

REDRESS

Ending Torture. Seeking Justice for Survivors

**REHABILITATION AS A FORM
OF REPARATION UNDER
INTERNATIONAL LAW**

December 2009

87 Vauxhall Walk
London, SE11 5HJ
United Kingdom

Tel: +44 (0)20 7793 1777 Fax: +44 (0)20 7793 1719

Web: www.redress.org

Registered Charity No.: 1015786

This Discussion Paper was researched and written by Dr. Clara Sandoval Villalba, Senior Lecturer at the School of Law, University of Essex and Consultant to REDRESS and edited by Carla Ferstman

© The Redress Trust

This Publication is available in English, French, Spanish and Arabic and is available in hard copy and electronic (soft) copy, from REDRESS' website. For further information on this or other REDRESS publications, please contact REDRESS or visit our website: www.redress.org.

We are very grateful to the European Initiative for Democracy and Human Rights for funding this research.

Table of Contents

Introduction	5
1. The meaning of rehabilitation.....	8
2. The right to rehabilitation under international human rights law.....	11
2.1 Rehabilitation under UN human rights treaty law	11
<i>The International Bill of Rights</i>	<i>11</i>
<i>Other UN human rights treaties before the 1980s.....</i>	<i>12</i>
<i>The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i>	<i>12</i>
<i>Other UN human rights treaties post CAT</i>	<i>13</i>
2.2 Other UN instruments	15
<i>The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power</i>	<i>17</i>
<i>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</i>	<i>18</i>
<i>Conclusion</i>	<i>20</i>
3. Rehabilitation under regional human rights treaty law	21
3.1 The Council of Europe	22
3.2 The Organisation of American States.....	22
3.3 The African Union	24
<i>Conclusion</i>	<i>25</i>
4. The right to rehabilitation in international legal practice	26
4.1 As a reparation measure awarded or considered by some UN bodies and special procedures	26
<i>The Human Rights Committee</i>	<i>26</i>
<i>UN Committee Against Torture.....</i>	<i>29</i>
<i>The Committee on the Elimination of all Forms of Discrimination Against Women.....</i>	<i>32</i>
<i>Special Rapporteur on Torture.....</i>	<i>32</i>
<i>Special Rapporteur on the Right to Health</i>	<i>34</i>
<i>Special Rapporteur on Violence against Women</i>	<i>38</i>
<i>The UN Voluntary Fund for Victims of Torture</i>	<i>43</i>
4.2 Regional human rights Courts.....	45
<i>European Court of Human Rights.....</i>	<i>45</i>
<i>Inter-American Court of Human Rights</i>	<i>48</i>
Conclusions – Facing the challenges of rehabilitation	58
Key Recommendations.....	64
1. To further clarify the existing gaps under international law.....	64
2. The need to clarify the legal meaning of rehabilitation	64
3. To clarify the meaning of rehabilitation under international law.....	64
4. To impact the jurisprudential treatment of rehabilitation by regional human rights courts and relevant treaty monitoring bodies	65

The Principle of *Restitutio ad integrum* under international law calls for the redress of the 'life plan' of victims of serious human rights and humanitarian law violations. This justifies the need for rehabilitation as a form of reparation, since victims have a right to reconstruct, as far as possible, their life.

The concept of a "life plan" is akin to the concept of personal fulfillment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself. Strictly speaking, those options are the manifestation and guarantee of freedom. An individual can hardly be described as truly free if he does not have options to pursue in life and to carry that life to its natural conclusion. Those options, in themselves, have an important existential value. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this Court cannot disregard.

[...]

It is reasonable to maintain, therefore, that acts that violate rights seriously obstruct and impair the accomplishment of an anticipated and expected result and thereby substantially alter the individual's development. In other words, the damage to the "life plan", understood as an expectation that is both reasonable and attainable in practice, implies the loss or severe diminution, in a manner that is irreparable or reparable only with great difficulty, of a person's prospects of self-development. Thus, a person's life is altered by factors that, although extraneous to him, are unfairly and arbitrarily thrust upon him, in violation of laws in effect and in a breach of the trust that the person had in government organs duty-bound to protect him and to provide him with the security needed to exercise his rights and to satisfy his legitimate interests.¹

¹ Inter-American Court of Human Rights, *Loayza Tamayo v. Peru*, Judgment on Reparations and Costs, 27 November 1998, paras. 148-150.

Introduction

As intended, the policy of rape has had profound long-term consequences for the victims. A substantial number of the women became pregnant as a result of the rape, creating unbearable tensions with their surviving relatives who frequently disowned them and their children. Most important of all, HIV/AIDS is widespread amongst female survivors, who must also contend with ill-health, the psychological repercussions of the trauma they experienced, poverty, social isolation and the stigma of rape and HIV/AIDS.²

We cannot be indifferent to the consequences of human rights violations and situations like the ones just described, wherever they may take place - in Rwanda, the Democratic Republic of Congo, Peru, Colombia or anywhere else. These violations destroy the dignity of the person and have life-long repercussions for the victim, the next of kin and very often, the community.

Legal responses to such atrocities have gained momentum with the recognition of the right to redress for victims of torture and, particularly, of rehabilitation as a form of reparation in Article 14 of the 1985 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) which provides that “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.*”³

The Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles) further clarify this right. These Principles indicate the types of reparation that may be needed, depending on the particular circumstances of the case, to afford adequate and effective reparation to victims, explicitly recognising five forms of reparation for such violations: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁴

Nevertheless, despite the fact that international human rights law is beginning to respond to the harm experienced by persons who suffer serious human rights violations such as torture, “rehabilitation” continues to be an elusive form of reparation. It is unclear what exactly it means, to whom it applies and for what duration (many human rights violations have life-

² REDRESS and African Rights, *Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes*, November 2008, p. 94. Available at: www.redress.org/reports/Rwanda%20Survivors%2031%20Oct%2008.pdf.

³ CAT, Treaty Series, vol. 1465, 10 December 1984, p. 85.

⁴ General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147, 16 December 2005, para. 18.

long and multigenerational impacts), who has the obligation to afford it and how practically it can be afforded.

There are a range of possible explanations as to why the concept of rehabilitation remains elusive. This Discussion Paper attempts to consider these, and in particular the problem that, legally speaking there seems to be a lack of agreement among States, international courts (both criminal and human rights ones), international bodies and relevant stakeholders about its meaning and the way in which it should be fulfilled. There is a lot of discussion about rehabilitation as a form of reparation but so far, no one has been able to define it properly. This lack of agreement about its meaning could be partly explained by the fact that in its nature, rehabilitation requires multidisciplinary and interdisciplinary work to secure a holistic treatment of victims.⁵ Doctors, social workers, educators, psychologists, lawyers, the survivors themselves and other stakeholders are all vital to such a dialogue. The absence of such an interdisciplinary dialogue on rehabilitation has hampered efforts aimed at addressing its legal conceptualisation.

REDRESS is an international nongovernmental organisation committed to obtaining justice for torture survivors. Our objectives and working methods focus on assisting survivors to pursue and secure legal remedies and developing the means to ensure compliance with international standards, and in particular their right to reparation. We consider that it is fundamental to advance the understanding of the meaning of rehabilitation given that it is a crucial reparation measure for torture survivors and their next of kin. In a practical sense, whilst the tools REDRESS uses are legal and the language of its discourse is legal, its clients are individuals who have a range of challenges, hopes and aspirations which defy categorisation. In addition to the legal challenges they face in accessing adequate and effective remedies for the harm suffered, REDRESS' clients have faced the denial of rehabilitation services, both in the United Kingdom and abroad, a lack of access to such services, and to information about them. Depending on the state in question, there may be very limited state services and infrastructure to deal with the consequences of torture in a forward looking and holistic manner. Addressing these challenges holistically requires a multidisciplinary approach to the concept of reparation in general and to rehabilitation in particular.

There is very limited literature on the subject or important work trying to clarify the many unresolved legal, policy and practical issues about rehabilitation. Institutions and organisations whose mandate it is to provide rehabilitation services have given a lot of thought to the key challenges about rehabilitation, yet to date, the dialogue has mainly been internal and focused primarily on the practical day-to-day challenges of rehabilitative work. There is still no clarity about rehabilitation from a legal perspective or detailed consideration in comparative perspective, about how this form of reparation has been implemented in practice.

⁵ REDRESS, *Reintegration and Reparation for Victims of Rendition and Unlawful Detention in the War on Terror: A European Perspective*, 10-11 September 2008, p. 76. Available at: www.redress.org/publications/Reintegration%20and%20Reparation%20Report_FinalDraft_27March_CLEAN.pdf.

These and other related factors led REDRESS to prepare this initial Discussion Paper. It forms a part of REDRESS' global work on the right to reparation in which it is working on three inter-related levels: i) to assist survivors to access remedies and reparation practically, case by case, ii) to develop and strengthen international standards relating to reparation, of which the right to rehabilitation is a key component; and iii) to work with states and civil society groups to develop the means to implement international standards domestically.

The Discussion Paper is not an exhaustive consideration of the topic. Its purpose is to identify the critical legal gaps and challenges relating to rehabilitation as a form of reparation under international law, and more precisely in international human rights law. Rehabilitation as a form of reparation requires careful consideration of the law on state responsibility, and is relevant to many branches of international law including but not limited to international human rights law, refugee law, international humanitarian law and international criminal law. Nevertheless, this first Discussion Paper focuses on the legal treatment and understanding of rehabilitation under international human rights law given that this is the branch of international law where it has mainly developed, and given that it is often called to inform other branches of international law. It is hoped that this Discussion Paper will lead to a broader and fuller consideration of the topic.

Structure of the Discussion Paper

The first section of the Paper begins with a discussion of the different working concepts of rehabilitation relevant to clarifying its meaning. In this sense, it approaches rehabilitation from a multidisciplinary perspective, highlighting points of convergence but, especially, areas of divergence among different disciplines but also among different key actors working on rehabilitation today. This section also introduces the concept of rehabilitation that would be used to measure the legal achievements and gaps of current international human rights law related to the topic.

The second and third sections of the Paper explore the status of rehabilitation as a form of reparation and a right under international human rights law. To this end, they analyse relevant UN and regional human rights treaties and other relevant instruments, in order to address the question of whether rehabilitation as a form of reparation has treaty law status or not. Once this point is exhausted, the Paper advances some views in relation to rehabilitation under customary international law.

The fourth section of the Discussion Paper analyses the treatment given to rehabilitation in the international legal practice of relevant international bodies (UN special procedures and treaty bodies and regional courts) to try to grasp the working understanding applied by these bodies when confronted with rehabilitation issues. Although additional bodies/special procedures could also be analysed under this section, the Paper focuses on the most relevant ones given the treatment they have given to the issue and/or that it is to be expected that they deal with it as part of their mandates. As for courts, the paper focuses on the two regional courts with relevant jurisprudence on rehabilitation: The European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACtHR). The African Court of Justice and Human Rights has yet to decide its first case and therefore has not dealt with reparations.

Next, the conclusion is dedicated to a careful assessment of the achievements and challenges of current international human rights law in the treatment of rehabilitation. This section is closely linked to the last section of this Paper, on recommendations.

REDRESS is extremely grateful to Dr. Clara Sandoval Villalba, Senior Lecturer at the School of Law, University of Essex and consultant to REDRESS, for researching and authoring this Discussion Paper. We are also very grateful to all the individuals who provided views and relevant information for different sections of the Discussion Paper. Although not everyone could be named, special thanks go to Dr. Nimisha Patel. Her comments on the outline of this Paper and on the need to have a holistic approach to rehabilitation were really important in the initial conceptualisation of the Paper. Also, REDRESS is very grateful to Professor Sir Nigel Rodley, Professor Paul Hunt, Professor Theo van Boven, Michael Duttwiler, Diana Morales-Lourido, Patricia Martin Sanfilippo, Evie Francq and Tara Van Ho. Their insights were crucial.

1. The meaning of rehabilitation

The Oxford Dictionary provides a standard but limited definition of rehabilitation. According to the dictionary, rehabilitation is “a course of treatment, largely physical therapy, designed to reverse the debilitating effects of an injury.”⁶ This definition reflects one of the most common but narrowed concepts of rehabilitation, one that is focused on physical care. A second understanding of rehabilitation, also narrowed and predominant in law, is the one connected to helping “a person who [...] has been released from prison [or is still in prison] to readapt to society.”⁷ Both of these concepts have had an impact on the way rehabilitation is understood under international law.

It should be noted, however, that although rehabilitation as a form of reparation could be understood in particular narrow medical terms (as indicated in the last paragraph), physicians have also developed more comprehensive concepts of rehabilitation. For example, The World Health Organisation, in the Second Report of its Expert Committee on Medical Rehabilitation (1968) provided four important definitions of rehabilitation. The first one aimed at understanding rehabilitation in general and defined it as “the combined and co-ordinated use of medical, social, educational and vocational measures for training or re-training the individual to the highest possible level of functional ability.”⁸ Although such definition was particularly designed for the treatment of persons with disabilities, its emphasis on a set of variants, not only medical, to attain the best possible functional ability of a person is commendable.

⁶ *Oxford Pocket Dictionary*, available at <http://www.encyclopedia.com/doc/1O999-rehab.html>.

⁷ *Collins English Dictionary*, (UK, HarperCollins Publishers, 2000), p. 1299.

⁸ WHO Expert Committee on Medical Rehabilitation, *Second Report*, Technical Report Series 419, (Geneva, 1969), p. 6.

The same Report also distinguishes between three different species of rehabilitation: *medical rehabilitation*, referring to “the process of medical care aiming at developing the functional and psychological abilities of the individual, and, if necessary, his compensatory mechanisms, so as to enable him to attain self-dependence and lead an active life;”⁹ *social rehabilitation*, meaning “the part of the rehabilitation process aimed at the integration or re-integration of a disabled person into society by helping him to adjust to the demands of family, community, and occupation, while reducing any economic and social burdens that may impede the total rehabilitation process;” and *vocational rehabilitation*, that refers to “the provision of those vocational services, e.g. vocational guidance, vocational training and selective placement, designed to enable a disabled person to secure and retain suitable employment.”¹⁰ In the same vein, Professor and MD Alexander Mair, Scottish renowned medical specialist and author of the Mair report (1972), understands medical rehabilitation as “the restoration of an individual to his fullest physical, mental and social capabilities.”¹¹

Although these definitions are more encompassing to the ones found in standard dictionaries, they also fail to cover other important communal dimensions of rehabilitation, such as when people experience extreme violence, genocide or conflict situations. It is the Report of the WHO Expert Committee on Disability Prevention and Rehabilitation (1981) that takes even further the definitions just introduced by considering its community dimension.¹² It states that “community-based rehabilitation involves measures taken at the community level to use and build on the resources of the community, including the impaired, disabled and handicapped persons themselves, their families and their community as a whole,”¹³ and also highlights the active role that communities should play in the rehabilitation of individuals.¹⁴

According to other relevant actors (but also influenced by the health dimension of rehabilitation), working with specific populations such as torture survivors has placed special emphasis on the restoration of human dignity (human rights legacy) as part of the definition of rehabilitation and the cultural aspect of the process.¹⁵ For example, one of the leading providers of rehabilitation services in the world, and one of the pioneers in the area, the International Rehabilitation Council for Torture Victims (IRCT) believes that “[r]ebuilding the life of someone whose dignity has been destroyed takes time and as a

⁹ Ibid.

