

Lost and Regained?

Restitution as a Remedy for Human Rights Violations in the Context of International Law

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1 Introduction

Most probably, the deepest desire of any victim of a human rights violation is to turn back the clock. This article focuses on the legal way to do so: the issue of *restitution* in the context of human rights. Restitution – or *restitutio in integrum* as it is often called, using its Latin origin² – is one of the ways in which a violation of international law can be remedied. In order for such a remedy to become applicable, there will first have to be a violation of a human right. Remedies have a double meaning in English. On the one hand they involve access to justice in situations of alleged violations of a legal norm. This entails the possibility to lodge a complaint before a judicial, administrative or other body that can redress the harm done. On the other hand remedies also have a substantive meaning. They concern measures taken to “make good the damages caused.”³ Whereas the former relates to the availability and form of the procedure, the latter concerns its outcome.⁴ The confusion this gives rise to in English, is absent in other languages. In French for example, different words are used: *recours* and *réparation* respectively. In this article, I will focus on the substantive meaning of remedies – often called reparations – in the specific context of human rights. First of all, this approach entails an assessment of the place of restitution among other reparations under international law. Secondly, I will look at restitution in the context of human rights. Thirdly, the chapter will zoom in on restitution as a form of reparation in the regional setting of the European Convention on Human Rights (ECHR).

2. Violations of international law and their remedies

A remedy presupposes a wrong. Consequently, the norms governing the consequences of wrongful conduct under international law are of importance for present purposes. These norms have been codified in the context of wrongful conduct of states by the International

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² S. Haasdijk, ‘The Lack of Uniformity in the Terminology of the International Law of Remedies’, *Leiden Journal of International Law* vol. 5 (1992) pp. 245-263, see p. 250.

³ Christian Tomuschat, ‘Reparation for Victims of Grave Human Rights Violations’, *Tulane Journal of International and Comparative Law* vol. 10 (2002) pp. 157-184, see pp. 167-168.

⁴ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press 2005, 2nd ed.) pp. 7-9. “Access to relevant information concerning violations and reparation mechanisms” has been recognized as a third aspect of remedies in: Commission on Human Rights resolution 2005/35, *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*, 19 April 2005, UN Doc. E/CN.4/2005/L.10/Add.11, principle 11(c).

Law Commission (ILC) in the *Articles on Responsibility of States for Internationally Wrongful Acts* (hereafter: ILC Articles).⁵ State responsibility comes into play (Art. 2) when an act (or omission) can be attributed to the state concerned under international law and when it “constitutes a breach of an international obligation” of that state. These requirements are cumulative. The responsible state has the duty “to cease that act, if it is continuing” and to “offer appropriate assurances and guarantees of non-repetition, if circumstances so require.”⁶ The obligation of cessation arises from the general norm of acting in conformity with international law.⁷ In this sense the duty of cessation exists independently of a duty of reparation. Nevertheless, depending on the circumstances, it can *also* be part of reparations.⁸ For example, the cessation of denial of access to someone’s home may in effect amount to partial reparation – partial, since arguably material and or immaterial harm caused by the denial of access will also have to be remedied.

The state responsible for the wrongful act is obliged to provide full reparation for material or moral injury or damage caused by that act (Art. 31). This tenet of international law has been recognized by the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case.⁹ The PCIJ added that reparation “is the indispensable complement of a failure to apply a convention and there is no need for this to be stated in the convention itself.” Its successor, the International Court of Justice (ICJ), confirmed this in the *LaGrand* case.¹⁰ This position is relevant for our subsequent inquiry, since it offers the possibility for international courts to assume the power to afford remedies, even if the treaty under which they operate does not explicitly attribute them this power.¹¹

What then should reparation comprise? In a later phase of the proceedings of the *Chorzów* case, the PCIJ formulated a definition which is still used today:

Reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.¹²

In the most technical sense the goal of reparations is thus to turn back the time as if no harm was done; the reparation functions as a kind of magical wand. The general and comprehensive notion of reparation¹³ can take several specific forms: restitution,

⁵ *Report of the International Law Commission, fifty-third session*, UN Doc. A/56/10 (not yet published). Also to be found in: James Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press 2002). All references to articles between brackets in this chapter will be to these Articles, unless otherwise specified.

⁶ Article 30. See also: Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press 2003, 5th ed.) p. 714.

⁷ Shelton (2005) p. 149.

⁸ In this respect, I disagree with the absolute separation between the two, as argued by Colandrea. See: Valerio Colandrea, ‘On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the *Assanidze*, *Bronionski* and *Sejdovic* Cases’, *Human Rights Law Review* vol. 7 (2007) pp. 396-411.

⁹ PCIJ, *Chorzów Factory (Jurisdiction)* (*Germany v. Poland*), 26 July 1927, Series A, no. 9, p. 21. See also UN Doc. A/56/10, p. 223.

¹⁰ ICJ, *LaGrand (Merits)* (*Germany v. United States of America*), 27 June 2001, para. 48.

¹¹ Shelton (2005) p. 52.

¹² PCIJ, *Chorzów Factory (Merits)* (*Germany v. Poland*), 13 September 1928, Series A, no. 17, p. 47. See for other case law references: Shaw (2003) p. 715.

¹³ Theo van Boven a.o. (ed.), *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, SIM Special vol. 12 (1992) p. 6.

compensation and satisfaction, separately or in combination (Art. 34). Article 35 describes restitution as follows: “to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) Is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.” Thus two exceptions to the duty of restitution exist. The first is related to the circumstances of the wrongful act. A destroyed house, for example, cannot be restituted, for the simple reason that it no longer exists. A poignant example is the 2007 ICJ judgment in the case of Bosnia and Herzegovina against Serbia. Although the Court concluded that Serbia had violated its legal obligation to prevent genocide in the Bosnian town of Srebrenica, the Court seemed to conclude that *restitutio in integrum* was not possible in relation to genocide.¹⁴ The second exception is related to the capacity or capability of the wrongdoing state: if for that state the duty of restitution would involve a much heavier burden than compensation, then the latter may be called for. Since this may not always be in the interest of the injured state, this exception is rather one of pragmatism than of justice for the wrong done.

Compensation is a secondary form of reparation in the sense that a state has the obligation of compensation for damage “not made good by restitution”, covering “any financially assessable damage including loss of profits insofar as it is established” (Art. 36). Compensation thus concerns all forms of reparation which can be paid in cash or kind.¹⁵ In the context of a house lost, compensation may therefore consist of alternative housing.

Satisfaction, the third type of reparation, becomes relevant when the other two cannot result in full reparation. Satisfaction can be provided in multiple ways: a state can formally acknowledge the wrong done, express its regret, formally apologize or choose another appropriate modality (Art. 37), e.g. an assurance of non-repetition.¹⁶

3. Restitution as the preferred remedy

The injured state may in principle choose between the various available modes of reparation it wants to claim. If it prefers compensation over restitution it can claim accordingly.¹⁷ But besides this freedom of choice for the injured state, it is important to assess what the preferred order is under international law. A hierarchy of modes of reparation does indeed exist.¹⁸ From a theoretical perspective this can be shown by the Articles themselves: compensation and satisfaction only become relevant to the extent that restitution does not suffice to provide full reparation. Such an approach was also followed by the PCIJ in the *Chorzów Factory* case, in which it held that there was a duty on the wrongdoing state in the case at hand to “restore the undertaking and, if this be not possible, to pay its value at the time of its indemnification, which value is designed to take the place of restitution which has become impossible.”¹⁹ Restitution is thus the primary means of reparation.

¹⁴ ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Merits) (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, para. 460.

¹⁵ *Ibid.*, pp. 6-7.

¹⁶ Shaw (2003) p. 720. Article 37 specifies that satisfaction “shall not be out of proportion to the injury and may not take a form humiliating to the responsible state.”

¹⁷ See the ILC’s *Commentary*, pp. 244-245.

¹⁸ Antonio Cassese, *International Law* (Oxford: Oxford University Press 2002, 2nd ed.) p. 259.

