJ still considerably limited the right of the United States to choose the appropriate procedural remedy. First, the ICJ explicitly excluded the executive clemency as an adequate remedy for the violation of Article 36 of the Vienna Convention. Second, it suggested that the judicial branch was the addressee of the obligation.<sup>107</sup>

The ICJ, therefore, did not suggest that all sentences handed down in the face of violation of the Vienna Convention on Consular Relations should have been annulled, as proposed by the Mexican government in its *restitutio in integrum* argument.<sup>108</sup> It suggested that all sentences should be judicially reviewed and reconsidered in light of the prejudice caused by the violation of an individual right of a foreigner.<sup>109</sup> Therefore, it

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reconsideration of these nationals’ cases by the United States courts, as the Court will explain further in paragraphs 128 to 134 below, with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant.”).

107. *Id.* at 65-66 (“In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration. As has been explained in paragraphs 128 to 134 above, the Court is of the view that, in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 (b), of the Convention has resulted, in the sequence of judicial proceedings that has followed, in the individuals concerned being subjected to prolonged detention or convicted and sentenced to severe penalties, the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task. . . . The Court notes, however, that the clemency process, as currently practiced within the United States criminal justice system, does not appear to meet the requirements described in paragraph 138 above and that it is therefore not sufficient in itself to serve as an appropriate means of ‘review and reconsideration’ as envisaged by the Court in the *LaGrand* case.”).

108. *Avena and Other Mexican Nationals* (Mexico v. U.S.), Verbatim Record CR 2003/25, at 35, (Mar. 15, 2003) (Mexico’s argument at oral proceeding by Mr. Donovan), available at <http://www.icj-cij.org/docket/files/128/4079.pdf> (“For that reason, restitution here must take the form of annulment of the convictions and sentences that resulted from the proceedings tainted by the Article 36 violations. It follows from the very nature of *restitutio* that, when a violation of an international obligation is manifested in a judicial act, that act must be annulled and thereby deprived of any force or effect in the national legal system. Unsurprisingly, therefore, it is well established that the restoration of the *status quo ante* may require an order that a domestic judgment be annulled.”).

109. Some scholars seem to argue for a more radical approach to remedies than the ICJ itself. Measures suggested by writers embrace different views on the *restitutio in integrum* character of a remedy: release of the detained individual; dismissal of the

is up to the national courts to choose an adequate national remedy to comport with the international remedy of “review and reconsideration.”

Courts of the United States have read these instructions in many different ways but tend to reject the suggested remedy. Several cases stand out as illustrations of the methods which can be used to overcome difficulties associated with the implementation of international remedies. Rather, they may demonstrate the difficulties in the reconciliation between international and national remedies. In the *Torres* case,<sup>110</sup> the Oklahoma Court of Criminal Appeals found that the violation of the Vienna Convention on Consular Relations and the ruling of the ICJ in the *Avena* case established the right to judicial review of Torres’s sentence. However, as Torres had been granted clemency on May 13, 2004, the Oklahoma court conducted a review of the procedural remedy, declaring that Torres had been prejudiced by violation of the Vienna Convention, and found that a substantive remedy had already been granted in the form of clemency and commuted sentence.<sup>111</sup> Though the court denied relief on the basis that such a relief was unnecessary and rendered the

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indictment; suppression of the incriminating evidence; reversal of a conviction; a trial de novo. See generally William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT’L L. 257, 310-12 (1998); Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT’L L. 565, 610-12 (1997); Frederic L. Kirgis, *Restitution as a Remedy in U.S. Courts for Violations of International Law*, 95 AM. J. INT’L L. 341, 341 (2001); Erik G. Luna & Douglass J. Sylvester, *Beyond Breard*, 17 BERKLEY J. INT’L L. 147, 176-77 (1999).

110. *Torres v. Oklahoma*, 120 P.3d 1184, 1187-92 (Okla. Crim. App. 2005).