¹⁰ Ibid.

¹¹ Royal Hospital for Neuro-Disability, *Definitions of Rehabilitation*, available at: <http://www.rhn.org.uk/institute/doc.asp?catid=213&docid=208>.

¹² WHO Expert Committee on Disability Prevention and Rehabilitation, *Technical Report on Disability Prevention and Rehabilitation*, 668, (Geneva, 1981), p. 9.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ The obligation for health professionals to know about torture, including its methods, consequences, and possibilities for rehabilitation, has been described in various declarations, notably the Tokyo Declaration of 1975, the Position Statement on Nurses and Torture of 1989, and the Declaration for Physiotherapists of 1995. See PAIN Clinical Updates. Volume XV, Issue 7. October 2007. Available at <http://www.iasp-pain.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=5586>.

result long-term material, medical, psychological and social support is needed. Treatment must be a coordinated effort that covers both physical and psychological aspects. It is important to take into consideration the patients' needs, problems, expectations, views and cultural references."¹⁶

International law does not delineate a working definition of rehabilitation as a form of reparation under international law. The closest expression of such a definition is found in the Basic Principles that indicate that in certain situations persons who have suffered certain types of serious human rights or humanitarian law violations should be redressed by way of, among others, rehabilitation, meaning physical and psychological care as well as social and legal services. So, although the concept of rehabilitation set out in the Basic Principles spells out some other forms of rehabilitation beyond health, it mentions these other aspects without fully indicating what each one of them means or includes.

The leading scholar on reparation Dinah Shelton defines rehabilitation according to its objective and function. For her it is a right of "all victims of serious abuse and their dependants." It is "the process of restoring the individual's full health and reputation after the trauma of a serious attack on one's physical or mental integrity [...] It aims to restore what has been lost. Rehabilitation seeks to achieve maximum physical and psychological fitness by addressing the individual, the family, local community and even the society as a whole."¹⁷ Note however that she does not provide a breakdown of the possible services that could be involved to achieve such goals: she establishes a principle.

Therefore when considering rehabilitation under international law in the coming pages there is a tendency to fluctuate between two possible concepts:

1) *A holistic one* that encompasses all sets of processes and services states should have in place to allow a victim of serious human rights violations to reconstruct his/her life plan or to reduce, as far as possible, the harm that has been suffered. Such processes/services should allow the victim to gain independence and to make use of his/her freedom. The processes should not be defined in advance as they would depend on the particular circumstances of each case. Nevertheless, states should be obliged to establish a rehabilitation system that incorporates at least physical and psychological services, and social, legal and financial services, which should be available to any person who might need them, depending, of course, on the individual circumstances of each case.

2) *A narrow concept*, meaning rehabilitation only related to physical and psychological care.

The Basic Principles stand somewhere in between.

¹⁶ International Rehabilitation Council for Torture Victims, available at <http://www.ircrt.org/what-is-torture/rehabilitation.aspx>.

¹⁷ Shelton, D., *Remedies in International Human Rights* (Oxford, Oxford University Press, 2005), p. 275.

The coming sections of this Discussion Paper will measure the achievements of international law against these concepts of rehabilitation and identify the obstacles that have stopped such a concept from fully materialising in legal practice.

2. The right to rehabilitation under international human rights law

Before embarking on the task of understanding the scope of rehabilitation as a particular form of reparation, we should first analyse its legal bases under international law. According to Article 38 of the Statute of the International Court of Justice, the traditional sources of international law are treaty, custom and the general principles of law.¹⁸ This Discussion Paper will first scrutinise different international law and human rights treaties, both at the UN level and at the regional level, so as to clarify how widely accepted rehabilitation is as a form of reparation and as a right. Such analyses will permit the consideration of other relevant sources of international law such as custom.

2.1 Rehabilitation under UN human rights treaty law

The right to a remedy under international human rights law and rehabilitation as a form of reparation are clearly grounded in existing international law. Nevertheless, while the right to reparation (as a remedy) is incorporated in all relevant human rights treaties, rehabilitation as a form of reparation only made its way into some treaty law in the mid 80's, and has only begun to be incorporated consistently into international human rights law during the first decade of the new millennium. Indeed, if a careful analysis is carried out of the International Bill of Rights under international law and of other relevant UN human rights treaties, the following is found:

The International Bill of Rights

The Universal Declaration on Human Rights (1948) does not mention the word rehabilitation or any similar wording but it contains the right to an effective remedy in Article 8 and the right to an adequate standard of living for the health of the person and his family, including access to medical care and the required social services in Article 25. The International Covenant on Civil and Political Rights (1966) (ICCPR) mentions the word rehabilitation in Articles 10 and 14 to indicate that the aim of a prison system is to promote the social rehabilitation of prisoners but does not refer to it as a reparation measure. The ICCPR also incorporates the right to an effective remedy in Article 2(3). The International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) does not mention the word rehabilitation.

¹⁸ *Statute of the International Court of Justice*, available at: www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

Other UN human rights treaties before the 1980s

Equally, despite the atrocities that led states to draft the International Convention on the Elimination of all Forms of Racial Discrimination (1965), and the need to consider rehabilitation as a reparation measure given the particular situations of persons who are discriminated against because of the colour of their skin, this treaty does not mention the word once. The Convention on the Elimination of all Forms of Discrimination against Women (1979) is also silent on this point.

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

In contrast to the treaties just mentioned, the scope of the right to reparation became more explicit in relation to torture. Indeed, Article 11 of the Declaration on Torture (1975) established the right to redress and compensation of torture victims according to national law but was silent on rehabilitation. It is in the 1980's, however, when awareness about rehabilitation as a remedy penetrated international law thinking. The practice of torture and the physical, mental and other needs of torture survivors helped in this process. Indeed, it is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (CAT) that first gave a prominent place to rehabilitation when indicating that compensation shall include the necessary means for the fullest rehabilitation that is possible for a torture survivor. Article 14 of CAT indicates:

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.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

It is important to note, nevertheless, that rehabilitation as a reparation measure was not included in the draft CAT proposed by the International Association of Penal Law, or in the original Swedish Draft or in the Revised Swedish Draft.¹⁹ It was only during the 1980 working group discussions that “several representatives felt that in the special case of victims of acts of torture, there was a need to strengthen their right to compensation,” and proposed the inclusion of a sentence in the draft of Article 14 indicating that there should be “an enforceable right to fair and adequate compensation.”²⁰ In this context, ‘fair and adequate’ were meant to secure that a torture victim would be properly redressed.²¹ During these discussions, the experience of physicians and psychologists dealing with torture victims and the consequences of torture, paved the way for the inclusion in Article 14 of the words “including the means for his rehabilitation.” In this context, ‘rehabilitation’

¹⁹ Nowak, M., and McArthur, E., *The United Nations Convention Against Torture: A Commentary* (Oxford, Oxford University Press, 2008), p. 454.

²⁰ *Ibid*, p. 455.

²¹ E/1980/13.Supp, para. 74-81.

appears to have been included to refer to the medical and psychological services that a torture victim should have access to in order to deal with the harm that has been produced. Nevertheless, several representatives felt that the word 'rehabilitation' was too vague and could be understood to refer to more services than just the medical ones. Therefore, the word rehabilitation was put into square brackets for further discussion.²² The text adopted in 1980 read as follows:

...Each State Party shall ensure in its legal system that the victim of an act of torture be redresses and have and enforceable right to fair and adequate compensation including the means for his [rehabilitation]...

During the 1981 working group discussions, it was decided that rather than including only 'rehabilitation', Article 14 should refer to "for as full rehabilitation as possible." The official document of the discussions of the working group as presented to the Commission on Human Rights, does not allow for precisely identifying the meaning of the word 'rehabilitation' in Article 14.²³ The draft of this article would suffer minor changes in the coming discussions of the working group despite strong disagreement in relation to other points such as the applicability of the right to reparation in relation to cruel, inhuman and degrading treatment. The word rehabilitation was left in the final text of Article 14 together with the qualification just indicated.

After CAT was adopted and entered into force, other important developments under international law would help to further strengthen Article 14 and help to expand the understanding of 'rehabilitation' in more holistic ways as opposed to in only medical terms. For example, the Vienna Declaration and Programme of Action (1993) established that "the World Conference on Human Rights stresses the importance of further concrete action within the framework of the United Nations with the view to providing assistance to victims of torture and ensuring more effective remedies for their physical, psychological and social rehabilitation. Providing the necessary resources for this purpose should be given high priority, inter alia, by additional contributions to the United Nations Voluntary Fund for Victims of Torture."²⁴

Other UN human rights treaties post CAT

After CAT, the term 'rehabilitation' made its way into human rights treaty law even if not necessarily to refer to it as a reparation measure relating to torture victims. Indeed, the Convention on the Rights of the Child (1989)²⁵ mentions rehabilitation in Article 23 when referring to the services that should be available to disabled children, and in Article 24 where the right to the highest attainable standard of health, including rehabilitation facilities, is mentioned.²⁶ Also, the International Convention on the Protection of the Rights

²² Ibid, p. 456.

²³ See, E/1981/25, p. 61-62.

²⁴ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, A/CONF.157/23, 12 July 1993, para. 59, available at: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en).

²⁵ General Assembly, *Convention on the Rights of the Child*, RES 44/25, 20 November 1989.

of All Migrant Workers and their Families²⁷ also refers to rehabilitation in Articles 17 and 18 but in the context of imprisonment of a migrant worker or a member of the family, to indicate that the aim of the measure is to guarantee their social rehabilitation.

Article 24 of the International Convention for the Protection of all Persons from Enforced Disappearance (2006) (ICPPED), not yet in force, provides an important contribution to the clarification of rehabilitation and of its relationship with the right to reparation as it establishes that:

[...]

4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.

5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:

(a) Restitution;

(b) Rehabilitation;

(c) Satisfaction, including restoration of dignity and reputation;

(d) Guarantees of non-repetition.²⁸

As such, the Convention establishes that reparation in cases of enforced disappearances implies compensation and 'where appropriate' other forms of reparation such as rehabilitation.²⁹

The Convention on the Rights of Persons with Disabilities (2006) (CRPD),³⁰ already in force, contains new elements to understand the meaning of rehabilitation as it incorporates rehabilitation in several of its articles. Article 16 indicates that persons with disabilities should be free from exploitation, violence and abuse and that in such situations the state should take appropriate measures to promote their rehabilitation. Article 22 establishes the right to privacy of disabled persons in relation to rehabilitation information. Article 25 incorporates the right to the highest attainable standard of health, expressly mentioning that it should include access to health services that are gender sensitive, "including health related rehabilitation." More importantly, the Convention contains Article 26 entitled 'habilitation and rehabilitation' that states:

²⁶ The Optional Protocol to this Convention on the Involvement of Children in Armed Conflict (2000) also refers to the duty of states parties to the Protocol to cooperate in the rehabilitation and reintegration of children victims of armed conflict. See Article 7 and the Vienna Declaration and Programme of Action, 1993, para. 50.

²⁷ General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and their Families*, RES 45/158, 18 December 1990.

²⁸ General Assembly, *International Convention for the Protection of all Persons from Enforced Disappearance*, RES 61/177, 20 December 2006.

²⁹ Article 19 of the UN Declaration on the Protection of all Persons from Enforced Disappearances (1992) follows Article 14 of the CAT when it indicates that "The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible."

³⁰ General Assembly, *Convention on the Rights of Persons with Disabilities*, Doc.A/61/611, 13 December 2006.

1. States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:

(a) Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;

(b) Support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.

2. States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.

3. States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.

From this article it is possible to infer that rehabilitation is one of the means to allow a disabled person to “attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life”. It also follows that rehabilitation is not restricted to health services but that it also includes “employment, education and social services”. Article 27 of the Convention confirms that rehabilitation is also extended to employment. So, although this treaty does not refer to rehabilitation as a reparation measure, it establishes some important indicators to understand what it should entail as a form of reparation.

2.2 Other UN instruments

Other important developments at the United Nations level are worth mentioning given the impact they have had in the development of subsequent treaty and customary international law in the area of the right to a remedy and reparations. First of all, and although not specifically related to human rights violations, the International Law Commission embarked for more than fifty years in the drafting of principles on international responsibility of states for breaches of their international obligations. The so called Draft Articles on State Responsibility (Draft Articles) were finally adopted in 2001,³¹ Article 31 establishes the international obligation of a state in breach of an international rule to make reparations for

³¹ International Law Commission, *Draft Articles on State Responsibility*, 2001, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

the injury caused as a result of such breach. The article defines injury as “any damage, whether material or moral, caused by the internationally wrongful act of a State.” Although the Draft Articles deal primarily with international responsibility between States, the Commentary to the Draft makes it clear that such principles also apply in relation to all obligations “of the State and not only [to] those owed to other States.”³² The Commentary also recognises that, even if in narrower terms, the right to reparation to non-state actors also exists under international law as is exemplified by the existence of human rights violations.³³ Moreover, Article 34 of the Draft Articles enumerates restitution, compensation and satisfaction as the different forms of reparation that should be applied, singly or in combination, to produce full reparation for the injury caused. Although the Draft Articles do not mention rehabilitation as a specific form of reparation as the cases it considers are mostly cases of international responsibility owed to other States, rehabilitation can be inferred from compensation and satisfaction as reparation measures. A good example of rehabilitation in such a context is the *Corfu Channel* case, cited by the Commentary to the Draft, where the United Kingdom exercised its right to claim reparations, among other reasons, for the deaths and injuries suffered by members of the navy. The International Court of Justice (ICJ) awarded £50,048 (GBP) as compensation for “the cost of pensions and other grants made by the victims or their dependants, and for costs of administration, medical treatment, etc.”³⁴ Equally, some of the examples of satisfaction given by the Commentary to the Draft could potentially overlap with rehabilitation as is the case of a public apology, given its healing effect. Nevertheless, rehabilitation as a particular form of reparation owed to victims of gross human rights violations is not the object of any reference or analysis in the Draft Articles; yet they do not contradict the essential legal considerations that the right to reparation requires when it comes to human rights violations.