¹⁹ *Chorzów Factory (Merits)* p. 48. See the ILC’s *Commentary*, p. 239, for case law references.

The situation in state practice is less clear. Restitution is a rather rare remedy in international arbitration and compensation is sought much more often. Already in the 1980s, the claim was made that the divergence between principle and practice is so extensive that the principle of the primacy of restitution is in itself misleading.²⁰ In order to assess whether general practice indeed requires that we discard with the principle altogether, it is necessary to look into the advantages and disadvantages of restitution as a remedy.

Gray enumerates the most important disadvantages in her monograph on remedies: legal restitution may engender clashes or divergences between international and national law which can in turn diminish or annihilate the effect of international judicial decisions in national legal systems. The payment of cash as compensation may in those cases be easier. Secondly, the passage of time since the enactment of the wrong may make restitution rather difficult or even impossible. One could think of a new inhabitant of an illegally taken home. With each subsequent generation, restitution of the house to the original inhabitant or his heirs will become more difficult in a practical sense and more unjustifiable in a moral sense. Finally, restitution may not be adequate reparation for the damage done.²¹ Medical care does not by itself serve as restitution for torture. These disadvantages, according to Gray explain why restitution is not often used in international dispute settlement. Nevertheless, she admits that there is “not sufficient arbitral practice to provide clear guidance to a tribunal as to when *restitutio in integrum* would be a suitable remedy and when not.”²²

Even if practice thus does not unequivocally confirm the primacy of restitution, neither does it exclude it in principle. In fact, all the disadvantages mentioned are of a *practical* nature. The incongruity of national and international legal systems is a rather awkward shield for a wrongdoing state to hide behind. It runs counter to an effective system of state responsibility. This is why Article 32 stipulates that the “responsible state may not rely on the provisions of its internal law as justification for failure to comply with its obligations” to make full reparation. Thus either national law should be changed or not be applied in such a case. The second disadvantage, the lapse of time, is more an argument in favor of rapid dispute settlement than against the principle of restitution as such. Finally, the disadvantage of inadequacy would be a convincing argument against the *exclusive* use of restitution. The principle, by contrast, posits the primacy, but not the exclusivity of restitution. Therefore, if restitution cannot – or not entirely – make good the wrong inflicted, then the other ways of reparation can be used to complement it.

Moreover, the advantage of restitution is that it is most in conformity with the general goal of reparations: to wipe out the consequences of the illegal act and to restore the situation as it was before that act.²³ Restitution is thus the best road forward to achieve the goal for which the whole notion of reparations was developed in the first place. This is not just an advantage of principle, but also of practice, if we accept that the injured party’s interests are best served by a return to the *status quo ante*. In addition, it does justice to the idea that a right is more than a commodity, a violation of which can always be traded off monetarily by way of compensation. In relation to the latter, it may be remarked that an

²⁰ Christine Gray, *Judicial Remedies in International Law* (Oxford: Clarendon Press 1987) p. 13.

²¹ *Ibid.*, pp. 13-16.

²² *Ibid.*, p. 16.

²³ See also the ILC’s *Commentary*, p. 238. And: Felipe H. Paolillo, ‘On Unfulfilled Duties: The Obligation to Make Reparations in Cases of Violations of Human Rights’, in: Götz a.o. (eds.), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag* (Berlin: Springer 1999) pp. 291-311, see p. 303.

obligation of restitution could be a greater incentive for state authorities to change their policies or actions than the mere financial obligation of compensation.

Concluding on the issue of hierarchy of reparations, we have seen that the primacy in principle lies with restitution. The other means of reparation are subsidiary. General legal practice on the international level does not offer full support for this, but neither does it exclude it. The underlying reasons for the limited use of restitution are practical, not principled, and can be overcome. The advantages of restitution can be argued to outweigh the disadvantages.

4. Restitution in the context of human rights

After having provided an overview of the situation under the law of state responsibility, it is now time to zoom in on the specific field of human rights. The first question in this context is whether the principles as laid down in the ILC Articles, which have been designed to regulate legal relations between states, can be transposed to those between individuals and states.²⁴ A first indication towards an answer to this question can be found in the Articles themselves. Article 33 stipulates that although the Articles concern the duties owed towards other states, they are without prejudice to “any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.” In its *Commentary* the ILC points out that in the context of human rights individuals are the “ultimate beneficiaries” and in that respect the holders of rights. Whether state responsibility can be invoked by individuals directly at the international level, instead of through their states, depends on the rules and mechanisms at stake. Human right treaties may provide for a right to individual application.²⁵ The existence of a right is thus to a certain extent independent of the possibility to invoke it internationally. This can be clearly seen in the adjacent field of international humanitarian law (IHL), where rights for individuals exist, although these individuals have almost no possibilities to enforce them. There is no general international mechanism through which they can invoke their rights.²⁶ The possibilities to lodge claims at the national level are therefore all the more important.²⁷ Although the ILC Articles codify principles on state responsibility, this does not rule out the continued existence of principles and rules on the topic. The Articles concern inter-state relations. Other relations, such as those between individuals and states, can exist outside these Articles.

A second argument for the possibility of extending state responsibility rules to individuals could be made as follows: the ICJ in its Advisory Opinion *Reparation for Injuries Suffered in the Service of the United Nations* recognized that a non-state entity – the international

²⁴ For a more general discussion on the applicability of the *Articles* on human rights law, see: Rick Lawson, ‘Out of Control. State Responsibility and Human Rights: Will the ILC’s Definition of the ‘Act of State’ Meet the Challenges of the 21st Century’, in: Monique Castermans-Holleman a.o. (ed.), *The Role of the Nation-State in the 21st Century* (The Hague: Kluwer Law International 1998) pp. 91-116, see especially pp. 98-101.

²⁵ ILC *Commentary*, pp. 234-235. See also: Nigel S. Rodley, ‘The International Legal Consequences of Torture, Extra-Legal Execution, and Disappearance’, in: Lutz a.o. (eds.), *New Directions in Human Rights* (Philadelphia: University of Pennsylvania Press 1989) pp. 167-194, see p. 172. And: Marco Sassòli, ‘State Responsibility for Violations of International Humanitarian Law’, *International Review of the Red Cross* vol. 84 (2002) pp. 401-434, see p. 418.

²⁶ Liesbeth Zegveld, ‘Remedies for Victims of Violations of International Humanitarian Law’, *International Review of the Red Cross* vol. 85 (2003) pp. 497-527, p. 525.

²⁷ Riccardo Pisillo Mazzeschi, ‘Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview’, *Journal of International Criminal Justice* vol. 1 (2003) pp. 339-347, see pp. 342-344.

organization of the United Nations – had the right to claim reparation at the international level from a state.²⁸ Extending this, one could argue that if other new subjects of international law arise, they too can claim. Individuals have been recognized as being such subjects of international law.²⁹ To the extent that they are accorded rights under international law, they should therefore have the possibility to claim. Again, this points to the possibility to claim, not to a guarantee to do so. Such a (procedural) guarantee only arises in the context of regimes of treaties or international organizations which envisage it.³⁰

The possibility thus exists, but what about the necessity of transposing the principles? A strong argument of cogency can be made here. This argument starts with three basic assumptions. The first is the general principle that every violation of a substantive rule of international law requires a remedy. The second is that states are under a general obligation to respect and ensure human rights. The third is that individuals, as stated in the previous paragraph, are the main beneficiaries towards which the duty of human rights observance is owed. If one accepts these three assumptions, there can be no other logical conclusion than the following: individuals should have a right to reparation applying the ILC Articles by analogy.

Tomuschat, who puts forward such trains of thought, is very cautious himself. He even concludes that establishing an individual right to reparation would be a “progressive development of the law and not [a] codification of existing rules.”³¹ Others, such as Kamminga, have argued that such an entitlement already exists under international law.³² To answer the question more conclusively it is necessary to look at the practice of human rights institutions. In that context the possibility to complain, and thus to lodge a claim on the international plane exists. But have the supervisory or adjudicative mechanisms provided for or even ordered reparations to be made in the cases in which they found a violation of a human right? More specifically, have they ordered restitution?