111. *Id.* at 1189-90 (“After a thorough evidentiary hearing, the trial court found that Torres had been prejudiced by the violation of his Vienna Convention rights, and declined to find whether trial counsel had been ineffective. Upon review, this Court concludes, first, that Torres suffered actual prejudice regarding his Vienna Convention claim only in the context of his capital sentence. The record shows that the Mexican government would have, and subsequently has, offered Torres assistance in finding and presenting mitigating evidence in order to avoid the imposition of the death penalty. Second, we find that, while evidence does not show trial counsel’s acts or omissions would have affected the jury’s determination of guilt, trial counsel’s performance might have affected the jury’s decision to impose death. However, Torres no longer faces a sentence of death. The Oklahoma Constitution and statutes vest in the Governor the power to both commute and impose restrictions on sentences after criminal conviction. The Governor exercised that power in this case. By Executive Order he granted clemency with the condition that Torres shall not be eligible to be considered for parole for the remainder of his life. A commuted sentence has the same legal effect as though the sentence had originally been for the commuted term. We find that Torres is not entitled to relief from his convictions for murder either as a result of Vienna Convention violations or through counsel’s actions. We find that Torres was actually prejudiced by the failure to inform him of his rights under the Vienna Convention, and by counsel’s acts or omissions which might have affected his sentencing. However, the Executive Branch grant of clemency and limitation of Torres’s sentence to life without the possibility of parole renders these issues moot. Consequently, no relief is required. Torres’s application for post-conviction relief is denied.”) (footnotes omitted).

issue moot, the court still observed that “[h]ad the Governor not granted clemency, this Court would have been required to grant relief on that claim.”<sup>112</sup>

When the violation of individual rights under the Vienna Convention on Consular Relations is shifted from criminal to civil remedies, the issue that arises is whether an alien is entitled to damages.<sup>113</sup> Unlike many other cases which deal with restorative national remedies within a criminal proceeding, the case of *Jogi v. Voges*<sup>114</sup> raised the issue of national civil remedies for the failure of state officials to inform arrested foreign nationals of their right to consular notification. In the first set of proceedings, the U.S. Court of Appeals for the Seventh Circuit found that Article 36 of the Vienna Convention conferred individual rights on detained nationals but also an implied private right of action to enforce the individual’s Article 36 rights.<sup>115</sup> In the second set of proceedings, the same court reversed its previous decision and established its jurisdiction solely on federal question jurisdiction, namely 28 U.S.C. § 1331. The court then awarded the remedy to the victim, recognizing the cause of action under 42 U.S.C. § 1983, which creates a private right of action as a remedy when a violation of a statute, and presumably a treaty, granting an individual right has been established.<sup>116</sup> Though the final enforcement of remedies is still to be conducted,<sup>117</sup> the court established a national civil remedy for an internationally wrongful act. It did so without encroaching on the U.S. Supreme Court’s finding on the limited availability of criminal remedies for violations of the Vienna Convention on Consular Relations.<sup>118</sup>

112. *Id.* at 1190.

113. See Kirgis, *supra* note 109, at 341 (stating U.S. courts have rarely addressed restitution as a possible remedy).

114. *Jogi v. Voges*, 425 F.3d 367, 370 (7th Cir. 2005).

115. *Id.* at 385 (“We conclude, therefore, relying on the language of Article 36, the purpose of the Article, and the need to interpret the Vienna Convention in a manner consistent with the other states party to the Convention, that there is an implied private right of action to enforce the individual’s Article 36 rights.”).

116. *Jogi v. Voges*, 480 F.3d 822, 835-36 (7th Cir. 2007).

117. Chimène I. Keitner & Kenneth C. Randall, *The Seventh Circuit Again Finds Jurisdiction for Private Remedies for Violations of Article 36 of the Vienna Convention on Consular Relations*, ASIL INSIGHTS., May 16, 2007), <http://asil.org/insights/2007/05/insights070514.html> (“While the Seventh Circuit’s confirmation of federal jurisdiction is significant, the case will now be sent back to the district court, and the ultimate outcome is far from settled. The district court will have to determine whether Jogi filed his complaint within the applicable time limit, and whether the defendant Illinois officials are entitled to immunity.”).

118. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006). For a general overview of the impact of the Sanchez case on national remedies for the violation of the Vienna

The *Jogi* case, regardless of its final outcome, demonstrates the necessity to find national remedies for international violations, or in other words, to identify national counterparts for international remedies. This practice is preferable to transplanting international remedies as established by international courts into national arenas.