Parallel to the consideration by the International Law Commission of reparations under international law, there have been several other crucial developments at the United Nations Level that have played an important role in the recognition, protection and promotion of the right to a remedy of victims of human rights violations. These two developments are: The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Basic Principles of Justice) and the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Human Rights Violations and Serious Violations of International Humanitarian Law (Basic Principles).

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

This Declaration adopted by the UN General Assembly almost a year after CAT (1985), is the first concrete manifestation at the international level to consider carefully the needs of victims of crime and abuse of power. It clearly incorporates the right to reparation in relation to both regular crimes and abuse of power but considers diverse reparations

³² Commentary to the Draft Articles on State Responsibility on Article 28, 2001, p. 87.

³³ Ibid, Commentary to Article 28 and 33, 2001, p. 87 and 93-94.

³⁴ Ibid, p. 100.

measures and different subjects as responsible for paying them.³⁵ Paragraphs 8 to 11 of the Declaration deal with ‘restitution’, meaning that the offender or a third party involved in the crime and not always and only the state, should, among others, “return [...] property or payment for the harm or loss suffered, reimburse[...] expenses incurred as a result of the victimization, [and provide] services and the restoration of rights.”³⁶ Then, the Declaration deals with ‘compensation’ to refer to the obligation of the State to pay a sum of money to victims “who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;” and to “the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization,” and if the offender cannot pay compensation or it cannot be obtained through other sources.³⁷

Subsequently, the Declaration deals with ‘assistance’, meaning the services that should be available to victims to deal with their harm regardless of whether state agents or others operating with their acquiescence committed the crime. As Clark puts it “the provisions of the Victims Declaration on assistance start from the rather obvious premise that some victims need more than money to make them whole. A support system must be in place.”³⁸ Therefore, although the Basic Principles of Justice do not use the word rehabilitation as a particular reparation measure, it incorporates what could be called ‘the right of assistance,’ meaning that such victims “should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.”³⁹

Equally important, in 1996 the UN Commission on Crime Prevention and Criminal Justice called for the drafting of a Manual on the use and application of the Basic Principles of Justice. The central objective of the manual⁴⁰ was to outline “the basic steps in developing comprehensive assistance services for victims of crime”, which go beyond reparations measures and are not limited to health services but incorporate others such as physical safety, compensation, counselling and legal services.⁴¹ The manual uses the word rehabilitation mainly to refer to the need to provide social rehabilitation to offenders,⁴² a terminology already used in the ICCPR, for example, but also to indicate that rehabilitation is a way to provide restitution to victims. In this context, restitution is not only seen as a reparation measure but also as a sanction and/or a criminal penalty.⁴³

³⁵ Clark, R., *The United Nations Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at Their Implementation* (Philadelphia, University of Pennsylvania Press, 1994), p. 193.

³⁶ General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, RES 40/34, 29 November 1985, para. 8.

³⁷ *Ibid*, paras. 12-13.

³⁸ Clark, R., *The United Nations Crime Prevention and Criminal Justice Program*, *above*, n. 35, p. 195.

³⁹ *Basic Principles of Justice*, *supra*, n.36, paras. 14-17 and 19.

⁴⁰ UNODCCP and the Centre for International Crime Prevention, *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (NY, 1999).

⁴¹ *Ibid*, p. iv.

⁴² *Ibid*, p. 42, 49 and 74.

⁴³ *Ibid*, p. 47.

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

The Declaration of Basic Principles of Justice paved the way in international *fora* for careful thinking about victims' rights *vis à vis* those of the alleged offender. Indeed, other UN bodies mandated to consider human rights promotion and protection began to deal with redress for human rights violations.⁴⁴ As such, the then UN Subcommission on Prevention of Discrimination and Protection of Minorities, adopted a resolution in 1988, where it established that "all victims of gross violations of human rights and fundamental freedoms should be entitled to restitution, a fair and just compensation and the means for as full a rehabilitation as possible for any damage suffered by such victims, either individually or collectively,"⁴⁵ and that it would consider the possibility of elaborating principles and guidelines on the matter.⁴⁶ The Subcommission mentioned 'rehabilitation' as an express form of reparation for gross human rights violations. Subsequently, in a resolution the following year, the Subcommission entrusted Theo van Boven with the task of studying current international law on the right to restitution, compensation and rehabilitation for victims of gross human rights violations.⁴⁷

Professor van Boven presented his final report to the Subcommission in 1993.⁴⁸ The proposed basic principles and guidelines in that report indicated that "Reparation for human rights violations has the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations." As such, reparation "[...] shall include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition [...]," and the report established that "rehabilitation shall be provided, to include legal, medical, psychological and other care and services, as well as measures to restore the dignity and reputation of the victims." Further, when defining 'compensation' as a reparation measure, the report makes it clear that a sum of money might also be a way to produce rehabilitation when it aims to pay a) "reasonable medical and other expenses of rehabilitation;" b) "harm to reputation or dignity;" and c) "reasonable costs and fees of legal or expert assistance to obtain a remedy".⁴⁹

⁴⁴ Shelton, D., *Remedies in International Human Rights Law* (Oxford, Oxford University Press, 2001, 1st edition), p. 18.

⁴⁵ UN Subcommission on the Prevention of Discrimination and the Protection of Minorities, E/CN.4/Sub.2/Res/1988/11, 1 September 1988, para. 1.

⁴⁶ *Ibid*, para. 2.

⁴⁷ UN Subcommission on the Prevention of Discrimination and the Protection of Minorities, E/CN.4/Sub.2/Res/1989/13, 31 August 1989, para. 1.

⁴⁸ UN Subcommission on the Prevention of Discrimination and the Protection of Minorities, E/CN.4/Sub.2/1993/8, 2 July 1993.

⁴⁹ *Ibid*, principles 3-4, and 9-10, p. 56-57.

In 1996 van Boven released the second final version of his principles, which mentioned all forms of reparation including rehabilitation, but established that reparations may take any or more of those forms. As Bassiouni commented, “the 1996 version perhaps demonstrates a greater flexibility for the State in determining reparations.”⁵⁰ M. Cherif Bassiouni was then appointed as the independent expert of the Commission to continue working on the elaboration of the principles. One of his first tasks was to revise the work carried out by van Boven. In 1999 he concluded that the terminology used was far from clear and was inconsistent. He arrived to this view in relation to concepts like restitution, compensation and rehabilitation.⁵¹

A year later, in 2000, Bassiouni submitted his revised principles to the Commission on Human Rights.⁵² This version goes back to some of the drafting of the 1993 van Boven version, although the principles are also applicable to humanitarian law violations, as it indicates that in certain circumstances “States should provide victims of violations of international human rights and humanitarian law the following forms of reparation: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.” Such account does not prioritise or establish hierarchies between different forms of reparations.

The revised principles define rehabilitation as including “medical and psychological care *as well as* legal and social services.” Equally, when defining compensation, the new set of principles indicate that a sum of money could also be paid to cover “cost[s] required for legal or expert assistance, medicines and medical services, and psychological and social services” in the same part of the principle rather than in separate principles as was the case under the van Boven principles.⁵³ So, Bassiouni’s 2000 revised principles provide more precision on the kind of services that are included in rehabilitation rather than the more open statement included in van Boven’s earlier drafts. Nevertheless, as was evident at the open consultations held in Geneva in 2002, the inclusion of legal and social services within rehabilitation was not that obvious due to the connector ‘as well as’,⁵⁴ while the meaning of a social service was far from clear.⁵⁵ The International Rehabilitation Council for Torture Victims (IRCT) responded to some of these views indicating that “victims often come from the least well resourced groups in society, and thus need assistance to avail themselves of the system.”⁵⁶

⁵⁰ Bassiouni, M.C., *Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms*, E/CN.4/1999/65, 8 February 1999, para. 21.

⁵¹ *Ibid*, paras, 37 and 73.

⁵² Bassiouni, M.C., *Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms* E/CN.4/2000/62, 18 January 2000.

⁵³ *Ibid*, paras, 23-24.

⁵⁴ See comment made by the delegation of Ecuador in Salinas, A., *Report of the Consultative Meeting on the Draft Basic Principles on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, E/CN.4/2003/63*, 27 December 2002, para. 131.

⁵⁵ See comment made by the delegation of Japan, *Ibid*, para. 132.

⁵⁶ *Ibid*, para. 144.

The revised versions of the principles between 2002 and 2004 did not incorporate important changes to the meaning of rehabilitation or to rehabilitation through compensation. Nevertheless, delegations continued to indicate that the meaning of legal and social services was not clear and some others questioned the reference to them.⁵⁷

The final version of the Basic Principles⁵⁸ establishes the principle of adequate, effective and prompt reparations in principle 15, but also indicates that “in accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.” This means, that although rehabilitation is a form of reparation, it should be provided by states depending on the particular circumstances of each case if it is “appropriate” and “proportional” to the gravity of the situation. Principle 21 equally establishes that ‘rehabilitation should include medical and psychological care as well as legal and social services’.

Conclusion

UN treaty law and other relevant instruments mentioned in this section allow one to conclude that rehabilitation as a form of reparation is expressly recognised in relation to torture survivors as established by CAT⁵⁹, a treaty that has been ratified by 146 out of 192 states. The UN Convention on Enforced Disappearances, not yet in force, and with 16 states parties, also indicates it as a possible form of reparation in relation to any victim of this crime but depending on the particular circumstances of the case. The Basic Principles extend the possible application of rehabilitation as a form of reparation beyond torture and disappearances to include any other gross human rights violation and serious violations of humanitarian law such as arbitrary killings. Although the Basic Principles are not binding law, they reflect existing international law on the matter. Furthermore, given the reference in Article 75 of the Rome Statute of the International Criminal Court to the role of the judges in establishing principles related to reparation, (and specifically mentioning rehabilitation as a form of reparation), then the claim that rehabilitation as a form of reparation applies beyond torture and disappearances gains force, at least in relation to crimes against humanity, war crimes and genocide. The Rome Statute has been ratified by 110 States worldwide. However,

⁵⁷ Salinas, A., *Report of the Third Consultative Meeting on the Draft Basic Principles on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, E/CN.4/2005/59, 21 December 2004, para. 51.

⁵⁸ Zwanenburg, M., “The Van Boven/Baoussouini Principles: An Appraisal”, in 24(4) *The Netherlands Human Rights Quarterly* (2006), pp. 641-668.

⁵⁹ When ratifying the Convention, Bangladesh included an Interpretative declaration to article 14 which was read by different states parties to CAT as a reservation and one to which they objected to. New Zealand also added a reservation to article 14, indicating that it reserves the right to award compensation to torture victims to the discretion of the Attorney General. Article 14 does not have any other reservation or interpretative declaration.

although the Rome Statute may be a good indicator to consider the acceptance of rehabilitation as a form of reparation, it should be noted that the Rome Statute deals with individual criminal responsibility and not with state responsibility even if the two could be intrinsically linked in particular situations.

Finally, although rehabilitation is recognised in CAT and other instruments as a form of reparation for torture survivors and for other victims, the meaning of rehabilitation is far from clear. As indicated earlier in this Discussion Paper, the definitions range from a limited understanding that refers exclusively to physical and psychological care to more holistic services such as social and legal without there being a precise understanding of what these latter categories of services imply. For example, is employment and education part of social services or separate categories as understood by the UN Convention on Disabilities? Questions like this one require precise answers.

Also, an important question deriving from the international instruments just commented on, relates to the most appropriate forms of reparation to fulfil rehabilitation. Is compensation, as also envisaged in some of the drafting of the Basic Principles and in the final version of that text, the best way to provide rehabilitation? Or should States provide services as required by the particular circumstances of the case? Further sections of this Discussion Paper provide illustrations of the overlap between compensation and rehabilitation.

3. Rehabilitation under regional human rights treaty law

At the regional level, three important systems for the protection of human rights have been established. This section of the paper looks at regional human rights treaty law in these systems to contrast such developments with the ones just described at the UN level. These systems are part of the following three regional organisations: the Council of Europe (CE), the Organisation of American States (OAS) and the African Union (AU).

3.1 The Council of Europe

Article 41 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (ECHR) refers to 'reparation' but not to rehabilitation. It provides that "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." This Article comes as no surprise given the fact that the ECHR was opened for signature in 1950, at a time when awareness about rehabilitation as a form of reparation did not exist. However, in 1983, the European Convention on the Compensation of Victims of Violent Crimes (ECCVVC) was signed by Council of Europe member states to establish minimum guidelines applicable in any of such countries for victims of violent crime aiming

to provide them with compensation for “loss of earning, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of maintenance.”⁶⁰ The guidelines aimed to achieve full reparation by covering those situations where the offender or another source did not provide the victim with full or partial reparation. In such situations, states shall contribute to the payment of compensation.⁶¹ Although the Convention does not refer to rehabilitation, it is clear from its text and its Explanatory Report that compensation should include any mental and physical harm the victim might have suffered as well as “prescription charges and cost of dental treatment.”⁶²

3.2 The Organisation of American States

Article 63 of the American Convention on Human Rights (ACHR) incorporates the right to compensation of victims of violations of rights protected under the Convention. It states that “If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court 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.”⁶³ Although this article does not expressly mention rehabilitation as a form of reparation, the article clearly stipulates that besides compensation and, if appropriate, the consequences of the harm should be repaired. Such a statement could imply rehabilitation as a reparation measure when, as happens with torture survivors, a consequence of the harm is physical and mental illness and/or disability, which destroys the life plan of a person.

The Inter-American Convention to Prevent and Punish Torture (1985) (IACPPT), signed just months after the CAT, also incorporates the right to reparation for victims of torture in Article 9 although its language is not as clear and precise as the text of the CAT and no express reference is made to rehabilitation as a form of reparation; rather the emphasis is on compensation. According to the Convention:

The States Parties undertake to incorporate into their national laws regulations guaranteeing suitable compensation for victims of torture.

⁶⁰ Article 4 of the Convention, found at: <http://conventions.coe.int/Treaty/en/Treaties/Html/116.htm>.

⁶¹ Articles 1 and 2, found at: <http://conventions.coe.int/Treaty/en/Treaties/Html/116.htm>.