Before delving deeper into this question, one should be aware that the filing of claims before international institutions often requires prior exhaustion of domestic remedies.³³ This follows from the subsidiary nature of those institutions. The national state concerned is under a duty to provide a remedy. This subsidiary international role entails that human rights institutions can both indicate what procedural and substantive remedies a national state should provide and can also themselves recommend or order specific reparations to be made, but only *if* the national level has failed to play its role.

The International Covenant on Civil and Political Rights (ICCPR) stipulates in Article 2(3) that states have a duty to provide an effective remedy in case of a violation of the human rights protected in the Covenant and that individuals have a concomitant right. The Human Rights Committee (HRC) has held that Covenant violations in general entail “appropriate compensation” and that reparation can involve “restitution, rehabilitation and measures of satisfaction”.³⁴ In its own views on individual applications in which it found a

²⁸ ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, 11 April 1949.

²⁹ Cassese (2005) p. 150.

³⁰ *Ibid.*

³¹ Christian Tomuschat (2002) see p. 173.

³² Menno Kamminga, ‘Legal Consequences of an Internationally Wrongful Act of a State against an Individual’, in: Tom Barkhuysen a.o. (eds.), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (The Hague: Martinus Nijhoff Publishers 1999) pp. 65-74, see p. 74.

³³ Shaw (2003) p. 730. It therefore often is an admissibility requirement: see e.g. Art. 35(1) ECHR.

³⁴ Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 16.

violation, the HRC has always found this obligation of reparation on the state to apply. Although the ICCPR provides no express basis for the HRC to indicate which remedies should be used, the Committee has done so as part of an “inherent authority” of its role as monitor of state compliance with the Covenant.³⁵ Gradually, it has gone beyond general findings and started to give specific indications on how to remedy the violation, including specific monetary amounts of compensation, amendments of national laws, public investigations and even restitution, of liberty, employment and property.³⁶ The latter was ordered in cases concerning property deprivations in the Czech Republic. In the *Des Four Walderode* case the HRC held that the state was under an obligation to provide the applicants with an effective remedy “entailing in this case prompt restitution of the property in question or compensation therefor.”³⁷ And in *Brok* it held that the remedy “should include” these reparations.³⁸ Although the views of the HRC are not legally binding *stricto sensu*, they can be seen as the most authoritative interpretations of the ICCPR. This may explain why the HRC’s indication of specific remedies is formulated as part of a general obligation under the Covenant, which *is* legally binding as a treaty. In spite of this, the compliance of states with the HRC’s views on reparations seems very low, a study done in 1999 suggests.³⁹ In this context, the requirement to comply is rather a moral or quasi-judicial carrot than a legal stick.⁴⁰

The stance of the HRC does not seem to mirror the preference for restitution as the most appropriate reparation under international law. Compensation seems to be at least on an equal footing and many other forms of reparations have been indicated by the HRC. Even in specific cases involving deprivations of property, neither restitution nor compensation is given clear primacy. What the Committee’s position does indicate, however, is that restitution is a recognized and appropriate form of reparation in specific cases and that it is an element of a more general obligation for states to provide remedies for human rights violations.

In a regional context, the Inter-American Court of Human Rights has held in the *Velásquez Rodríguez (Compensatory damages)* judgment that “that every violation of an international obligation which results in harm creates a duty to make adequate reparation”. Although it acknowledged that compensation was the most usual way of doing so, it also held that *restitutio in integrum* was the starting point to counter the harm done.⁴¹ It took a very broad view of the latter, including “the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.”⁴² Effectively, this amounts to a broad notion of restitution which includes both a return to the situation before the harm was done and compensation. The legal basis for such an approach is to be found in Article 63(1) of the

³⁵ Shelton (2005) p. 178.

³⁶ *Ibid.*, pp. 183-184, including specific references to case law.

³⁷ HRC, *Des Fours Walderode v. the Czech Republic*, 30 October 2001 (Comm.no. 747/1997) para. 9.2.

³⁸ HRC, *Brok v. the Czech Republic*, 31 October 2001 (Comm.no. 774/1997) para. 9.

³⁹ Paolillo (1999) pp. 294-295.

⁴⁰ Eckart Klein, ‘Individual Reparation Claims under the International Covenant on Civil and Political Rights: The Practice of the Human Rights Committee’, in: Albrecht Randelzhofer & Christian Tomuschat (eds.), *State Responsibility and the Individual. Reparation in Instances of Grave Violations of Human Rights* (The Hague: Martinus Nijhoff Publishers 1999) pp. 27-41, see p. 36.

⁴¹ IACtHR, *Velásquez Rodríguez v. Honduras (Compensatory damages)*, 21 July 1989 (Series C, No. 7, Case No. 7920) paras. 25-26.

⁴² *Ibid.*, para. 26.

Inter-American Convention on Human Rights, which stipulates that when the Court has found that a Convention right has been violated, it:

shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

This provides a solid basis for remedial action by the Court, which it has indeed used. Both the Court and the Commission have often required states to take specific measures, including restitution where possible⁴³, to remedy violations.⁴⁴ They have thus gone beyond mere awards of compensation. Nevertheless, it should be noted that the Court has the discretion to award restitution or compensation (“if appropriate”).

The African system of human rights seems to follow suit. The African Commission of Human and Peoples’ Rights has accepted the principle of reparations. In spite of an absence of express authority in the African Charter on Human and Peoples’ Rights or in its own rules of procedure, it has been developing a practice of providing remedies, including declaratory relief, compensation and restitution.⁴⁵ The Protocol establishing a Court to the Charter system, does stipulate in Article 27 that if “the Court finds that there has been violation of a human or peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”

Generally, the practice of the global and regional human rights mechanisms dealt with here does not seem to clearly single out restitution as the preferred form of reparation. All mention restitution as a possibility, but only apply it when appropriate, in a tailor-made fashion. This could be explained by the fact that in the case of human rights violations restitution may be especially difficult or even impossible.⁴⁶ Still, I would argue, this depends on the specific right at stake: lost property or housing may very well be restored to the original owner or inhabitant. And a banned book may be made legal again.

A different indication militating against a *specific* right to restitution at the international level is that the award of reparation is at the discretion of the supervisory institution involved. Such institutions therefore function as instruments which can be used by the individual against the state to a limited extent only. The general obligation upon states under international law to provide redress for violations, preferably through *restitutio in integrum*, is not complemented by a concomitant possibility for an individual to enforce a right to reparation in the international arena when his human rights have been violated. This is an asymmetry that has not gone unnoticed in human rights forums and to which I will turn in the next section.

⁴³ Scott Davidson, *The Inter-American Human Rights System* (Aldershot: Dartmouth 1997) p. 216. For full references to the Court’s restitution case law, see: Douglas Cassel, ‘The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights’, in: K. De Feyter a.o. (eds.), *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations* (Antwerp: Intersentia 2005) pp. 191-223, see p. 197.

⁴⁴ Shelton (2005) pp. 285-289.

⁴⁵ Gino J. Naldi, ‘Reparations in the Practice of the African Commission on Human and People’s Rights’, *Leiden Journal of International Law* vol. 14 (2001) pp. 682-693, see p. 685.

⁴⁶ Paolillo (1999) pp. 304-305.