Another case illustrative of the search for, or defense from, remedies for victims of violations of international law within the U.S. legal system is the *Medellin* case.<sup>119</sup> Medellin's right to consular assistance was the subject matter of the ICJ's ruling in the *Avena* case.<sup>120</sup> Medellin's right to consular assistance arguably constituted his right to remedy both on the basis of the decision and on the Vienna Convention on Consular Relations. His attempts to have his conviction reviewed as a violation of the Vienna Convention had failed. Additionally, he was consistently denied the right to a national criminal remedy for the violation of individual rights under international law.

The U.S. Supreme Court first granted certiorari but subsequently denied it on the basis of two developments in the case. First, President Bush issued a memorandum that stated the United States would discharge its international obligations under the *Avena* judgment. Medellin, relying on this memorandum and the *Avena* judgment, filed a successive state application for a writ of habeas corpus. Second, the Supreme Court held that a state proceeding might provide Medellin with the review and reconsideration of his Vienna Convention claim, and therefore, its action in the matter were not required.<sup>121</sup> However, the Texas Court of Criminal Appeals refused to grant the remedy of review to Medellin, finding that

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Convention, see Janet K. Levit, Sanchez-Llamas v. Oregon: *the Glass is Half Full*, 11 LEWIS & CLARK L. REV. 29, 38-40 (2007).

119. *Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 I. C. J. 12 (Mar. 31).

120. *Id.* at 53 ("[The International Court of Justice] finds that, by not informing, without delay upon their detention, the 51 Mexican nationals referred to in paragraph 106 (1) above of their rights under Article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations of 24 April 1963, the United States of America breached the obligations incumbent upon it under that subparagraph."). Subparagraph 106 (1) of the case reads: "On this aspect of the case, the Court thus concludes: (1) that the United States committed breaches of the obligation incumbent upon it under Article 36, paragraph 1 (b), of the Vienna Convention to inform detained Mexican nationals or their rights under that paragraph, in the case of the following 51 individuals: Avena (case No. 1), Ayala (case No. 2), Benavides (case No. 3) . . . Medellin (case No. 38) . . .". *Id.* at 53-54.

121. *Medellin v. Dretke*, 125 S. Ct. 2088, 2093 (Tex. Crim. App. 2005) ("In light of the possibility that the Texas courts will provide Medellin with the review he seeks pursuant to the *Avena* judgment and the President's memorandum, and the potential for review in this Court once the Texas courts have heard and decided Medellin's pending action, we think it would be unwise to reach and resolve the multiple hindrances to dispositive answers to the questions here presented. Accordingly, we dismiss the writ as improvidently granted.").

neither ICJ decisions nor the President's Memorandum constituted a federal law.<sup>122</sup> The Texas court both refused to transplant the remedy required by the ICJ decision into the national arena and refused to interpret domestic law in light of the U.S.'s international obligations. Consequently, on April 30, 2007, the U.S. Supreme Court granted certiorari to review the decision of the state court.<sup>123</sup> The issue in this case is strictly within the realm of national criminal remedies, so it is yet to be seen how the Supreme Court will respond after having both closed and opened several doors for granting national remedies.<sup>124</sup>

The struggle of U.S. courts to adjust national remedies to its obligations, either under the ICJ rulings or the Vienna Convention, has drawn an extraordinary reaction from the academic community. Academics have criticized the approach of the U.S. judiciary and argued for a judicial dialogue between U.S. courts and the ICJ<sup>125</sup> or for a correct interpretation of international obligations arising from the *Vienna Convention on Consular Relations*.<sup>126</sup>

Consular cases, however, highlight the relevance of remedies for the implementation of international law into domestic legal orders even more than others. In consular cases, the problem reveals the dilemma. The court must either to choose an adequate national remedy to

122. *Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. 2006).

123. *Medellin v. Texas*, 127 S. Ct. 2129 (2007).

124. Though the questions presented before the U.S. Supreme Court do not directly reveal the issue of remedies, the decision will certainly have a remedial effect if upheld by the Court. Interestingly, questions are framed within the issue of the effect of ICJ decisions, rather than the remedies under the Vienna Convention. Moreover, there is no reference to the Vienna Convention on Consular Relations. See *Medellin v. Texas*, No. 06-984, 2007 WL 119139, at \*v (U.S. Jan. 16, 2007), *cert. granted*, 127 S.Ct. 2129 (2007) ("This case presents the following questions: 1. Did the President of the United States act within his constitutional and statutory foreign affairs authority when he determined that the states must comply with the United States' treaty obligation to give effect to the *Avena* judgment in the cases of the 51 Mexican nationals named in the judgment? 2. Are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* judgment in the cases that the judgment addressed?").