⁶² Council of Europe, *Explanatory Report to the European Convention on the Compensation of Victims of Violent Crimes*, ETS No 116, paras. 18-19 and 28. Available at: <http://conventions.coe.int/Treaty/en/Reports/Html/116.htm>.

⁶³ The initial draft of article 63.1 of the ACHR followed former article 50, now article 41, of the ECHR that is, as just seen, more restrictive in nature. In response to the draft, Guatemala presented a new proposal that was wider as it included that the injured party should receive reparations for the consequences produced resulting from violations of the ACHR and should also be guaranteed the enjoyment of any impaired rights and freedoms. This final view was adopted and the minutes of the Drafting Committee considered the ‘text [to be] broader and more categorically in defence of the injured party than was the Draft.’ OAS, *Report of the II Committee: Organs of Protection and General Provisions*, OEA/Ser.K/XVI/1.1.doc.71, 30 January 1970.

None of the provisions of this article shall affect the right to receive compensation that the victim or other persons may have by virtue of existing national legislation.⁶⁴

In contrast to the IACPPT and the UN Declaration and Convention on Enforced Disappearance stands the Inter-American Convention on Forced Disappearance of Persons (1994) (IACFDP) as it does not include a right to reparation for victims of such crime and does not mention rehabilitation in any of its articles.⁶⁵ This silence is even more striking given that this Convention was adopted at the same time as the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará) in 1994, which explicitly includes the right to reparation when it indicates that states should “ [...] g) establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies.”⁶⁶ Such differential treatment could be explained by looking at the bodies in charge of the drafting process of both treaties. The Belém do Pará Convention was prepared by the Inter-American Commission on Women (CIM) while the IACPPT was prepared by the OAS Permanent Council and required several years of negotiation.

Finally, the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (1999) does not include the right to reparation but refers, as does the equivalent UN Convention on the subject, to rehabilitation as one of the measures that should be available to persons with disabilities to provide them with certain degree of independence and the best possible quality of life.⁶⁷

3.3 The African Union

The African Charter on Human and Peoples’ Rights (1981) (ACHPR) does not include a right to reparation for violations of the Charter and does not refer to rehabilitation. The only explicit reference found in the Charter is in cases of spoliation where the dispossessed have the right to claim “adequate” compensation.⁶⁸

The African Charter on the Rights of Women in Africa (2003) (ACRWA) is the first instrument of the Union to expressly state that women who are subjected to violence via

⁶⁴ Organisation of American States, *Inter-American Convention to Prevent and Punish Torture*, 9 December 1985, available at: <http://www.cidh.oas.org/Basicos/English/Basic9.Torture.htm>.

⁶⁵ Organisation of American States, *Inter-American Convention on Forced Disappearance of Persons*, 9 June 1994, available at: <http://www.cidh.oas.org/Basicos/English/Basic11.Disappearance.htm>.

⁶⁶ Article 7 of the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, 9 June 1994. Available at: <http://www.cidh.oas.org/Basicos/English/basic13.Conv%20of%20Belem%20Do%20Para.htm>.

⁶⁷ Articles 3 and 4 of the *Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities*, 7 June 1999. Available at: <http://www.cidh.oas.org/Basicos/English/Basic15.Disability.htm>.

⁶⁸ See Article 21 of the ACHPR.

violations of their rights to life, integrity and security of the person should have access to reparations including rehabilitation. Article 4 indicates that states have the obligation to take appropriate and effective measures to a) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims; and f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women. This article is complemented by a paragraph of Article 12, right to education and training that provides further guidance as to the kind of appropriate measures the States should take. Indeed, the Article obliges the State “to provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment.” Furthermore, under Article 10, the right to peace, the Protocol obliges the State to create mechanisms to increase the participation of women “in all aspects of planning, formulation and implementation of post-conflict reconstruction and rehabilitation.”

The African Charter on the Rights and Welfare of the Child (1990) refers to rehabilitation as an aim of incarceration. The Youth Charter (2006) (AYC) mentions rehabilitation in several articles but not always to refer to it as a reparation measure such as when it refers to the word in the context of treatment of drug addicts or in relation to youth who are in prison or in rehabilitation centres.⁶⁹ As a form of reparation, the AYC expressly recognises in Article 17, on peace and security, that “In view of the important role of youth in promoting peace and non-violence and the lasting physical and psychological scars that result from involvement in violence, armed conflict and war, States Parties shall: Mobilise youth for the reconstruction of areas devastated by war, bringing help to refugees and war victims and promoting peace, reconciliation and rehabilitation activities.” This Article establishes the obligation of states parties to use the youth as an element of the rehabilitation process.

Article 27 of the Protocol to the African Charter on the Establishment of An African Court (1998) (PACEAC), follows article 63.1 of the American Convention by stipulating that the Court could make appropriate orders to redress the violation(s) “including compensation or reparation.” The content of this Article is further clarified by Article 45 of the Statute of the African Court of Justice and Human Rights that indicates that “the Court may, if it considers that there was a violation of a human or peoples’ right, order any appropriate measures in order to remedy the situation, including granting fair compensation.” Therefore, the African Court can also make use of different forms of reparation including rehabilitation.

Finally, and despite the fact that the African Union does not have a treaty on the rights of disabled people, it is noteworthy that it has a treaty for the Establishment of the African Rehabilitation Institute (1985) (ARI), which has been ratified by 24 out of 53 countries in the region, including Uganda. The primary objective of the ARI is to deal with rehabilitation of persons with disability in Africa.⁷⁰

⁶⁹ See Articles 16 and 18 for example of the AYC.

⁷⁰ ARI is based in Harare. See its website at:
www.africanrehab.org.zw/index.php?option=com_content&task=category§ionid=4&id=20&Itemid=26.

Conclusion

Regional human rights treaty law permits one to conclude that there is recognition of rehabilitation as a reparation measure even if the word is not found in such explicit terms as in CAT. However, phrases like “...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” of the ACHR followed also by the PACEAC, imply that rehabilitation is a reparation measure that could be used, depending on the circumstances, in relation to different violations of human rights. Although the ECHR is drafted in narrower terms, the ECCVVC recognises that reparation should also be provided for mental and physical harm, including prescription charges and costs of dental treatment, even if such obligation by the state, by the perpetrators or other relevant actors has to be discharged via compensation.

Further, both the Americas treaty on violence against women and the counterpart in Africa recognise the right to rehabilitation of victims of such abuses. The latter treaty does so expressly and also goes beyond the Belém do Pará Convention in spelling out important elements of rehabilitation such as victims’ participation and counselling services.

Finally, as also seen at the UN level, the recognition of the rights of disabled persons in different continents has been clear, and connected to this has been the recognition that disabled persons have a primary right to rehabilitation. Although in this Discussion Paper we are concentrating on rehabilitation as a secondary rule that comes into being once a violation of a human right takes place, it is important to consider the dimension that the recognition of such a primary right can have for torture survivors and other victims of human rights violations since such persons are left, in many instances, also disabled as a direct consequence of the harm they suffered.

Nevertheless, it has to be said that the treatment of rehabilitation as a form of reparation at the regional level is not as strong as it is at the UN treaty law level.

4. The right to rehabilitation in international legal practice

This Discussion Paper has clarified the nature of rehabilitation as a legal form of reparation in relation to torture survivors, women who have suffered violence and victims of gross human rights violations and serious breaches of humanitarian law. It is clear that this form of reparation has treaty law status and in some cases, as with torture, it might well also reflect customary international law but evidence in this regard requires careful analysis. Now, it is important to consider two interconnected questions:

- 1) what is the scope of rehabilitation as a form of reparation? What does it entail? and
- 2) what is the best way to fulfil such a form of reparation.

To consider these questions from an international human rights law perspective, the legal and quasi legal practice of some UN bodies and special procedures as well as regional systems for the protection of human rights is analysed in the following pages.

4.1 As a reparation measure awarded or considered by some UN bodies and special procedures

The Human Rights Committee

As indicated earlier, the ICCPR only refers to rehabilitation as an aim of imprisonment. Yet, the Human Rights Committee (HRC), the authoritative interpreter of the ICCPR, has recognised rehabilitation as a form of reparation in the context of the right to an effective remedy under Article 2 of the ICCPR. According to Article 2, the HRC has the obligation “(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.”

In this context, the HRC’s General Comment 31 (2004) on the nature of the general legal obligations imposed on state parties, clearly indicates that:

Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. 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.⁷¹

Therefore, according to General Comment 31, all rights breached under the Covenant imply the right to reparation as this is an essential element of the right to an effective remedy. Moreover, the HRC considers that the usual form of reparation is compensation but that in

⁷¹ Human Rights Committee, *General Comment 31, Nature of the Legal Obligation Imposed on States Parties to the Covenant*, 26/05/2004, para. 16, available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument).

certain circumstances and “where appropriate”, reparation might also entail other forms of reparation such as rehabilitation. It should be pointed out that the General Comment does not spell out the kinds of violations where other reparations measures besides compensation are needed. However, from the text just quoted, and taking into account the Draft Articles on State Responsibility, and the Committee’s practice as already outlined, it is possible to infer that they apply in relation to serious and gross human rights violations such as torture, arbitrary killings, disappearances and trafficking of women and children.

Importantly, the HRC was not always that clear in relation to the states’ obligation to provide a remedy and reparation for breaches of the ICCPR. Indeed, if one considers General Comment 3 on the implementation of the ICCPR at the national level, which was replaced by General Comment 31, it is very telling to find that it does not refer to the obligation to provide reparation for harm done and not even to afford compensation. This omission was evident in all General Comments of the HRC during the 1980s.⁷² This omission can be explained given the fact that at the time the HRC and other UN bodies were more engaged with standard setting rather than implementation. General Comment 20 (1992) on torture and other cruel, inhuman or degrading treatment or punishment is the first of the HRC’s General Comments to expressly state that victims of torture have the right to an effective remedy that also incorporates compensation and “such full rehabilitation as may be possible”, which also follows the wording of Article 14 of CAT. No other General Comment of the HRC establishes in such an explicit way the right to reparation and in particular rehabilitation in relation to a right of the ICCPR. Nevertheless, no definition of rehabilitation is provided.

The practice of the HRC in its concluding observations and views is in line with the content of the General Comments, particularly of General Comment 31. Indeed, the HRC reminds states that there is a right to reparation for actual breaches of the Covenant that are formally established,⁷³ and that rehabilitation is one possible way to fulfil the right. However, and although the HRC refers to rehabilitation, it is not possible to define in clear terms what it means by such a reparation measure. All that can be deduced from its practice is that rehabilitation should be available primarily to victims of torture, of arbitrary or unlawful killings and their families,⁷⁴ to victims of sexual violence including domestic violence⁷⁵ and force prostitution⁷⁶ and to children and women victims of sexual trafficking and to children

⁷² The omission is even more telling if one considers that during the 1980s important General Comments on the right to life, the prohibition of torture or cruel, inhuman or degrading treatment or punishment and rights of the child, among others, were adopted. None of these General Comments refers explicitly to the right to reparations. The closest reference is found in General Comment 7 on Torture or Cruel, Inhuman or Degrading Treatment or Punishment, that establishes the right to receive compensation of torture victims. See, *General Comment 7*, 30/05/82, para. 1.

Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/7e9dbcf014061fa7c12563ed004804fa?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7e9dbcf014061fa7c12563ed004804fa?Opendocument).

⁷³ See for example, HRC, *George Kazantzis v. Cyprus*, Communication No 972/2001, Views of 7 August 2003, para. 6.6 and *Bernadette Faure v. Australia*, Communication No. 1036/2001, Views of 31 October 2005, para 7.2.

⁷⁴ Concluding Observations Germany, UN doc. CCPR/CO/80/DEU, 4 May 2004, paras. 15, 16.

⁷⁵ Concluding Observations Ukraine, UN doc. CCPR/C/UKR/CO/6, 28 November 2006, para. 10; Concluding Observations Ireland, UN doc. CCPR/C/IRL/CO/3, 30 July 2008, paras. 9, 16 and Concluding Observations Japan, UN doc. CCPR/C/JPN/CO/5, 18 December 2008, paras. 15, 23.

⁷⁶ Concluding Observations Lithuania, UN doc. CCPR/C/79/Add.87, 19 November 1997, para. 11.

who have been used in pornography or who are street children.⁷⁷ The HRC particularly emphasises the role of medical rehabilitation in relation to torture survivors⁷⁸ while in relation to domestic violence it considers necessary to provide such victims with “social and medical centres for rehabilitation, regardless of their sex and gender.”⁷⁹ Nevertheless, what rehabilitation entails remains unclear although a very significant statement of the HRC is found in its concluding observation to Japan in 2008, where in relation to domestic violence and trafficking it made use of a more holistic concept of assistance and rehabilitation for such victims. In relation to domestic violence it stated that the State should among other things

increase the amount of compensation for victims of domestic violence and of child-rearing allowances for single mothers, enforce court orders for compensation and child support, and strengthen long-term rehabilitation programmes and facilities, as well as assistance for victims with special needs, including non-citizens. [...] ⁸⁰

Equally, in relation to trafficking, the HRC indicated that it

is concerned about the lack of [...] comprehensive support for victims, including interpretation services, medical care, counselling, legal support for claiming unpaid wages or compensation and long-term support for rehabilitation, and the fact that special permission to stay is only granted for the period necessary to convict perpetrators and that it is not granted to all victims of trafficking (art. 8). [...] The State party should [...] support private shelters offering protection to victims, strengthen victim assistance by ensuring interpretation, medical care, counselling, legal support for claiming unpaid wages and compensation, long-term support for rehabilitation and stability of legal status to all victims of trafficking.⁸¹

These concluding observations made clear that a more “comprehensive” system should be in place to respond to the consequences of certain types of human rights violations. However, the HRC appears to distinguish rehabilitation, meaning health services, from social or legal services. This view contradicts the content of the Basic Principles that, as was seen, understand rehabilitation as including also social and legal services and not only physical and mental care. However, this view has not always been maintained by the HRC as seen when referring to domestic violence and considering social and medical centres as part of rehabilitation.

⁷⁷ Ibid.

⁷⁸ Concluding Observations Egypt, UN doc. CCPR/C/79/Add.23, 9 August 1993, para. 10.

⁷⁹ Concluding Observations Ukraine, UN doc. CCPR/C/UKR/CO/6, 28 November 2006, para. 10.

⁸⁰ Concluding Observations Japan, *supra*, n.75.

⁸¹ Ibid, para. 23.