5. The Van Boven/Bassiouni Principles: an emerging right to restitution?

Towards the end of the 1980s, the Sub-Commission on Prevention of Discrimination and Protection of Minorities⁴⁷, a subsidiary body of the UN Human Rights Commission, started the quest for universal principles on reparations for victims of human rights victims.⁴⁸ In 1989 it asked one of its members, Theo van Boven, to prepare a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. The aim was to develop international standards to ensure that victims of these violations “have an enforceable right to restitution, compensation and rehabilitation, as appropriate, duly recognized at the international level.”⁴⁹ A process of drafting, research and redrafting started with the involvement of Van Boven, of independent expert Cherif Bassiouni from 1998 onwards, and of Chairperson-Rapporteur Alejandro Salinas, starting 2002.⁵⁰ Numerous drafts of basic principles and guidelines were submitted and commented upon by member states of the UN. Controversy centered on the scope and on the binding nature of the principles. The questions of scope were whether serious violations of humanitarian law should be included – which was eventually done – and whether the focus should be on gross and serious violations only or on all human rights’ violations. The first approach was taken. As to the issue of the binding nature, the United States, among others, insisted that the principles were aspirational and certainly not a statement of existing law.⁵¹ During the process, the Commission on Human Rights (CHR) called upon “the international community to give due attention to the right to restitution, compensation and rehabilitation for victims of grave violations of human rights.”⁵² According to Paolillo, the “true intention” of the CHR was to require states indirectly to fulfill their general obligation under international law to remedy unlawful acts.⁵³ This may be correct to the extent that states were asked to submit information on national reparation laws; the venue to create rights for individuals was apparently a focus on the state’s duty to legislate in this context. From such a perspective, the *Basic Principles* can be seen as a global guidebook indicating the framework within which national laws should fit. Although the perspective is seemingly that of the individual⁵⁴, the state’s duties are in reality the focal point of the *Basic Principles* – rights of individuals and duties of states being of course closely interrelated.⁵⁵

⁴⁷ Later called the Sub-Commission on Promotion and Protection of Human Rights.

⁴⁸ Shelton (2005) p. 144. Earlier, in 1985, the UN General Assembly had already recognized that victims of violations of fundamental rights should, where appropriate, receive restitution: UN GA Res. 40/34, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 29 November 1985, principle 8.

⁴⁹ Theo van Boven, ‘The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms’, in: Gudmundur Alfredsson & Peter Macalister-Smith (eds.), *The Living Law of Nations* (Kehl: N.P. Engel Verlag 1996) pp. 339-354, see p. 340.

⁵⁰ Shelton (2005) p. 146.

⁵¹ US Mission to Geneva, *General Comments of the United States on Basic Principles and Guideline on the Right to A Remedy for Victims of Violations of International Human Rights and Humanitarian Law* (press release), 15 August 2003.

⁵² E.g. CHR Resolutions 1994/35, 4 March 1994; 1995/34, 3 March 1995; 1996/35, 19 April 1996; 1997/29, 1 April 1997, as mentioned in: Paolillo (1999) p. 291.

⁵³ *Ibid.*

⁵⁴ Looking e.g. at the title of the *Guiding Principles*.

⁵⁵ A lot has been written on the relationship between duties and rights in the field of legal philosophy. It is often emphasized that the correlation between rights and duties is not an absolute one. A commonly used typology of rights was devised by the American legal philosopher Wesley Newcomb Hohfeld, who distinguished between claim-rights, liberty-rights, power-rights, and immunity-rights. Only the first category qualified, in his view, as a real legal right. In my view, restitution rights can be seen as belonging to that

The UN General Assembly finally adopted – without a vote – the *Basic Principles* on 16 December 2005, their official title being *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*.⁵⁶ This is a formal endorsement, but does not amount to a binding agreement. Nevertheless, the process has clearly put the issue on the international agenda.⁵⁷ The principles may start to serve as some form of soft law which may gradually impact national and international practice. Moreover, the fact that they were adopted by the General Assembly gave them increased political weight and may function as an element of emerging customary law on the issue.

Having considered how the principles came into existence we will now address their contents. The first part of the *Basic Principles* is much broader than its title suggests and stipulates the general obligation for states to respect and ensure respect for human rights and humanitarian law (principle 1) and to make their internal laws consistent with international norms in these fields, including “adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice” (2b) and “making available adequate, effective, prompt, and appropriate remedies, including reparation” (2c). The *Principles* thus include both kinds of remedies, procedural and substantive.

The second part specifies that this general duty includes equal and effective access to justice for victims “irrespective of who may ultimately be the bearer of responsibility for the violation” (3c) and effective remedies, including reparation. The second part seems a mere repetition of the first, but when one takes a closer look there is a difference to be seen: under principle 2, access to justice and reparations should be implemented in the domestic legal order. This is a duty of transposition for the direct benefit of the individual. Under principle 3, on the other hand, the emphasis is on these procedural and substantive remedies as part and parcel of the international obligation to respect human rights. Put differently, under principle 2 accountability is mainly downwards towards the individual, under principle 3 upwards, towards the international community. A positive aspect to be noted here is that access to justice should be guaranteed, whether the perpetrator is the state or another private party (or even unknown, one may add).

The third part of the guidelines concerns those violations that constitute crimes under international law and includes duties of investigation and prosecution (4 and 5). Part four stipulates that national statutes of limitations shall not apply if international obligations concerning those violations which are international crimes so provide (6). For all other violations of human rights and IHL national statutes of limitations “should not be unduly restrictive”(7). One cannot help but notice how weak this latter principle is: no binding

category, although it is not always crystal-clear by whom the duty of restitution is owed in cases of deprivation of the home by other actors than states. In the human rights context, and this is the perspective I adopt, the state in those instances can become involved through the concept of positive obligations – in the most practical sense the obligation to evict the illegal occupier of someone’s house. Although I will not further delve into these issues in the context of the present article, it is important to keep this broader context in mind. For further reading and references, see e.g. Elizabeth Ashford, ‘The Inadequacy of Our Traditional Conception of the Duties Imposed by Human Rights’, *Canadian Journal of Law and Jurisprudence* vol. 19 (2006) pp. 217-235; David Lyons, ‘The Correlativity of Rights and Duties’, in: Carlos Nino (ed.), *Rights* (Aldershot: Dartmouth 1992) pp. 45-59; Jack Mahoney, *The Challenge of Human Rights. Origin, Development, and Significance* (Oxford: Blackwell Publishing 2007) pp. 85-90; Carl Wellman, *The Proliferation of Rights. Moral Progress or Empty Rhetoric?* (Boulder: Westview Press 1999) pp. 7-8 and pp. 125-127.

⁵⁶ UN GA Res. 60/147.

⁵⁷ Shelton (2005) p. 144.

language is used (“should” instead of “shall”) and even within this exhortation – rather than obligation – states have a certain margin. This means that the access to justice and the right to reparations can be limited by states to a considerable extent, at least in time. Although it is understandable that societies dealing with past abuses want to close this past by way of a *punto final*⁵⁸ and to focus on the future, it would be very desirable from the perspective of human rights and thus of the victims to have minimum guarantees on this point. This would, to a larger extent than the *Principles* now provide for, preclude states from barring restitution claims for reasons of political expediency. Parts five and six respectively concern the definition of victims (8 and 9) and their humane treatment (10). Part seven stipulates, in principle 11, the actual core of the *Principles*: remedies “include the victim’s right to the following as provided for under international law: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; and (c) Access to relevant information concerning violations and reparation mechanisms.” The third right enumerated, access to information, can serve both substantive aims – helping the family of a disappeared person to know what has happened – as well as procedural, by informing victims of the specific ways in which they can use the remedies available. It should be noted that this principle again points to existing international law, thus not adding new norms.

Concerning the issue of reparation in particular, principle 15 stipulates that reparation “should be proportional to the gravity of the violations and the harm suffered” – again more a desirability (“should”) than a reflection of an obligation. Since implementation of reparation decisions has in the past often been a problem, states are exhorted to enforce these decisions. This entails the necessity to set up effective domestic mechanisms to that end (17). Full and effective reparation should be the starting point. This can include “restitution, compensation, rehabilitation, satisfaction and guarantees of non repetition” (18). Although mentioned as the first possibility, restitution is not given the same formal precedence as in the *Articles on State Responsibility*.⁵⁹ Again, objections by states may have been the main cause for this avoidance of strongly worded provisions.⁶⁰ Restitution itself is defined as restoring the victim to the situation before the violation occurred (19). Return to one’s place of residence and return of property are two of the explicitly mentioned examples of such restitution.

The *Principles* finally stipulate that their interpretation and implementation should be done without discrimination of any kind (25). They do in no way whatsoever restrict other existing norms of human rights or IHL and are without prejudice to a remedy and reparation for victims of all violations in these two fields of law (as opposed to the *Principles*’ scope of gross and serious ones) (26).