125. Bruno Simma & Carsten Hoppe, *From La Grand and Avena to Medellín—A Rocky Road Toward Implementation*, 14 TUL. J. INT'L & COMP. L. 7, 47 (2005) ("We take this [Torres case] as the beginning of a fruitful judicial dialogue between U.S. judges and the Hague Court.").

126. Luna & Sylvester, *supra* note 111, at 176 ("[A] near unanimous opinion among scholars that the American judiciary's interpretation of the Vienna Convention is fundamentally flawed.").

substitute for an international substantive remedy<sup>127</sup> or create a new remedy on the basis of treaty violations<sup>128</sup> which amounts fairly closely to a direct implementation of the international remedy.<sup>129</sup> There are a variety of remedies that have been ordered by international bodies, and there is lack of consensus regarding the right of an individual to bring direct claims for such remedies on an international level under general international law. Additionally, there is difficulty in “translating” or “transplanting” international remedies into national legal orders. As such, one question may be

whether a judicially imposed remedy is appropriate, and if so, what that remedy should be. Courts in the United States have sometimes asked this question, as in the cases involving the Consular Convention, but they have not tried to ascertain what remedy international law would impose. They should try to do so.<sup>130</sup>

However, the correct question might well be: how to find a remedy which does not distort any of the legal regimes associated with it and adequately remedies the harm of the victim himself.

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127. See *supra* notes 102-05 (favoring interpretation of domestic statutes so as to give effect to international remedies).

128. Carlos M. Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1159 (1992) (“When a state’s primary obligation under a treaty is an obligation to behave in a given way towards individuals, an additional default rule of customary international law imposes an obligation on the parties to the treaty to afford the individual a remedy domestically.”); Kirgis, *supra* note 109, at 345 (“If, then, an international law duty to provide restitution (or restoration of the status quo ante) for a breach of an international obligation indeed applies when restitution is feasible under the circumstances and would not be disproportionately burdensome, and if a municipal law canon directs that a U.S. court should not place the United States in breach of its international law duty unless Congress has unequivocally mandated otherwise, a domestic court should order restitution as the usual remedy when a party with a real stake in the matter has established that a violation of international law has occurred. It would not matter whether the breached international obligation arose from custom or a treaty.”); Tomuschat, *supra* note 1, at 182 (“In this sense, after more than 200 years of existence, the United States’ ATCA may be viewed as a precursor of a development that will mature in the coming decades. However, proceeding from the premises just outlined, the ‘new’ claim to reparation would be founded on international, rather than on domestic law.”). See generally Valerie Epps, *Violations of the Vienna Convention on Consular Relations: Time for Remedies*, 11 WILLAMETTE J. INT’L L. & DISP. RESOL. 1, 27-28 (2004); Jeremy White, *A New Remedy Stresses the Need for International Education: the Impact of the Lagrand Case on a Domestic Court’s Violations of a Foreign National’s Consular Relations Rights Under the Vienna Convention*, 2 WASH. U. GLOBAL STUD. L. REV. 295, 311-12 (2003).

129. E.g., *Torres v. Oklahoma*, 120 P.3d 1184 (Okla. Crim. App. 2005).

130. Kirgis, *supra* note 109, at 342.

#### IV. CONCLUSION

Victims deserve remedy for harm suffered. Where there is no customary rule providing victims with remedies under international law and there are inconsistent responses by national courts in implementing remedies, victims are placed in a quite unfavorable position. Furthermore, this may be at odds with the trend of international courts in developing remedial forms. Both the development of international remedies and the fact that national courts rarely adopt adequate remedies leave victims without satisfactory remedies. This is despite the fact that their victimhood is the heart and substance of the cause of action pursued on the international plane. Victims receive adequate remedies only in exceptional cases. Additionally, the graver the violation, the less likely it is that victims will be remedied. This is, in a way, the end result of the fragmentation of remedies in international law. Therefore, more attention should be paid to those victims who lose out in the redistribution of remedies, even though their loss has been legally recognized as a cause of action as well as a ground for expanding international jurisdiction. A more integrated approach to remedies is necessary, if not already required by international law.