UN Committee Against Torture

In contrast with the 33 General Comments of the HRC, the Committee Against Torture (The Committee) has only two General Comments and neither of them refers to the right to reparation of torture victims, to compensation or to rehabilitation or to that effect to Article 14 of CAT. Nevertheless, the Committee, the authoritative interpreter of CAT, has reaffirmed in multiple concluding observations and views that torture victims have a right to reparations, including rehabilitation and other measures. Indeed, the Committee when referring to Article 14 of CAT has stated that “redress should cover all the harm suffered by the victim, including restitution, compensation, rehabilitation of the victim and measures to guarantee that there is no recurrence of the violations.”⁸² It is important to note, however, that the Committee qualifies this statement by “bearing in mind the circumstances of each case.”⁸³

As part of the Committee’s practice, States are asked to provide the Committee with information on reparation measures available for torture victims, including rehabilitation services;⁸⁴ and statistical data in relation to the amount of torture victims, how many of them have benefited from rehabilitation services and other forms of reparation.⁸⁵ Equally, the Committee permanently encourages States to set up rehabilitation services and/or to contribute to the UN Voluntary Fund for Victims of Torture or to independent organisations wishing to deliver rehabilitation services.⁸⁶ For example, Committee member, Mr. Sørensen, during the 1996 discussion of the Senegalese report, recommended Senegal to make a voluntary contribution to the UN voluntary fund for victims of torture, so as to contribute to the rehabilitation of victims of torture.⁸⁷ Also, committee member, Mr. Rasmussen in 2000, during the discussion of the Chinese report, indicated that although there were more than 200 rehabilitation centres for torture victims in the world, not one was located in China. China responded indicating that its national health system was able to respond to the needs of torture survivors. However, Rasmussen replied stating that “rehabilitation of torture

⁸² See for example, Committee Against Torture, *Saadia Ali v. Tunisia*, Communication No. 291/2006, 21 November 2008, para. 15.8; *Mr. Kepa Urria Guridi v. Spain*, Communication No. 212/2002, 17 May 2005, para. 6.8 and *Mr. Ali Ben Salem v. Tunisia*, Communication No. 269/2005, 2 May 2005, para. 16.8 and CAT/C/SR.422, paras. 35-46, 7 November 2007.

⁸³ *Ibid*, see for example the communication in the case of *Mr. Kepa Urria Guridi v. Spain*, *ibid*, para. 6.8 and *Ali Ben Salem v. Tunisia*, *ibid*, para. 6.8.

⁸⁴ Second Periodic Report of Armenia, CAT/C/SR.440, 17 November 2000, paras 29-30 and Concluding Observations: Georgia, CAT/C/GEO/CO/3, 23 June 2008, para. 21; Conclusions and Recommendation of the Committee against Torture: Peru, CAT/C/PER/CO/4, 25 July 2006, para. 24; Conclusions and Recommendations of the Committee against Torture: Hungary, CAT/C/HUN/CO/4, 6 February 2007, para. 17; Conclusions and Recommendations of the Committee against Torture: Italy, CAT/C/ITA/CO/4, 16 July 2007, para. 24; Conclusions and Recommendations of the Committee against Torture: Latvia, CAT/C/LVA/CO/2, 19 February 2008, para. 22; Concluding Observations of the Committee against torture: Serbia, CAT/C/SRB/CO/1, 21 November 2008, para. 23 and Concluding Observations of the Committee against Torture: Montenegro, CAT/C/MNE/CO/1, 19 January 2009, para. 20.

⁸⁵ CAT/C/SR.247, 17 January 1997, para. 24.

⁸⁶ See, A/52/44, paras. 189-213.

⁸⁷ CAT/C/SR.247, *supra*, n.85, para. 28.

victims called for special skills. Moreover, many States, acknowledging the importance of rehabilitating torture victims, offered financial support to rehabilitation centres or contributed to the United Nations Voluntary Fund for Victims of Torture. But China seemed to be one of the four or five countries that had never contributed to the Fund.”⁸⁸

The Committee has also recommended countries like Ecuador, Georgia, Honduras, Hungary, Italy and Serbia to enact legislation to regulate compensation and rehabilitation for torture victims. For example, in relation to Ecuador, a country where torture problems have been a serious concern, the Committee has encouraged the country to “establish a specific regulatory framework to govern compensation for acts of torture, and . . . devise and implement programmes of all-round care and support for victims of torture.”⁸⁹ Georgia was asked “to consider adopting specific legislation in respect of compensation, reparation and restitution, and [while such legislation is in place] to take practical measures to provide redress and fair and adequate compensation, including the means for as full rehabilitation as possible.”⁹⁰

Some of the more recent concluding observations include stronger and more consistent language on the obligation to provide rehabilitation as a form of reparation. Honduras, Hungary, Italy, Latvia, Lithuania, and Serbia were each asked to “strengthen its efforts in respect of compensation, redress and rehabilitation” and encouraged to “develop a specific programme of assistance” for torture victims.⁹¹ This means that isolated rehabilitation measures do not respond in an adequate manner to the consequences of torture and that full programmes to assist torture victims are needed.

Also, in relation to Montenegro the Committee noted that “[...] the State party should develop reparation programmes, including treatment of trauma and other forms of rehabilitation provided to victims of torture and ill-treatment, as well as the allocation of adequate resources to ensure the effective functioning of such programmes.”⁹² Equally, in response to Sri Lanka’s report, the Committee recommended to “establish a reparation programme, including treatment of trauma and other forms of rehabilitation, and to provide adequate resources to ensure its effective funding.”⁹³

The most recent concluding observations to address Article 14 of CAT are the ones on Chad.⁹⁴ The Committee noted the existence of persistent allegations of torture.⁹⁵ The

⁸⁸ CAT/C/SR.416, 18 May 2000, para. 33.

⁸⁹ Conclusions and Recommendations of the Committee against Torture, CAT/C/ECU/CO/3, 8 February 2006, para. 26.

⁹⁰ CAT/C/GEO/CO/03, *supra*, n. 84, para. 20.

⁹¹ *Ibid.*

⁹² CAT/C/MNE/CO/1, *ibid.*, para. 20.

⁹³ Conclusions and Recommendations of the Committee against Torture: Sri Lanka, CAT/C/LKA/CO/2, 15 December 2005, para. 16.

⁹⁴ Concluding Observations of the Committee against Torture: Chad, CAT/C/TCD/CO/1, 4 June 2009.

⁹⁵ *Ibid.*, para. 17.

Committee encouraged Chad to “[o]ffer full reparation, including fair and adequate compensation for the victims of such acts, and provide them with medical, psychological and social rehabilitation.”⁹⁶ And, in the same observations, the Committee noted that women and children were subjected to sexual violence at the hands of diverse non state actors and the armed forces,⁹⁷ recommending Chad to “redouble its efforts to prevent, combat and punish sexual violence and abuse against women and children [and] [t]o this end, the State party should [...] set up a rehabilitation and assistance scheme for victims.”⁹⁸

The interventions by Physician Bent Sørensen (Committee member in the 1990’s) during the Committee sessions were very explicit to highlight the different components of rehabilitation. He referred to the 3 Ms of rehabilitation: “moral, monetary and medical”⁹⁹. He insisted on understanding redress as including “moral rehabilitation to remedy what had occurred; compensation, in monetary form; and full rehabilitation including medical rehabilitation.”¹⁰⁰

From these concluding observations and views it is possible to say that although the meaning of rehabilitation is not fully fleshed out by the Committee, its working concept is clearer than that of the HRC and more holistic since it clearly goes beyond access to mental and physical services, expressly acknowledging the existence and the need to treat trauma and to also incorporate social services as an element of rehabilitation. Yet, what social services imply is still far from clear.

The Committee on the Elimination of all Forms of Discrimination Against Women

As the HRC and the CAT Committee, the CEDAW Committee has also generated awareness among states about their duty to provide rehabilitation measures for victims of violations of CEDAW. Such an approach has been particularly clear in relation to breaches that are considered to constitute violence against women. In fact, out of the 26 general recommendations to states parties to the Convention on the Elimination of all Forms of Discrimination Against Women it is the one on Violence Against Women¹⁰¹ that explicitly refers to rehabilitation for women who have been subjected to violence either through family violence, rape, sexual assault or through other means. This is not surprising when the same emphasis is also found in the practice of the HRC and the CAT Committee. Importantly, however, the CEDAW Committee also understands rehabilitation as requiring

⁹⁶ Ibid.

⁹⁷ Ibid, para. 20.

⁹⁸ Ibid.

⁹⁹ CAT/C/SR.36, para. 21; CAT/C/SR.232, 21 November 1995, para. 22; and also see Ingelse, C., *The UN Committee Against Torture: An Assessment* (The Netherlands, Kluwer Law International, 2001), p. 370 and Nowak, M., and McArthur, E., *The United Nations Convention Against torture*, above, n. 19, p. 464.

¹⁰⁰ CAT/C/SR.232, Ibid, para. 22.

¹⁰¹ CEDAW Committee, *General Recommendation 19: Violence against Women*, 1992.

the existence of “support services” for victims in such situation, particularly “trained health workers, rehabilitation and counselling.”¹⁰²

The CEDAW Committee refers in different concluding observations to rehabilitation although it also fails to precisely define what it entails. Some guidance is found however in the only one of its 15 cases that addresses this issue. In the case of *A. T. v. Hungary*,¹⁰³ concerning a woman who was subjected to severe domestic physical and mental violence by her husband, Hungary did not have any mechanisms in place to effectively protect her or any other women in such situation. The Committee was of the view that this amounted to several violations of CEDAW and recommended Hungary to “Provide victims of domestic violence with safe and prompt access to justice, including free legal aid where necessary, in order to ensure them available, effective and sufficient remedies and rehabilitation.”¹⁰⁴ This general recommendation was applied by the Committee in the case of *A.T* as it considered that the State shall “ensure that A. T. is given a safe home in which to live with her children, receives appropriate child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights.”¹⁰⁵ Therefore, even if the CEDAW Committee does not spell clearly its understanding of rehabilitation, it is possible to conclude that it sees it in holistic terms, including not only reparation for health related consequences but also legal services, housing and child support.

Special Rapporteur on Torture

The SRT has stated in different reports that “Both the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provide that a State should 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 a rehabilitation as possible.”¹⁰⁶ Further, the SRT has mentioned in several documents the Basic Principles and the drafts that lead to them and fully supports the view that torture victims have a right to reparation which, depending on the particular gravity of the situation, should include “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”¹⁰⁷ It has gone as far as saying that Article 14 should be interpreted in light of the content of the Basic Principles.¹⁰⁸

¹⁰² Ibid, para. 24.

¹⁰³ CEDAW Committee, *Ms A. T. V. Hungary*, Communication No.: 2/2003, 26 January 2005, paras 1.1 and 3.1.

¹⁰⁴ Ibid, para. 9.6.II.g.

¹⁰⁵ Ibid, para. 9.6.I.b.

¹⁰⁶ SRT, A/54/426, 1 October 1999, para. 49; A/55/290, 11 August 2000, para. 24.

¹⁰⁷ SRT, A/58/120, 3 July 2003, Paras. 31-32.

¹⁰⁸ A/HRC/4/33, 15 January 2007, para. 61.

It is important to note that Theo van Boven who, as noted before, began the drafting process of the Basic Principles, also served as Special Rapporteur on Torture. During his mandate as SRT he made some of the most revealing analyses of reparations as they apply to torture victims. In its report to the Commission on Human Rights at its sixtieth session,¹⁰⁹ van Boven included a section on the impact of torture on victims. This section is the first comprehensive analysis carried out by a special procedure of the consequences of torture with the aim of clarifying the redress needed to deal with such harm. Indeed, he considered “crucial to identify the many aspects of the impact of torture on its victims in order to better appraise and address their needs, in particular from a medico-psychosocial point of view, and to make recommendations that would ensure the most adequate and effective reparation.”¹¹⁰

The report acknowledges the multifaceted dimensions of torture and ill-treatment. It explains most of its usual physical, psychological and socioeconomic *sequelae*, the existence of overlapping injuries,¹¹¹ and its after effects. Moreover, it highlights an essential but forgotten dimension of torture: the consequences for the family unit and for the network of people close to the torture victim.¹¹² With compelling words, it states:

Physical and psychological impediments caused by torture may create difficulties in resuming satisfactory relationships with the family, in particular with spouses and children. [...] Permanent physical wounds, psychological problems and cognitive impairment may also reduce the survivor’s working capacity. Social disabilities and loss of employment may lead to social and economic exclusion, which would have an impact on the whole family, especially when the torture survivor was the principal earner. Some torture victims may also decide to leave their home place for fear of continued persecution, because of the social stigma or in an attempt to forget the experience. They, and often their relatives, would have thus to start a new life with all the socioeconomic and other consequences this involves.¹¹³

This comprehensive understanding of the multiple consequences of torture allowed van Boven to consider that “rehabilitation programmes should also include the family of the torture victim,”¹¹⁴ and two kinds of state responses in terms of assistance, meaning rehabilitation for torture victims:

1) “urgent interventions to provide medical aid or attention and to denounce abusive situations with a view to preventing further torture or the deterioration of the state of health of the person concerned” and

¹⁰⁹ SRT, A/59/324, 1 September 2004, section 4, paras. 43-60.

¹¹⁰ Ibid.

¹¹¹ Ibid, para. 47.

¹¹² Ibid, para. 50.

¹¹³ Ibid.

¹¹⁴ Ibid, para. 51.

2) long-term assistance, which should be “multidimensional and interdisciplinary”¹¹⁵.

For him, “medical aspects, including psychological ones, must not be separated from legal and social assistance. Such assistance should also be provided to the families of torture survivors and, if need be, to their communities.”¹¹⁶ The report considers this two tier approach as essential to guarantee “adequate, effective and prompt reparation.”¹¹⁷

The SRT has also called upon states to provide financial support to the United Nations Voluntary Fund for Victims of Torture and has asked them to “support and assist rehabilitation centres that may exist in their territory to ensure that victims of torture are provided the means for as full a rehabilitation as possible.”¹¹⁸ It has even stated that those State where torture is systematic and generalised should be required to “contribute adequate funds” to the UN Fund.¹¹⁹ Finally, the SRT has equally stressed the need for legal assistance so that victims of torture could obtain reparation, including rehabilitation.¹²⁰

Special Rapporteur on the Right to Health

Given that one of the salient dimensions of rehabilitation as a form of reparation, and the most stressed in the literature, is health, it is important both to understand the relationship between the right of everyone to the enjoyment of the highest available standard of physical and mental health and the right to rehabilitation; and to establish the content given to such relationship by the SRRH.