In conclusion, the *Principles* seem to contain somewhat less than what their bold title seems to promise. As argued here, they do in effect not only focus on establishing a right for individuals, but to a large extent on structuring existing obligations for states. In that respect their approach does not differ as much from the ILC Articles as one would expect. The weak language and the constant references to existing norms of international law seem to reflect that the concerns the UN member states voiced have been taken into account to such an extent that not much news remains. The *Principles* do not create nor even clearly stipulate

⁵⁸ Notion used in the Latin American context for amnesty laws which barred further prosecution of perpetrators of human rights violations.

⁵⁹ Marten Zwanenburg, ‘The Van Boven/Bassiouni Principles: An Appraisal’, *Netherlands Quarterly of Human Rights* vol. 24 (2006) pp. 641-668, see p. 666.

⁶⁰ Shelton (2005) p. 150.

a general right to restitution, be it only for the reason that their scope is limited to the gravest of violations.

Beyond these points of criticism, the *Principles* are undoubtedly a major step forward. First, they take the victim of violations as their point of departure. Not the violations of rights as such, but the needs (and rights) of the victim are the central concern of the *Principles*.⁶¹ This focus is reflected not just in the *Principles*' wording and rhetoric, but also by the fact that they compile and structure a broad range of victim-related standards.⁶² Secondly, they can play a very important role in providing guidance for the practice of states, international organizations and others. A salient example is the Bosnian Human Rights Chamber which implicitly relied on them.⁶³

The genesis of the *Principles* engendered a broader discussion on reparations. A legal approach to reparations, as opposed to a political one in the form of a general settlement, has been said to be inappropriate. It has been argued that a right to reparation may be effective and adequate only in a stable state under the rule of law. But in the wake of catastrophes such as armed conflict, as this line of reasoning suggests, requirements of justice should be weighed against what a society is able to handle.⁶⁴ The means of reparation may not be available to poor states with weak governments emerging from conflict.⁶⁵ These are practical difficulties of potentially enormous extent that have to be reckoned with. Nevertheless, these arguments can be countered by the fact that reparations "may be the most tangible and visible expression of both acknowledgement and change"⁶⁶ after periods of large-scale human rights violations. In that respect they contribute to the reconstruction and reconciliation of the afflicted society. Arguably a legal approach is better than a political compromise to achieve this goal. Moreover, even if one accepts that the burden of an individual right to reparation on weakened states can be too heavy, this argument should not rule out the possibility of such a right altogether. I would argue that it depends on the human right and situation involved. In the case of housing restitution the financial and practical burden is lessened with each house that has not been destroyed. Each of these can be part of a restitution process without the need to resort exclusively to expensive and full compensation. Maybe it is here that one of the main merits of the *Basic Principles* is to be found; they emphasize a legal approach, but leave room for specific application in specific national situations and for specific rights. In that respect their relative weakness could be their strength.

6. Reparations under the European Convention of Human Rights

After having surveyed restitution as a remedy under international law and under human rights specifically, I will now assess the situation in the European context. I will elaborate

⁶¹ Zwanenburg (2006) p. 646.

⁶² *Ibid.*, 667.

⁶³ Manfred Nowak, 'Reparation by the Human Rights Chamber for Bosnia and Herzegovina', in: K. De Feyter a.o. (eds.), *Out of the Ashes. Reparation for Victims of Gross and Systematic Violations* (Antwerp: Intersentia 2005) pp. 245-288, see p. 287.

⁶⁴ Christian Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law', in: Randelzhofer & Tomuschat (1999) pp. 1-25, see p. 21.

⁶⁵ Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas', *Hastings International and Comparative Law Review* vol. 27 (2004) pp. 157-219, see p. 185-186; Tomuschat (2002) p. 174; Shelton (2005) p. 389.

⁶⁶ Roht-Arriaza (2004) p. 200.

upon the possibilities for restitution under the European Convention. As a consequence of the subsidiary nature of the Strasbourg system, the Convention puts the primary obligation to provide remedies at the national level. Article 13 ECHR guarantees the right to an effective remedy to everyone who has an arguable claim⁶⁷ that his or her Convention rights have been violated “notwithstanding that the violation has been committed by persons acting in an official capacity.” This claim should be decided by a judicial or other authority which is able to provide redress if appropriate.⁶⁸ The protection Article 13 offers can thus be said to be mainly of a procedural nature. Since in this article the focus is on the substantive remedies, I will not elaborate on this ECHR provision.⁶⁹ What is of more interest for the present inquiry, is whether the Court itself can and will provide substantive remedies, specifically restitution, once a human rights complaint has found its way to Strasbourg. The Court’s power to provide for reparations is laid down in Article 41 which stipulates:

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.

The article shows that the primary obligation to provide reparation lies with the state; it should provide redress for breaches of the Convention.⁷⁰ From that perspective Article 41 conforms to the general principle of international law that the state should be given an opportunity to provide redress before international reparation claims can be made.⁷¹ However, this does not entail that applicants in whose case the Court has found a violation, have to exhaust domestic remedies for a second time before they can claim just satisfaction in Strasbourg.⁷² What it does mean is that the Court’s role under Article 41 is of a subsidiary nature: its purpose in this context is to “provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied.”⁷³ The Court’s decisions on just satisfaction are binding on the state parties since these have, in acceding to the Convention, undertaken to abide by the Court’s judgments. The Committee of Ministers supervises the execution of these judgments.⁷⁴

Under the ECHR ‘just satisfaction’ has a broader meaning than satisfaction under the *Articles on State Responsibility*. The Court has awarded a broad range of just satisfaction: declaratory judgments, awards of pecuniary and of non-pecuniary damages, costs and expenses, and sometimes very specifically restitution. In the first decades of its existence the Court held that its powers to afford just satisfaction were limited to forms of monetary compensation and to declaratory judgments. This position found firm ground in the drafting process of the Convention. When the idea of a European Court of Human Rights was developed, it was originally meant to have the power to take punitive or administrative action

⁶⁷ ECtHR, *Klass a.o. v. Germany*, 6 September 1978 (Appl.no. 5029/71) para. 64.

⁶⁸ ECtHR, *Silver a.o. v. The United Kingdom*, 25 March 1983 (Appl.nos. 5947/72 a.o.) para. 113.

⁶⁹ See section 8.4 for more on Article 13 ECHR.

⁷⁰ ECtHR, *Z. a.o. v. The United Kingdom*, 10 May 2001 (Appl.no. 29392/95) para.103.

⁷¹ D.J. Harris, M. O’Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths 1995) p. 683.

⁷² E.g. ECtHR, *De Wilde, Ooms & Versyp v. Belgium* (just satisfaction), 10 March 1972 (Appl.nos. 2832/66 a.o.) paras. 15-16; ECtHR, *Barberà, Messegué & Jabardo v. Spain* (just satisfaction), 13 June 1994 (Appl.nos. 10588/83 a.o.) para. 17.

⁷³ ECtHR, *Scovazzi & Giunta v. Italy*, 13 July 2000 (Appl.nos. 39221/98 and 41963/98), para. 250.

⁷⁴ Article 46 ECHR.

vis-à-vis the national wrongdoer and to order the annulment or amendment of national acts. Since the Committee of Experts drafting the Convention was not in favour of this, it decided to limit the powers of the Court in this respect.⁷⁵

In its early judgments, the Court often restricted itself to a declaratory judgment in cases in which it established violations of Convention rights. This shows that the finding of a violation may of itself constitute just satisfaction.⁷⁶ During the 1980s the Court increasingly awarded monetary compensation as just satisfaction. The amounts of compensation were simultaneously on the rise.⁷⁷ Requests for reparations other than monetary relief were consistently rejected by the Court.⁷⁸ In the *Gillow* case, for example, in which the applicants sought to have their residence qualifications on the island of Guernsey restored, the Court held that the Convention did not allow it to make an order of this kind.⁷⁹ The general stance it took was that state parties, although bound by the Court's judgments under Article 46⁸⁰, could themselves choose the means of implementing them in their own legal orders.⁸¹

The unwillingness of the Court to say anything on how a judgment should be implemented gradually changed in the 1990s. The first important step was taken in the case of *Papamichalopoulos* (1995), which concerned land expropriation in Greece contrary to Article 1 of Protocol 1 (P1-1). In its judgment on just satisfaction the Court formulated the principle that when it found a breach of the Convention the defendant state was under a legal obligation to “put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.”⁸² It added that, in spite of state parties' freedom to choose how to implement judgments, “[i]f the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself.”⁸³ Interestingly, the Court lit the torch to show which path the state should follow. The torch, however, was explicitly not its own power or authority. Rather, I would argue, the Court implicitly referred to the general norm under international law that restitution is the preferred remedy in case of a breach. In doing so, it efficiently pointed the attention to a rule generally incumbent upon states without having to expect the criticism that it was acting out of bounds.