Article 12 of the CESC¹²¹ rights incorporates the right to health. The Committee on ESC rights drafted General Comment 14¹²² to define the content of this article. According to the

¹¹⁵ Ibid, para. 57.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid, para. 50;

¹¹⁹ A/HRC/4/33, 15 January 2007, para. 68.

¹²⁰ A/55/290, 11 August 2000, para. 29.

¹²¹ Article 12 reads as follows: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

¹²² Committee on ESC rights, *General Comment 14, The Right to the Highest Available Standard of Health*, E/C.12/2000/4, 11 August 2000.

General Comment, Article 12 enunciates some, but not all, obligations of states parties to the Covenant.¹²³ It highlights that states have obligations to respect, protect and fulfil the right to health and that there are some core obligations -minimum ones- that all states should guarantee. The Core obligations included in the General Comment are the following:

- (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- (e) To ensure equitable distribution of all health facilities, goods and services;

And the Committee considers of “comparable priority” the following ones:

- (a) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
- (b) To provide immunization against the major infectious diseases occurring in the community;
- (c) To take measures to prevent, treat and control epidemic and endemic diseases;
- (d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;
- (e) To provide appropriate training for health personnel, including education on health and human rights.

Although all of these core obligations are relevant to fulfil the physical and mental health needs of victims of serious human rights violations like torture, arbitrary killings, internal displacement and disappearances, none of them have the capacity to provide these victims with a legal tool to guarantee that states would take the necessary measures to respond to the particular harm they have suffered. For instance, although the General Comment and the core obligations guarantee access to primary health care to any person without discrimination and to essential drugs, in the case of a torture survivor the need to respond to the physical and mental sequelae of torture requires much more than primary health care and essential drugs. As Manfred Nowak has said, “since victims of torture often suffer from long-term physical injuries and post-traumatic stress disorders, various types of medical, psychological, social and legal rehabilitation usually are best suited to provide relief. Long-term rehabilitation measures, which are often provided by special torture rehabilitation centres, are fairly cost intensive.”¹²⁴ Further, such measures are not part of the core obligations of the right to health. Therefore, the needs of torture survivors would not

¹²³ Ibid, para. 7.

¹²⁴ A/HRC/4/33, 15 January 2007, para. 66.

necessarily be fulfilled if claimed in terms of the right to health. Although other important elements such as access to basic shelter, housing, access to potable water and to food supply could make a difference for a torture victim unable to look after her or himself.

It is equally telling that the only paragraph of the General Comment related to reparations omits any reference to rehabilitation as one of its possible forms. The General Comment states that “any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition.” When asked about this omission on the General Comment, the former Committee member and Special Rapporteur on the Right to Health, Paul Hunt, indicated that the omission was not intentional but that despite the active involvement of the World Health Organisation in the drafting of the Comment, committee members were not fully aware of this dimension.

Although there is a clear gap between the core obligations recognised by the Committee on ESC rights and the health measures needed to provide health rehabilitation, it is important to see how the SRRH has dealt with this gap and how it has understood/used the term rehabilitation. The SRRH has dealt with rehabilitation in different reports, however, it has mainly done so to highlight the need for rehabilitation services related to mental health, and as a consequence, as a key measure to deal with mental disability.

The first reference to rehabilitation is found in the SRRH report on Peru of 2005.¹²⁵ After the SRRH visited a country that faced a severe conflict during the 1990’s, and that as a result generated multiple psychosocial problems and serious trauma,¹²⁶ he found that there was a lack of “rehabilitation services and community-based mental health and support services.” Such absence of services applied not only in relation to victims of the conflict but also in relation to any one with mental health problems. This led the rapporteur to make several recommendations to Peru where he particularly acknowledged the consequences of conflict for health such as “to take steps towards making appropriate mental health care - including care provided through general health services and in community settings, rehabilitation services, and support services for family members - available and accessible to people with mental disabilities and psychosocial problems throughout Peru, including in rural areas;”¹²⁷ and particularly to women, and even called donors to “contribute funding and technical assistance for the implementation of the Comprehensive Plan for Reparations of the Truth and Reconciliation Commission, including in the area of mental health.”¹²⁸

In 2005 the SRRH also wrote a report for the Commission on Human Rights on Mental Health¹²⁹ where he states that the right to mental health is relevant not only to people with

¹²⁵ Hunt, P., *SRH: Mission to Peru*, E/CN.4/2005/51/Add.3.

¹²⁶ *Ibid*, para. 22 and 68-69.

¹²⁷ *Ibid*, para. 71.c.

¹²⁸ *Ibid*, para. 71. f.

¹²⁹ Hunt, P., *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Available Standard of Physical and Mental Health*, E/CN.4/2005/51, 11 February 2005.

mental disabilities but also to the whole population. However, the SRRH focused most of his report on the situation of people with mental disabilities which he defined as those persons with “mental illness and psychiatric disorders, e.g. schizophrenia and bipolar disorder; more minor mental ill health and disorders, often called psychosocial problems, e.g. mild anxiety disorders; and intellectual disabilities.”¹³⁰ The SRRH, in the same way as treaties on disabilities at the UN and regional level, refers to rehabilitation as a right of a person with mental disability. To this end, the SRRH used the Standard Rules on the Equalization of Opportunities for Persons with Disabilities Adopted by the UN General Assembly in December 1993, at the end of the decade of disables persons, that defines rehabilitation as

a process aimed at enabling persons with disabilities to reach and maintain their optimal physical, sensory, intellectual, psychiatric and/or social functional levels, thus providing them with the tools to change their lives towards a higher level of independence. Rehabilitation may include measures to provide and/or restore functions, or compensate for the loss or absence of a function or for a functional limitation. The rehabilitation process does not involve initial medical care. It includes a wide range of measures and activities from more basic and general rehabilitation to goal-oriented activities, for instance vocational rehabilitation.¹³¹

Such definition of rehabilitation as applied to health, led the SRRH to recommend that states “should take steps to ensure a full package of community-based mental health care and support services conducive to health, dignity, and inclusion, including medication, psychotherapy, ambulatory services, hospital care for acute admissions, residential facilities, rehabilitation for persons with psychiatric disabilities, programmes to maximize the independence and skills of persons with intellectual disabilities, supported housing and employment, income support, inclusive and appropriate education for children with intellectual disabilities, and respite care for families looking after a person with a mental disability 24 hours a day.”¹³² It should be noted that although he is dealing with rehabilitation in the context of health for the mentally disabled, rehabilitation is understood in holistic ways so as to go beyond health measures to include housing, employment and income support, all of which are “underlying determinants” of the right to health. Both the SRRH and General Comment 14 of the Committee on ESC rights define underlying determinants as those factors that determine the possible enjoyment of the right to physical and mental health such as “food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”¹³³ Further, it is possible to conclude that even if General Comment 14 does not refer to rehabilitation as a form or reparation, the view of the SRRH appears to be different since he particularly recognises the harm that results from violence and conflict, how such harm might produce mental disability and how rehabilitation, understood holistically, is essential to repair the harm done. It should be noted however that not all people with mental disability are entitled to rehabilitation as a reparation measure as this

¹³⁰ Ibid, para. 19.

¹³¹ Ibid, para. 25.

¹³² Ibid, para. 43.

¹³³ Supra, n. 122, paras. 4, 10, 12, 16 and 18 and *Report of the Special Rapporteur*, above, n. 129, para. 45.

would only be the case in relation to victims of human rights violations. In the case of other disabled persons, rehabilitation is a primary right.

Special Rapporteur on Violence against Women

The mandate of the SRVW was established in 1994 by the then Commission on Human Rights to seek and receive information on violence against women, consider its causes and consequences, to work closely with other UN bodies so as to enhance information on violence against women and their protection, and more importantly, to “recommend measures, ways and means, at the national, regional and international levels, to eliminate violence against women and its causes, and to *remedy its consequences*”¹³⁴ [italics not in original text]. The mandate of SRVW was extended by the Commission on Human Rights in 2003, and the Commission once more recalled that States should “take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the State, by private persons or by armed groups or warring factions, and to provide access to just and effective remedies and specialized, including medical, assistance to victims.”¹³⁵ Such emphasis is the result of the content of Article 4 of the UN Declaration on the Elimination of Violence against Women, an instrument that the SRVW is bound to apply,¹³⁶ that clearly highlights that States have the obligation to

[...] ensure, to the maximum extent feasible in the light of their available resources and, where needed, within the framework of international cooperation, that women subjected to violence and, where appropriate, their children have specialized assistance, such as rehabilitation, assistance in child care and maintenance, treatment, counselling, and health and social services, facilities and programmes, as well as support structures, and should take all other appropriate measures to promote their safety and physical and psychological rehabilitation.¹³⁷

Clearly, since violence against women can also be committed by non-state actors, the international responsibility of the state is not always involved. Nevertheless, the SRVW highlights, regardless of whether the State is responsible or not, the state obligation to ensure “the provision of *specialized assistance* for the support and rehabilitation of women victims of violence.”¹³⁸

¹³⁴ Commission on Human Rights, *Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women*, Resolution 1994/45, 4 March 1994, para. 7. Available at: <http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/401503e99f333b03802567360041e65c?Opendocument>.

¹³⁵ Commission on Human Rights, *Elimination of Violence against Women*, Resolution 2003/45, 23 April 2003, para. 5.

¹³⁶ Ibid.

¹³⁷ UN General Assembly, *Declaration on the Elimination of Violence against Women*, Resolution A/RES/48/104, 23 February 1994.

¹³⁸ Coosmaraswamy, R., *Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences*, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45, E/CN.4/1995.42, 22 November 1994, para. 108, c.

Equally, after the visit of the SRVW to the Republic of Korea and Japan to document the situation of military sexual slavery in wartime (comfort women) and the international responsibility of Japan to the Democratic Peoples' Republic of Korea, and in response to the contention of Japan that it does not have a legal obligation to provide these women with reparations,¹³⁹ the SRVW clearly recalled that individuals have a right to reparations and referred to the Draft Basic Principles of 1996 to re-state that rehabilitation is a form of reparation that "implies the provision of legal, medical, psychological and other care, as well as measures to restore the dignity and reputation of victims."¹⁴⁰ The SRVW concluded that the Government of Japan should pay reparations to the victims of Japanese military sexual slavery following the principles outlined by the Draft Basic Principles.¹⁴¹

In this same light, the SRVW has discussed the issue of violence against women in times of conflict, particularly stressing the impact of sexual violence in their lives. For the SRVW such crimes "are physically, emotionally and psychologically devastating for women victims. Few countries have adequately trained personnel to meet the needs of victim-survivors. Additionally, in some situations, forced impregnation has likewise been used as a weapon of war to further humiliate the rape victim, by forcing her to bear children of the perpetrator. Some rape survivors have given birth to the unwanted children of rape. Likewise, some survivors have been forced into the role of sole head of the household with little earning power."¹⁴² Therefore, the SRVW contends, in situations of conflict where trauma is prevalent, and women are particularly affected, "the process of reconstruction and reconciliation must take into account the problem of psychological healing and trauma. Counsellors trained to work with victim-survivors of violence against women must be available to assist women navigating their way through State structures and taking control of their lives. Victim-survivors of sexual violence are in special need of advocacy, counselling and support. Centres that employ a victim-centred methodology should be established as an aspect of the reconstruction and rehabilitation process."¹⁴³ For the SRVW such a demanding obligation should be fulfilled not only by the State but also requires the help of the international community that should establish a special fund to provide societies emerging from conflict with specialised services, including psychological counselling and social rehabilitation.¹⁴⁴ Equally, NGOs are called upon to provide some of those services.¹⁴⁵

Further, the SRVW highlights the obligation of states facing conflict to fight impunity, which includes "providing redress for victims, including compensation for injuries and costs,

¹³⁹ Coosmaraswamy, R., *Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime*, E/CN.4/1996/53/Add.1, 4 January 1996, para. 92.

¹⁴⁰ *Ibid.*, para. 121.c.

¹⁴¹ *Ibid.*, para. 137.b.

¹⁴² Coosmaraswamy, R., *Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Radhika Coomaraswamy, submitted in accordance with Commission resolution 1997/44, E/CN.4/1998/54, 26 January 1998, para. 14.

¹⁴³ *Ibid.*, para. 94.

¹⁴⁴ *Ibid.*, para. 97.

¹⁴⁵ *Ibid.*, para. 112.

within national mechanisms and providing economic, social and psychological assistance to victim-survivors of sexual violence during times of armed conflict.”¹⁴⁶ The SRVW has particularly noted that to fight impunity states are obliged to collect data on different issues, one of which is the “extent, geographical distribution, use and unmet demand for support services: helplines, shelters, counselling services, advocacy and one-stop shop provisions.”¹⁴⁷

Besides recognising that women subjected to violence have a right under international human rights law to reparations, including rehabilitation, the SRVW has also dealt with the difficult question of how to implement rehabilitation measures in post conflict and post genocide situations. In this regard, one paradigmatic example of violence against women, particularly sexual violence, is that of Rwanda. In this regard, the SRVW affirmed that sexual violence was used as an act of war and that thousands of women were subjected to such violence by men and women. Some were raped by their own sons, others had to give birth to children resulting from the rape, others became HIV positive, others were sexually mutilated and/or their reproductive systems became permanently damaged.¹⁴⁸ Given the physical and psychological consequences of the genocide, during her visit to the country in 1997, she aimed to clarify, among other issues, the status of women post-genocide. The SRVW was shocked to find out that three years after the genocide, there were only 170 doctors of which only 5 were gynaecologists to deal with the physical sequelae of genocide.¹⁴⁹ Also, she determined that although there were different projects being implemented by the UN and NGOs, they lacked an overall framework or strategy. Therefore, she made recommendations to all relevant stakeholders in Rwanda dealing with its reconstruction and the rehabilitation of victims. As far as the State of Rwanda was concerned, the SRVW recommended it to set up an interministerial task force to deal with sexual violence during the genocide so as to “address the consequences of sexual violence.” The SRVW also suggested the establishment of a “mobile health unit” to deal with long term diseases as a result of the genocide, HIV patients, rape-related abortions, reconstructive surgery and pregnancy.¹⁵⁰

The idea of setting up a “mobile health unit” is also the direct application of a recommendation that the SRVW has made in diverse reports. The SRVW considers that it is important to have “one-stop” centres available to women who have experienced violence (in or outside of conflicts) so that they can easily have access to adequate and professional legal, medical and psychological services in the same place.¹⁵¹ Although the mobile health unit only deals with the health dimension of rehabilitation, it is in any way an important step

¹⁴⁶ Ibid, para. 101.

¹⁴⁷ Ertürk, Y., *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences: Indicators on Violence against Women and State Response*, A/HRC/7/6, 29 January 2008, para. 89.

¹⁴⁸ Coomaraswamy, R., *Report of the mission to Rwanda on the issues of violence against women in situations of armed conflict*, E/CN.4/1998/54/Add.1, 4 February 1998, paras. 77-80.

¹⁴⁹ Ibid, para. 85.

¹⁵⁰ Ibid, para. 145.

¹⁵¹ Ibid, para. 113; Coomaraswamy, R., *Report on the mission of the Special Rapporteur to Brazil on the issue of domestic violence* (15- 26 July 1996), E/CN.4/1997/47/Add.2, 21 January 1997, paras. 90 and 105 (f) and Ertürk, Y., *Indicators on violence against women and State response*, A/HRC/7/6, 29 January 2008, para. 89.

towards making services available to those who need them in a more permanent and direct basis.

It should also be noted that the SRVW, to help States to comply with their obligations under international law to ensure that their domestic law is consistent with the rights and obligations derived from those instruments, produced a “framework for model legislation on domestic violence”¹⁵² aiming, among other things, to a) provide diverse remedies (civil and criminal) to deter and protect women from violence and to b) “establish departments, programmes, services, protocols and duties, including but not limited to shelters, counselling programmes and job-training programmes to aid victims of domestic violence.”¹⁵³ This report deals with rehabilitation as an element of the duty states have “to protect” women from violence but not as a reparation measure. Equally, the report uses the word rehabilitation not only to refer to the services and support that the victim of violence requires but also in relation to the support needed by the perpetrator of domestic violence. Nevertheless, the report presents in a holistic manner the measures of protection for women subjected to violence, distinguishing between emergency and non-emergency measures. As emergency measures the report lists the following:

- (i) Seventy-two hour crisis intervention services;
- (ii) Constant access and intake to services;
- (iii) Immediate transportation from the victim’s home to a medical centre, shelter or safe haven;
- (iv) Immediate medical attention;
- (v) Emergency legal counselling and referrals;
- (vi) Crisis counselling to provide support and assurance of safety;
- (vii) Confidential handling of all contacts with victims of domestic violence and their families.¹⁵⁴

Non emergency services are the following ones:

- (a) Delivery of services to assist in the long-term rehabilitation of victims of domestic violence through counselling, job training and referrals;
- (b) Delivery of services to assist in the long-term rehabilitation of abusers through counselling;
- (c) Programmes for domestic violence which are administered independently of welfare assistance programmes;
- (d) Delivery of services in cooperation and coordination with public and private, State and local services and programmes.¹⁵⁵

¹⁵² Coosmaraswamy, R., *Framework for Model Legislation on Domestic Violence*, E/CN.4/1996/53/Add.2, 2 February 1996.

¹⁵³ *Ibid*, para, 2.

¹⁵⁴ *Ibid*, para, 61.

¹⁵⁵ *Ibid*.

Importantly, although the report considers that counselling is an essential service to deal with violence against women, it establishes key principles that should be taken into account when considering rehabilitation as a reparation measure. It states that counselling services should be available to perpetrators as a supplement to the criminal justice system and to police, members of the justice system and victims. However, in relation to the victims the report highlights that “the law should provide but not mandate counselling for victims”, that it should be free of charge, and that its aim should be to produce empowerment.¹⁵⁶ This last point has also been highlighted by the SRVW in relation to rehabilitation as a reparation measure in different reports, as when visiting Rwanda and indicating that “it is essential to work towards women’s long term empowerment and self-reliance and to avoid women becoming chronically dependent on support.”¹⁵⁷

Finally, it should also be mentioned that in some of the SRVW reports, it is stressed that the measures taken in some states to protect certain women who have been subjected to violence, such as prostitutes and trafficked women, are not holistic since they present “rehabilitation” as a way to turn bad apples into good ones. In this sense, the SRVW has stated that “there is a need to move from a paradigm of rescue, rehabilitation and deportation to an approach which is designed to protect and promote women’s human rights, in both countries of origin and countries of destination. Although some women may be traumatized by their experiences and may, on a case-by-case basis, desire counselling and support services, overwhelmingly it is not “rehabilitation” that women need. Rather, they may need support and sustainable incomes. The Special Rapporteur calls on Governments to move away from paternalistic approaches that seek to “protect” innocent women to more holistic approaches that seek to protect and promote the human rights of all women, including their civil, political, economic and social rights.”¹⁵⁸

The UN Voluntary Fund for Victims of Torture

Finally, at the UN level, the practice of the UN Voluntary Fund for Victims of Torture (UNVFVT) should also be considered. The General Assembly of the United Nations, following its resolutions establishing and extending the mandate of the UN Trust Fund for Chile to provide victims of imprisonment in that country with humanitarian assistance¹⁵⁹ decided, despite strong discussion, to extend and widen the mandate of that fund so as to be able to receive “voluntary contributions for distribution, through established channels of assistance, as humanitarian, legal and financial aid to individuals whose human rights have been severely violated as a result of torture and to relatives of such victims, priority being given to aid to victims of violations by States in which the human rights situation has been the subject of resolutions or decisions adopted by the Assembly, the Economic and Social

¹⁵⁶ Ibid, paras, 69-72.

¹⁵⁷ Supra, n. 148, para. 81.

¹⁵⁸ Coomaraswamy, R., *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women’s migration and violence against women*, submitted in accordance with Commission on Human Rights resolution 1997/44, E/CN.4/2000/68, 29 February 2000, para. 88.

¹⁵⁹ General Assembly Resolution 33/174, 20 December 1978 and Resolution 35/190, 15 December 1980.

Council or the Commission on Human Rights.”¹⁶⁰ This fund became the UN Voluntary Fund for Victims of Torture since 1981.

The fund provides psychological, medical, legal, financial and social “assistance” to victims of torture and their next of kin and defines these five forms of assistance more clearly than any of the bodies commented in this section of the Discussion Paper or than any international instrument to that effect.

Psychological assistance entails “individual therapy, whether based on clinical, psychoanalytical, behavioural or other therapy, [...] to assist victims with their gradual reintegration into society. Psychiatric therapy may be combined with medication to alleviate physical and psychological symptoms.”¹⁶¹

Medical assistance is also provided “following diagnosis by a general practitioner, treatment is provided by medical specialists in the fields of orthopaedics, neurology, physiotherapy, paediatrics, sexual health, urology as well as traditional healing and complementary medicine.”¹⁶² It aims to deal with the physical consequences of torture.

Social assistance offers “various services to reduce the sense of marginalization that many victims experience. [...]It] ensures that victims have access to a minimum of basic services, including housing, health care, education, language classes and employment training.”¹⁶³

Legal assistance covers the “costs of lawyers, courts, translations and legal proceedings” as well as the fight against impunity by supporting victims of torture in their quest for reparation domestically or internationally.¹⁶⁴

Finally, financial assistance, the only one of the services provided by the UNVFVT that is not mentioned in the Basic Principles, but that was also stressed by the SRVW, aims to “enable victims to meet their needs” particularly when they are severely disabled as a result of torture and need some kind of subsidy to subsist or to provide their families with support such as education to children.¹⁶⁵

Importantly, as did some of the instruments mentioned in previous sections such as the Basic Principles of Justice (1985), the UNVFVT refers to “assistance” rather than to rehabilitation as a form of reparation. Such linguistic distinction is not accidental. During the 1980s and still today it was and is common to refer to assistance to precisely highlight the

¹⁶⁰General Assembly Resolution 36/151, 16 December 1981.

¹⁶¹ UNVFVT, Assistance, available at: <http://www.ohchr.org/EN/Issues/Pages/TortureFundAssistance.aspx>.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

non-legal obligation deriving from such support. Indeed, the resolution that establishes the UNVFVT clearly stated that it recognises “the need to provide assistance to the victims of torture in a purely humanitarian spirit.”¹⁶⁶ This point is crucial given that although the support of the UNVFVT is transcendental for some torture victims and their next of kin, the fund does not and cannot fulfil the obligation of states to provide adequate reparation, even if it provides a sound treatment of the subject that should inform rehabilitation as a form of reparation owed by states.

Equally important, nevertheless, is to recall that, as noted by the Committee against Torture,¹⁶⁷ and as stated by relevant UN bodies dealing with torture, “all States, in particular those which have been found to be responsible for widespread or systematic practices of torture, [should] contribute to the Voluntary Fund as part of a universal commitment for the rehabilitation of torture victims.”¹⁶⁸

Yet, despite the fact that the fund remains one that depends on voluntary contributions, it is clear that the UNVFVT is the only UN mechanism that “provides direct assistance to victims”¹⁶⁹ even if it does so by acting as a donor that provides NGOs (only) with grants from the fund so that they deliver assistance in the terms already indicated. During the last round of applications to the fund in 2009, 185 NGOs worldwide received funds to carry out assistance projects in different countries.¹⁷⁰ REDRESS received funds to carry out legal assistance. Under exceptional circumstances, victims of torture based in countries where there are no funded projects by the fund, could apply for emergency funding. To be eligible under such circumstances, the victim has to include medical/psychological evidence of the consequences of torture.

Although a broad range of NGOs receive grants, about half of the money is given to Western European NGOs (50.30% by 2008) particularly given that organisations in these countries apply for the grants while other NGOs in other parts of the world are less aware of the existence of the fund. Much of the work of such NGOs nevertheless relates to support to victims in other regions. This said, statistics show that in regions like Africa, the allocation of resources doubled between 2004 and 2008 (from 6.98% to 14.04%).¹⁷¹ The problem of allocation of resources should be analysed in terms of its possible impact (negative/positive) for the delivery of direct services/assistance to victims of torture and their next of kin.

¹⁶⁶ *Supra*, n. 159.

¹⁶⁷ See section of this report on the Committee against Torture.

¹⁶⁸ *Joint Statement by the Committee against Torture, the Subcommittee on Prevention of Torture, the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur of the Human Rights Council on violence against women, its cause and consequences and the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture to commemorate the International Day in Support of Victims of Torture*, 26 June 2008, in the United Nations Voluntary Fund for Victims of Torture, A/63/220, 5 August 2008, para. 25.

¹⁶⁹ Odio-Benito, E., “A Quiet Strength” in *Rebuilding Lives* (Geneva, UN, 2006), p. 60.

¹⁷⁰ UNVFT, List of Grantees – 2009, 29th-30th sessions of the Board of Trustees, available at: <http://www.ohchr.org/Documents/Issues/ListofGrantees2009.pdf>.

¹⁷¹ United Nations Voluntary Fund for Victims of Torture, A/63/220, 5 August 2008, para. 10.

4.2 Regional human rights Courts

European Court of Human Rights

The European Court despite being the oldest human rights regional court and having some of the richest jurisprudence in some areas, has not treated in the same manner its reparations' awards under former article 50 of the European Convention, now article 41 (Just satisfaction). In deep contrast with the jurisprudence of the Inter-American Court of Human Rights (examined below), the Court has mainly dealt with two categories of reparation: compensation and, just in recent years, restitution. Therefore, its treatment of rehabilitation as an independent form of reparation is yet to take place. Nevertheless, it should be noted that some of its awards under the heading of compensation, either for material damages or for moral damages, might well be interpreted to correspond to some elements of rehabilitation. Nevertheless, its limited awards on the matter permit to conclude that rehabilitation is not a form of reparation under its jurisprudence.

In cases related to serious human rights violations the Court has awarded compensation for past medical expenses. In the case of *Aksoy v. Turkey*, Mr. Aksoy was first arbitrarily detained and subjected to torture, then released and two years later shot to death as a reprisal for having taken his case to the European System.¹⁷² As a result of his torture, he was suffering from bilateral radial paralysis of both arms and of other health problems.¹⁷³ After his death, his father continued with the application before the ECHR. He claimed material damages as a result of the medical expenses he had and loss of earnings. For medical expenses he claimed 16,635,000 Turkish Liras and loss of earning of £40 GBP. Equally, the applicant requested £25,000 for non-pecuniary damages.¹⁷⁴ The Court awarded the money claimed taking into account the "seriousness of the violations and the anxiety and distress that these undoubtedly caused to his father."¹⁷⁵

Equally, in the case of *Mikheyev v. Russia*, the Court dealt with the arbitrary detention of Mr. Mikheyev, his torture, and his attempt to escape his torturers by throwing himself from a window of his interrogation room. As a result of his leap he was left permanently disabled and unable to have children. His mother had to abandon her work in order to take care of him.¹⁷⁶

Based on an expert report by a physician, the applicant claimed "ongoing" pecuniary damage due to his medical expenses. The expert physician and the applicant provided the Court with a calculation of the treatment to be required in the future equivalent to RUR

¹⁷² ECHR, *Aksoy v. Turkey*, Judgment on the Merits, 26 November 1996, paras. 10-22.

¹⁷³ *Ibid*, para. 19.

¹⁷⁴ *Ibid*, para. 111.

¹⁷⁵ *Ibid*, para. 113.

¹⁷⁶ ECHR, *Mikheyev v. Russia*, Judgment on the Merits, Application number 77617/01, 26 January 2006, paras. 9-27.

23,562,500 from the moment when the judgment is handed down until the age of 65. He also claimed loss of earnings for his mother since she had to give up everything to take care of him. Equally, he claimed non-pecuniary damages due to the trauma resulting from his torture and his disability to the amount of RUR 22,530,000.¹⁷⁷

The Court awarded him pecuniary damages for future medical expenses taking into account that “the applicant was tortured, as a result of which he attempted suicide. The authorities are thus responsible for the consequences ensuing from the incident [...]. The applicant is now unable to work, and a considerable amount of money is required to continue his treatment. Consequently, there is a causal link between the violation found and the reduction in the applicant’s earnings and his future medical expenses.”¹⁷⁸ Nevertheless, the Court did not agree with the system used by the applicant and the expert physician to arrive at the amount to be awarded for pecuniary damages and applying a different method concluded that “given the seriousness of the applicant’s condition, the need for specialised and continuous medical treatment and his complete inability to work in the future,” it should award EUR 130,000.¹⁷⁹

Equally, given the severity of his torture and the damage to his health, and given the “exceptionally serious consequences” of his suicide attempt, the Court awarded him EUR 120,000 for moral damages.¹⁸⁰ Nothing was awarded to his mother. The report of Dr. Magnutova, specialist in forensic medicine, was crucial for the understanding of the Court of the seriousness of his damage and the consideration of the reparations award.