⁷⁵ Montserrat Enrich Mas, ‘Right to Compensation under Article 50’, in: R.St.J. Macdonald, F. Matscher & H. Petzold (eds.), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers 1993) pp. 775-790, see pp. 777-778; Harris, O’Boyle & Warbrick (1995) pp. 683-684; Shelton (2005) pp. 280-281.

⁷⁶ Gray (1987) p. 155.

⁷⁷ Jean-François Flauss, *La satisfaction équitable dans le cadre de la Convention européenne des droits de l’homme – perspectives d’actualité* (Saarbrücken: Europa-Institut der Universität des Saarlandes 1995) p. 4. It should be noted that one of the elements that the Court takes into account when assessing the amount of compensation is the temporal scope of the ECHR: a state is not required to compensate for problems which occurred before the entry into force of the Convention, since those cannot be characterized as violations under the Convention. See e.g. ECtHR, *Weissman et autres c. Roumanie*, 24 May 2006 (Appl.no. 63945/00) para. 79.

⁷⁸ Shelton (2005) p. 281; Tomuschat (2002) p. 163.

⁷⁹ ECtHR, *Gillow v. The United Kingdom* (just satisfaction), 14 September 1987 (Appl.no. 9063/80) para. 9. Another example, among many others, is: ECtHR, *McGoff v. Sweden*, 26 October 1984 (Appl.no. 9017/80) para. 31.

⁸⁰ Before the entry into force of Protocol 11, which reformed the Convention’s supervisory system (1 November 1998), this was Article 53.

⁸¹ ECtHR, *Campbell & Cosans v. The United Kingdom* (just satisfaction), 23 March 1983 (Appl.nos. 7511/76 & 7743/76) para. 16.

⁸² ECtHR, *Papamichalopoulos a.o. v. Greece* (just satisfaction), 31 October 1995 (Appl.no. 14556/89) para. 34.

⁸³ *Ibid.* See also: Shelton (2005) p. 199.

The Court has rarely indicated restitution as the preferred remedy. Sometimes it has indicated the re-opening of trial proceedings in relation to Articles 5 and 6 ECHR.⁸⁴ In a case concerning unlawful detention, the Court held that “by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it” and that the state thus had to “secure the applicant’s release at the earliest possible date.”⁸⁵ A case on restitution and property issues is the judgment of *Brumărescu v. Romania* (2001). The case concerned deprivation of an apartment building in violation of P1-1. The applicant had received no adequate compensation nor had his efforts to recover ownership been successful. The Court specifically indicated the restitution of the building (“should” was the wording used) and established the sum of compensation to be paid by the state if restitution would prove impossible.⁸⁶ The judgment has been criticized for offering the state a possibility to disobey the restitution order by providing compensation.⁸⁷ However, the Court’s reasoning is in harmony with international law by ordering restitution as the primary, not as the exclusive, remedy. In addition, the applicant himself had indicated he was willing to consider compensation if restitution would be impossible to implement. In this particular case, the Court’s approach is both pragmatic and just, especially considering the fact that ownership of one of the apartments had been obtained by another individual in good faith. The applicant himself lived in one of the other apartments. Partial restitution and partial compensation – the latter for the apartment of the third party – thus makes sense.

A few years earlier, in 1998, the Court had already provided some clarification on restitution as reparation, in the Turkish housing destruction case of *Akdivar*. The Court held that if *restitutio in integrum* was impossible, as in the case at hand, “the respondent States are free to choose the means whereby they will comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard.”⁸⁸ Again, a reflection of general international law: the state is free to choose the way of reparation, with restitution being the preferred method. Paradoxically, through these judgments the Court did give to some extent an indication how to remedy – restitution as the primary method – while at the same time preaching its own impossibility to order it. These judgments could thus be called “groundbreaking”⁸⁹, but they break this new ground only in disguise.

Later, in *Scozzari and Giunta* (2002), the Court put even more emphasis on what could be the appropriate remedy. It held that a state party’s duty to abide with the Court’s judgments under Article 46 does not only mean that the state has to:

⁸⁴ See e.g. ECtHR, *Somogyi v. Italy*, 18 May 2004 (Appl.no. 67972/01) para. 86; ECtHR, *Stoichkov v. Bulgaria*, 24 March 2005 (Appl.no. 9808/02) para. 81.

⁸⁵ ECtHR, *Assanidze v. Georgia*, 8 April 2004 (Appl.no. 71503/01) paras. 202-203.

⁸⁶ ECtHR, *Brumărescu v. Romania* (just satisfaction), 23 January 2001 (Appl.no. 28342/95) paras. 22-23. A few months later, in another case in which it had found a violation of article 5, the Court held that the prolonged detention of the applicants would “necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent States’ obligation under Article 46 § 1 of the Convention to abide by the Court’s judgment.”: ECtHR, *Ilaşcu a.o. v. Moldova & Russia*, 8 July 2004 (Appl.no. 48787/99) para. 490.

⁸⁷ Tomuschat (2002) p. 165. The same criticism could be leveled against later comparable cases, such as *Rabinovici*, a case on post-communist housing restitution. In that case, like in *Brumărescu*, the Court indicated that restitution would place the applicant as much as possible in the situation as it had existed before the human rights violation occurred: ECtHR, *Rabinovici c. Roumanie*, 27 July 2006 (Appl.no. 38467/03) para. 42.

⁸⁸ ECtHR, *Akdivar a.o. v. Turkey* (just satisfaction), 1 April 1998 (Appl.no. 21893/93) para. 47. See also, e.g., ECtHR, *Orban v. Turkey*, 18 June 2002 (Appl.no. 25656/94) para. 451.

⁸⁹ Tomuschat (2002) p. 165.

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.⁹⁰

Apart from the obligation to comply with the Court's judgments on reparations, there is thus a parallel obligation of cessation of the violation; yet another reference to general international law. The combination of freedom and compatibility in this quotation however begs the question of how states should do this. Before long precisely this problem was brought to the Court's attention by the state parties.

The cautious steps of the Court outlined here reflect the need to change the traditional course. This need arose from the enormous increase in applications reaching the Court. A considerable number of these concern repetitive cases: applications relating to the same problem. If in every single of these cases the Court would continue only to award compensation without ordering specific structural changes, it risked getting submerged by the flood of cases coming from the state parties. These states, for their part, increasingly felt the need for guidance on how to change national acts or situations that had been found to contravene the ECHR. In 2004 these combined pressures led to a resolution by the Committee of Ministers in which it invited the Court:

as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.⁹¹

The Strasbourg judges took up the challenge a month later in the *Broniowski* judgment, a so-called pilot case.⁹² Pilot cases address structural or specific problems with so many potential victims that a high number of repetitive cases threatens to flood the Court.⁹³ *Broniowski* concerned the property rights of a large group of Poles who had lost their land due to border changes after the Second World War. The Court held that P1-1 had been violated and that, since this concerned a systematic defect in the Polish legal order, the measures to be adopted by Poland should remedy this defect. The Court indicated that Poland either had to “remove any hindrance to the implementation of the right of the numerous persons affected by the situation (...) or provide equivalent redress in lieu.”⁹⁴ It was the first case in which the Court gave specific indications to remedy a systemic problem. In the ensuing friendly settlement

⁹⁰ ECtHR, *Scovazzi & Giunta v. Italy*, para. 249.

⁹¹ Committee of Ministers, *Resolution on judgments revealing an underlying systemic problem*, 12 May 2004 (Res(2004)3). See also: Shelton (2005) pp. 198-199.

⁹² ECtHR, *Broniowski v. Poland*, 22 June 2004 (Appl.no. 31443/96).

⁹³ Elisabeth Lambert-Abdelgawad, ‘La Cour européenne au secours du Comité des ministres pour une meilleure exécution des arrêts “pilote”’, *Revue trimestrielle des droits de l’homme* vol. 16 (2005) pp. 203-224, see p. 204. The Court has decided very few pilot cases yet: ECtHR, *Sejdovic v. Italy*, 10 November 2004 (Appl.no. 56581/00); ECtHR, *Hutten-Czapka v. Poland* (chamber judgment), 22 February 2005 (Appl.no. 35014/97); ECtHR, *Hutten-Czapka v. Poland* (Grand Chamber), 19 June 2006 (Appl.no. 35014/97).

⁹⁴ ECtHR, *Broniowski*, para. 194.

judgment, the Court did not merely assess the settlement between the applicant and the state, but also the general measures taken by Poland to remedy the systemic defect. The reason given was that “it is evidently desirable for the effective functioning of the Convention system that individual and general redress should go hand in hand.”⁹⁵

The Court has thus, circumstances permitting, slowly been moving towards more specific indications of judgment implementation. This move has its limits, however. In the case of *Hirst* on voting rights of detainees, the British government specifically referred to the problem of knowing which system would be in line with the European Convention. The Court, however, refused to indicate which restrictions on voting rights would be compatible with the ECHR. In an attempt to indicate the boundaries of its own judicial activism, the Court reiterated its stance that the choice on how to implement judgments remained with the state, under the supervision of the Committee of Ministers. The Court added that it could give more precise recommendations only in two types of cases. First, cases in which it had found a systemic violation (the *Bronionski*-type cases) and, secondly, in exceptional cases in which “the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure.” But as long as the state parties to the Convention address a matter in different ways, the Court stated that it would not go beyond testing whether the states had remained within the allowed margin of appreciation.⁹⁶

7. Reparation as a right or a mere probability?

While the Court has at times become more specific in its reparation judgments, it is not always clear when the Court will award anything at all and when not. This part of the Court’s case law has received a considerable amount of criticism for its lack of clarity, reasoning, and legal certainty.⁹⁷ The award of just satisfaction even seems to depend on the character and personality of the applicant or, put more harshly, on the degree of sympathy the Court has for an applicant.⁹⁸ And whenever the damages cannot be calculated or when the applicant’s calculation is not reasonable, the Court awards just satisfaction based on the principle of equity.⁹⁹ Can an individual then have any guarantee that he will receive restitution or compensation or is an application to the ECHR a mere lottery ticket? Again, it has to be stressed that the Court has discretion in deciding to award just satisfaction, as the wording “if necessary” illustrates. Nevertheless, the requirements the Court has used explicitly and implicitly for awarding just satisfaction can give some guidance.

The first requirement is laid down in Article 41 explicitly: “if the internal law of the High Contracting Party concerned allows only partial reparation to be made”, then just satisfaction is a possibility. The second requirement is that the applicant must himself claim

⁹⁵ ECtHR, *Bronionski v. Poland* (friendly settlement), 28 September 2005 (Appl.no. 31443/96) para. 36.

⁹⁶ ECtHR, *Hirst v. the United Kingdom (No. 2)* (Grand Chamber), 6 October 2005 (Appl.no. 74025/01) paras. 83-84.

⁹⁷ Claire Ovey & Robin White, Jacobs and White, *The European Convention on Human Rights* (Oxford: Oxford University Press 2006, 4th Ed.) p. 491; Matti Pellonpää, ‘Individual Reparation Claims under the European Convention on Human Rights’, in: Randelzhofer & Tomuschat (1999) pp. 109-129, see p. 113.

⁹⁸ Enrique Mas (1993) p. 789; Gray (1987) p. 156; Shelton (2005) p. 352.

⁹⁹ Pieter van Dijk a.o., *Theory and Practice of the European Convention on Human Rights* (Antwerp: Intersentia 2006, 4th ed.) p. 262.

satisfaction. The Court will normally not award such satisfaction *ex officio*¹⁰⁰, with the possible exception of questions of public policy being involved.¹⁰¹ Interestingly, unlike under traditional international law, in the Convention system the individual has the possibility to claim before a court on the international level. Although human rights create obligations *erga omnes*¹⁰², towards all states, and the Convention system offers the possibility of inter-state claims, this possibility is rarely used for obvious reasons of political sensitiveness. Moreover, most of the complaints under the ECHR stem from individuals complaining against their own state of nationality. An exclusion of an individual possibility to claim would lead to the absurd result in which the state of nationality would have to claim against itself in order to obtain damages on behalf of the injured individual. Thus Article 41 should be read in conjunction with Article 34, the right to individual application. The victim in the latter article coincides with the injured party in the former article.¹⁰³

An injured party presupposes an injury and a violation. A violation of a substantive Convention article is indeed the third requirement. Only if the Court has found a violation in the judgment (part) on the merits, does Article 41 come into play.¹⁰⁴ The fourth requirement is that the applicant must have suffered damage, either pecuniary or non-pecuniary. As pecuniary damage the Court has recognized reductions in the value of property, loss of earnings (both past and future), fines, and loss of opportunities. Non-pecuniary damage may involve “reparation for the anxiety, inconvenience and uncertainty caused by the violation, and other non-pecuniary loss.”¹⁰⁵ Although damage must normally be shown by the applicant, the Court has mostly applied lenient review in cases of non-pecuniary damage.¹⁰⁶ In the latter cases the Court can award just satisfaction “if it considers that it is reasonable to assume that an applicant has suffered injury requiring financial compensation.”¹⁰⁷ This relative leniency has made awards for non-pecuniary damage much more common than for pecuniary losses.¹⁰⁸ Fifthly, a causal link between violation and injury has to be proven. If this link cannot be shown, then the Court will award no just satisfaction.¹⁰⁹ The standard of proof is very high and many applications for just satisfaction fail to meet this requirement.¹¹⁰

Even applicants meeting all these requirements are not certain of obtaining just satisfaction. The ultimate discretion of the Court is to be found in the last requirement: the Court assesses whether the award is necessary. It is here that the Court’s case law is not very predictable. Nevertheless, a number of factors seem to be taken into account when deciding

¹⁰⁰ Harris, O’Boyle & Warbrick (1995) p. 684; Pellonpää (1999) p. 112.

¹⁰¹ ECtHR, *Sunday Times v. The United Kingdom* (just satisfaction), 6 November 1980 (Appl.no. 6538/74) para. 14. One such exception emerged in 2005. In the Russian case of *Mayzit* the Court found a violation of article 3 ECHR, but the applicant had not submitted any claims for just satisfaction. Nevertheless, the Court held that since the violation concerned an absolute right, the Court found it “possible to award the applicant 3,000 euros by way of non-pecuniary damage”: ECtHR, *Mayzit v. Russia*, 20 January 2005 (Appl.no. 63378/00) para. 88.

¹⁰² Cassese (2005) p. 262.

¹⁰³ Enrich Mas (1993) p.776.

¹⁰⁴ Pellonpää (1999) p. 112.

¹⁰⁵ See e.g. ECtHR, *Comingersoll S.A. v. Portugal*, 6 April 2000 (Appl.no. 35382/97) para. 29.

¹⁰⁶ Harris, O’Boyle & Warbrick (1995) pp. 686-687. See e.g. ECtHR, *Abdulaziz, Cabales & Balkandali v. The United Kingdom*, 28 May 1985 (Appl.nos. 9214/80 a.o.) para. 96.

¹⁰⁷ E.g. ECtHR, *Romanov v. Russia*, 20 October 2005 (Appl.no. 63993/00) para. 117.

¹⁰⁸ Shelton (2005) p. 319.

¹⁰⁹ E.g. ECtHR, *Quaranta v. Switzerland*, 24 May 1991 (Appl.no. 12744/87) para. 43, as mentioned in: Van Dijk & Van Hoof (2006) p. 261. See also: Ovey & White (2006) pp. 491-492.

¹¹⁰ Shelton (2005) p. 323, including relevant case law references.

on necessity. First of all, the nature of the violation of the Convention is important.¹¹¹ If the breach involved is not of a very serious nature, it is more likely that the Court will hold that the finding of the violation constitutes in itself just satisfaction. In the opposite case, when the Court has held that a violation is very grave, monetary just satisfaction will often be awarded.¹¹² Another factor of importance is the earlier mentioned sympathy the Court has for an applicant. The applicant's conduct and the criminal offences he or she has committed are sometimes also taken into account. Since this factor is so subjective, no clear conclusions for satisfaction or against it can be drawn from this. Finally, damages are more often awarded in "routine and non-controversial substantive violations or procedural violations where there is a pattern of non-compliance."¹¹³ When the Court agrees on the merits instead of being split, the chances are thus better than otherwise. Additionally, if an applicant is not the first complaining about a situation in which the Court earlier found violations, chances are equally on the rise.

All of the above shows that many hurdles have to be taken by an individual applicant before obtaining just satisfaction in the form of more than a simple declaratory judgment. It is certain that an applicant does not have an "automatic" right to an indemnity by the Court.¹¹⁴ This is caused by the Court's discretion, which is incorporated into Article 41.¹¹⁵ To increase legal certainty for both the applicants and the respondent states, it would be helpful if the Court's judgments on just satisfaction would be argued more thoroughly. This may also increase the deterrent function of the Court's judgments and thus possibly make state parties more prone to offer a remedy on the national level.¹¹⁶ For their part, applicants can contribute to their own chances by presenting more detailed arguments concerning the link between violation and damage and concerning the nature – and in the case of compensation, amount – of reparation they ask for. The necessity of this to ensure the future of the Strasbourg system is felt more and more with the rising burden of the case load. The European Court "will increasingly need to rely" on the arguments of the parties.¹¹⁷

Nonetheless, as argued, there is a duty on the state to remedy violations of the Convention within its own legal order as far as possible. In principle, the ECHR therefore does not leave an individual whose rights have been violated without any relief. Some of the hurdles reflect international law: there has to be a wrongful act under the Convention attributable to the state. In such a case the state should remedy the wrong done towards the individual. The most appropriate reparation, if possible, is *restitutio in integrum*. If an applicant can show that the violation caused him or her damages which are not compensated on the national level, the Court is *likely* though not guaranteed to afford satisfaction – especially in case of pecuniary damage, when the amount of damage done often lends itself to calculation.

¹¹¹ Harris, O'Boyle & Warbrick (1995) p. 685.

¹¹² Gray (1987) p. 156. See e.g. ECtHR, *Akdivar v. Turkey* (just satisfaction), 1 April 1998 (Appl.no. 21893/93) para. 37.

¹¹³ Shelton (2005) p. 296.

¹¹⁴ Walter van Gerven, 'Remedies for Infringements of Fundamental Rights', in: Gert Brüggemeier (ed.), *Transnationalisierung des Rechts* (Baden-Baden: Nomos 2004) pp. 67-88, see p. 79.

¹¹⁵ Such discretion and flexibility in application can also be found in the practice of other international human rights institutions: Heidi Rombouts a.o., 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights', in: De Feyter a.o. (2005) pp. 345-503, see p. 451.

¹¹⁶ See for an argument that punitive damages may be the best way to ensure state compliance: Laplante (2004). The Court has so far always rejected claims for punitive damages though: ECtHR, *Selçuk & Asker v. Turkey*, 24 April 1998 (Appl.nos. 23184/94 a.o.) para. 119; ECtHR, *Cable a.o. v. the United Kingdom*, 18 February 1999 (Appl.nos. 24436/94 a.o.) para. 30. See also: Shelton (2005) p. 360.

¹¹⁷ Shelton (2005) p. 353.

For non-pecuniary damage the Court's discretion is more important and more likely to distort any strong expectations.¹¹⁸ Just satisfaction is not a right, but neither is it a simple lottery ticket.

8 Conclusion

Three trails of restitution issues have been followed in this article: (1) the place of restitution among other reparations under international law; (2) restitution in the context of human rights; and (3) restitution as a form of reparation under the ECHR. As to the first trail, it has been shown that international law puts a twofold obligation on states. First, an obligation of cessation of the wrongful act and, secondly, a duty to make full reparation for injuries caused. Since reparation should as far as possible wipe out the consequences of the act and restore the situation as it would have been had the act not been committed, restitution is the preferred remedy under international law. Although its use is rare in practice, this does not destroy its theoretical primacy.

The second trail started out with the argument that it is theoretically possible and necessary to transpose the inter-state rules on state responsibility for wrongful acts to legal relationships between states and individuals, the main beneficiaries of human rights. The practice of international human rights only reflects this to a certain extent. Although international human rights bodies have all accepted the possibility of restitution as a remedy, they have not clearly pinpointed it as the preferred one. This can be explained by the fact that for many human rights violations restitution is not a possibility. An individual can obtain restitution at the international level, but he has no right to it, since these bodies have discretion in deciding whether to award reparation. Within the United Nations efforts have been undertaken to resolve this asymmetry of state duty without concomitant individual right. The *Basic Principles*, however, do not entirely solve the problem. In spite of their focus on the victim, their contents still very much reflect state obligations without clearly giving restitution formal precedence. Moreover, the formulations used are at some points weak. Nevertheless, the *Principles* are very commendable for their legal approach to reparations. They form a key document that brings together international standards on reparation rights of victims. Finally, and most importantly, they may gradually impact national and international practice.

Finally, the third trail led to the practice developed by the European Court of Human Rights. Within the ECHR system the primary obligation of reparation for violations of the Convention is to be found at the national level. If such reparation is only partially possible at that level, the Court can afford just satisfaction. Like its international peers, the Court has a level of discretion in this matter. It has used this discretion to act very cautiously and for decades the Court was reluctant to go beyond declaratory judgments and monetary compensation. Only in the 1990s, partly under the pressure of the state parties to provide more clarity, the Court started to indicate in some cases which specific form of reparation would be the most appropriate. Although it kept emphasizing that states could choose the means of implementation of judgments, it has developed the general principle that states should provide *restitutio in integrum* whenever possible – a clear reflection of general international law. The tool of pilot judgments has strengthened this development by providing specific guidance in cases of large-scale violations.

¹¹⁸ Pellonpää (1999) p. 113.

The changes in the Court's position have not meant that an applicant has the guarantee to receive just satisfaction, let alone restitution specifically. The judgments indicating restitution have been few and far in between. Interestingly though, these cases mostly concern property disputes. This shows that although in general restitution may not constitute possible reparation for all human rights violations, it can be in relation to certain specific human rights. In addition, better argued applications *and* judgments could prove to be an important impetus in this direction.

The network of rules on restitution in international and human rights law outlined here has not yet grown into a coherent whole. The duties of states are to a large extent established, but the rights of individuals are not. Although specific human rights regimes such as the ECHR offer a right to claim just compensation, there is no directly enforceable right to reparation as such. The European Court has the power to issue binding judgments and has held that on the national level *restitutio in integrum* should be strived for, but it has not itself ordered restitution in a clearly binding way. A recent trend in its case law is that it *indicated*, on occasion, that restitution was the preferred or only possible reparation. Thus the formally professed freedom of implementation for the state has in some cases been subject to a certain degree of confinement. However, on the international level, the duty for the one, the state, is not yet an enforceable right for the other, the individual. In spite of slow but hopeful developments within the ECHR system, for the foreseeable future much will still depend on the systems for redress available at the national level. One side of the restitution coin is thus clearly shining, but the other side is still in need of polishing.