Despite the two exceptional rulings just analysed, the simplistic treatment of reparations by the Court is well illustrated in the case of *Salmanoglu and Pollatas v. Turkey*, as well as in the vast majority of its decisions. In *Salmanoglu*, the ECHR dealt with the ill-treatment of a sixteen and a nineteen year old girl, who were both detained in Turkey under the suspicion of membership in the PKK.¹⁸¹ While they were detained, they claimed to have been raped and subjected to inhuman treatment. Most of the analysis of the case concerning ill-treatment focused on the existence of medical reports prepared both by state authorities during the detention of the applicants (virginity tests, and other reports) and by impartial bodies like the Turkish Medical Association, the Istanbul University and the Fourth Section of the Forensic Medicine Institute after the women were released.¹⁸² After carefully analysing such reports, the Court concluded that:

taking into consideration the circumstances of the case as a whole, in particular the virginity tests carried out without any medical or legal necessity at the start

¹⁷⁷ Ibid, paras. 147-152.

¹⁷⁸ Ibid, para. 157.

¹⁷⁹ Ibid, para. 162.

¹⁸⁰ Ibid, para. 163.

¹⁸¹ ECHR, *Salmanoglu and Polattas v. Turkey*, Judgment on the Merits, Application 15828/03, 17 March 2009, paras. 5-28.

¹⁸² Ibid, para. 77.

of the applicants' detention in custody [...] and the post-traumatic stress disorders from which both applicants subsequently suffered, as well as the serious depressive disorder experienced by Fatma Deniz Polattaş, the Court is persuaded that the applicants were subjected to severe ill-treatment during their detention in police custody when they had only been sixteen and nineteen years of age.¹⁸³

It was to be expected that such findings, particularly related to the fact that the report proved the existence of Post Traumatic Stress Disorder (PTSD),¹⁸⁴ would have been taken into account by the Court when awarding just satisfaction. Nevertheless, this was not the case. Indeed, in a judgment of such importance, the Court considered sufficient to indicate that the applicants "each claimed 50,000 euros (EUR) in respect of non-pecuniary damage and EUR 20,000 in respect of pecuniary damage," without any indication of the grounds for such requests.¹⁸⁵ The Court responded by denying pecuniary damages since the applicants did not submit any documents to assess the harm,¹⁸⁶ when it would have been perfectly possible to make an award based on equity, taking into account the medical reports in the file that indicate that the applicants suffer from PTSD in order to cover future costs for psychological treatment or, at least, the Court should have reasoned its decision not to award pecuniary damages given the existence of medical reports. The Court only awarded EUR 10,000 as non-pecuniary damage for each victim.¹⁸⁷

Inter-American Court of Human Rights

Despite the holistic and ambitious approach of the IACtHR to reparations, when its case law is looked at from the perspective of rehabilitation, it is possible to identify areas where the Court's jurisprudence could be clarified and enhanced in the years to come. Nevertheless, and despite gaps that will be pointed out in the coming pages, it is important to note that still the jurisprudence of the system contains some of the most important elaborations of rehabilitation as a reparation measure in international law.

To date the Court has not expressly defined rehabilitation as a reparation measure or followed the Basic Principles, although it has awarded reparations for some elements of rehabilitation, particularly for physical and psychological harm, in most of its decisions related to serious human rights violations (disappearances, arbitrary killings, torture and inhuman treatment).

The first approach of the Court to rehabilitation took place through the award of reparations for psychological damage through compensation for moral damages. It began to do so since

¹⁸³ Ibid, para. 96.

¹⁸⁴ Ibid, para. 57.

¹⁸⁵ Ibid, para. 107.

¹⁸⁶ Ibid, para. 109.

¹⁸⁷ Ibid, para. 110.

its groundbreaking case in *Velázquez Rodríguez v. Honduras*, where it awarded moral damages because of “the psychological impact suffered by the family”.¹⁸⁸ The Inter-American Commission of Human Rights (IACtHR) played an important role in illustrating to the Court the dimension of the damage undergone by the next of kin of direct victims of disappearances. Such approach was then replicated in relation to arbitrary killings in cases like *El Amparo v. Venezuela* and *Neira Alegria v. Peru* and cases of torture and inhuman treatment such as *Loayza Tamayo v. Peru*¹⁸⁹ and *Cantoral Benavides v. Peru*.¹⁹⁰

As the concept of material or pecuniary damage used by the Court became more developed, and the Commission and the victims became more sophisticated in their understanding and treatment of such harm, the Court began to recognise as consequential pecuniary damage the expenses resulting from physical and psychological treatment. In the case of *Castillo Páez v. Peru*, a disappearance case, the Court awarded reparations for material damages that included some of the expenses incurred by the next of kin of the direct victim in treatment received in hospitals.¹⁹¹ This approach is also visible in cases of torture and inhuman treatment such as in *Suárez Rosero v. Ecuador*.¹⁹²

Nevertheless, strictly speaking, the Court only began to deal with elements of rehabilitation when it awarded reparations (mostly compensation) to treat the future physical and psychological consequences of the harm suffered. The first decision where the Court awarded material damages not only for medical services already used but for future medical and psychological services is the case of *Blake v. Guatemala*, a disappearance case where the injured party requested such compensation for the brother of Mr. Blake.¹⁹³ The Court ordered Guatemala to award Samuel USD\$15,000 “for the medical treatment received and to be received by Samuel Blake.”¹⁹⁴ Then, in other cases like the *Street Children v. Guatemala*, where five street children were arbitrarily killed, the Court also included reparations for physical harm and treatment under consequential damage.¹⁹⁵ This case is very important since, although the Court awarded other reparation measures (satisfaction measures particularly) the separate opinion by Judge Cançado Trindade drew the attention of the Court to the fact that it cannot limit itself to the award of compensation as a reparation measure since the ‘integrality’ of the human being and human suffering also require an integral form of reparation. In this regard he highlights how rehabilitation should be particularly used together with satisfaction measures¹⁹⁶ and, although he does not provide a definition of rehabilitation, in a footnote to his opinion where he refers to the 1993 study on restitution and compensation by van Boven, he asserts that “rehabilitation has already been

¹⁸⁸ IACtHR, *Velázquez Rodríguez v. Honduras*, Judgment on Reparations and Costs, 21 July 1989, para. 50.

¹⁸⁹ Para, 138.

¹⁹⁰ IACtHR, *Cantoral Benavides v. Peru*, Judgment on Reparations and Costs, 3 December 2001, para. 51(b).

¹⁹¹ IACtHR, *Castillo Páez v. Peru*, Judgment on Reparations and Costs, 27 November 1998, para. 76.

¹⁹² IACtHR, *Suárez Rosero v. Ecuador*, Judgment on Reparations and Costs, 20 January 1999, para. 60.c.

¹⁹³ IACtHR, *Blake v. Guatemala*, Judgment on Reparations and Costs, 22 January 1999, para. 44.d

¹⁹⁴ *Ibid*, para. 50.

¹⁹⁵ IACtHR, *Street Children v. Peru*, Judgment on Reparations and Costs, 26 May 2001, para. 80.

¹⁹⁶ IACtHR, *Ibid*, Separate Opinion by Judge Cançado Trindade, paras. 3-5.

identified as one of the forms of reparation but [...] it needs greater conceptual development.”¹⁹⁷

After the *Street Children* case, new developments took place in relation to rehabilitation in the case-law of the system. In *Barrios Altos v. Peru*, the famous massacre that led the Court to consider that self-amnesties and statutes of limitations are without effect and against the American Convention, the State and the victims arrived at a comprehensive agreement that was then confirmed by the IACtHR. Although the agreement and the Court did not refer to rehabilitation as a form of reparation, the agreement dealt not only with compensation for damages but also with health and education benefits to the victims not in the form of compensation. Of these two benefits the most comprehensive was the health one. In this regard, Peru agreed “to cover, through the Ministry of Health, the health service expenses of the beneficiaries of the reparations, granting them free care at the respective health centre according to their place of residence and at the respective specialized institute or hospital of referral, in the areas of out-patient consultation, diagnostic support procedures, medicine, specialized care, diagnostic procedures, hospitalization, surgery, childbirth, traumatological rehabilitation, and mental health,”¹⁹⁸ while for education, Peru only agreed to provide some scholarships and educational materials.¹⁹⁹

Cantoral Benavides v. Peru is the first case decided by the Court in which, besides recognising that the victims incurred and will incur medical expenses related to the physical and psychological damage caused by the violations, the Court expressly quantified the amount of money required for future medical costs *in relation to each of the victims* rather than awarding a lump sum of money to all of them. In this regard, it awarded USD \$10,000 to Luis Alberto Cantoral, the direct victim of arbitrary detention and torture given that “there is sufficient evidence to show that the victim’s disorders began during his incarceration and that he currently requires psychotherapy [...] as shown by the expert opinions.”²⁰⁰ The Court also awarded USD \$3,000 to Luis Fernando Cantoral, the twin of Luis Alberto, for future medical expenses given that he “was very affected by the plight of his brother Luis Alberto, so much so that it is reasonable to assume that he, too, should receive medical and psychological treatment.”²⁰¹ The mother of Luis Alberto was not awarded a lump sum of money for her future medical expenses but rather the Court ordered the state to provide her physical and mental treatment for the health problems derived from the situation of her son.²⁰²

Equally, this is the first case where the Court awarded an education scholarship to the direct victim, Luis Alberto, in order to restore his life plan. The scholarship aimed “to cover the

¹⁹⁷ Ibid, footnote 4.

¹⁹⁸ IACtHR, *Barrios Altos v. Peru*, Judgment on Reparations and Costs, 30 November 2001, para. 42.

¹⁹⁹ Ibid, para. 43. See also the “Acuerdo de Reparación Integral a las Víctimas y los Familiares de la Víctimas”, 17 September 2001, available at: http://www.corteidh.or.cr/expediente_caso.cfm?id_caso=183.

²⁰⁰ IACtHR, *Cantoral Benavides v. Peru*, supra, n. 190, para. 51(b).

²⁰¹ Ibid, para 51 (f).

²⁰² Ibid, para. 51(e).

costs of a degree preparing him for the profession of his choosing, and his living expenses for the duration of those studies, at a learning institution of recognized academic excellence, which the victim and the State select by mutual agreement.” The Court awarded this reparation measure as part of “other forms of reparation” although the victims in the case requested a lump sum of money to pay for it as part of the non-pecuniary damage caused to Luis Alberto.²⁰³ Again, it was Judge Cançado Trindade that highlighted the rehabilitation dimension of this measure. In his separate opinion he indicated that:

In the present Judgment, the Inter-American Court extended the protection of the Law to the victim in the *cas d'espèce*, in establishing, *inter alia*, the State's duty to provide him with the means to undertake and conclude his university studies in a center of recognized academic quality. This is, in my understanding, a form of providing reparation for the damage to his project of life, conducive to the rehabilitation of the victim. The emphasis given by the Court to his formation, to his education, places this form of reparation (from the Latin *reparatio*, derived from *reparare*, "to prepare or to dispose again") in an adequate perspective, from the angle of the integrality of the personality of the victim, bearing in mind his self-accomplishment as a human being and the reconstruction of his project of life.²⁰⁴

Finally, the Court also ordered, as a measure to restore the dignity of Luis Alberto, a rehabilitating action in itself, that the state nullifies all existing judicial proceedings (including the criminal ones) against him and expunges the records of such proceedings.²⁰⁵ In yet another case, *Bulacio v. Argentina*, Walter, a minor, was detained by the Police during a razzia of more than eighty people in Buenos Aires, after which he was taken to a detention centre where he was beaten by the Police and as a consequence he died some days later. Although neither the Commission or the next of kin of the victim requested reparations for future medical treatment, the Court *motu proprio* decided to award the next of kin a lump sum of USD \$10,000 to be divided in equal parts between the mother, the sister and the grandmother of the child. The Court awarded this sum stating “that compensation for non-pecuniary damage should also include, based on information received, case law and the proven facts, an amount of money for future medical expenses of the next of kin of the victim: Lorena Beatriz Bulacio, Graciela Rosa Scavone and María Ramona Armas de Bulacio, as there is sufficient evidence to demonstrate that the suffering of the latter originated both in what happened to Walter David Bulacio and in the subsequent pattern of impunity.”²⁰⁶

The sensitivity of the Court towards future medical expenses was to be expected given the clear documentation of the psychological trauma developed by different family members, where the father of the victim committed suicide and his sister tried to kill herself on two occasions.

²⁰³ *Ibid*, para. 54(i)

²⁰⁴ *Ibid*, Separate Opinion by Judge Cançado Trindade, para. 10.

²⁰⁵ *Ibid*. Para. 78.

²⁰⁶ IACtHR, *Bulacio v. Argentina*, Judgment on the Merits, Reparations and Costs, 18 September 2003, para. 100.

In the case of *Molina Theissen v. Guatemala*, both the Commission and the victims requested pecuniary damages for consequential damage incurred as a result of psychological treatment needed by different members of the family. The Court awarded the sum required by the family, equivalent to USD \$34,000 “since the victim’s sisters have incurred documented expenses for psychological treatment for several years since the forced disappearance of their brother.”²⁰⁷ Further, the Court, following the precedent of *Bulacio* just commented, awarded USD \$40,000 for non-pecuniary damages to cover future psychological treatment since “taking into account the statements of the victim’s next of kin [...] and the expert opinions of Carlos Martín Beristain [...] and Alicia Neuburger [...], there is evidence to establish that the psychological ailing of Marco Antonio Molina Theissen’s next of kin, [...] originated both in what happened to him and in the situation of impunity that persists in the instant case [...].”²⁰⁸ The money was to be divided in equal shares between the four surviving victims.

An important change in the jurisprudence of the Court took place in the case of the *19 Tradesman v. Colombia*, where 19 persons were arbitrarily killed by paramilitary groups in Puerto Boyaca with the acquiescence of state authorities. The bodies of the 19 persons were dismembered and thrown into a river.²⁰⁹ In this case, for the first time the Court did not deal with elements of rehabilitation within the headings of pecuniary or non-pecuniary damages. Instead, the Court awarded “medical care” to the next of kin of the arbitrarily killed men as “other form of reparation,” the third heading used by the Court when awarding reparations.²¹⁰ The Commission requested, among other forms of reparation, the provision of “health services, including psycho-social and family support programs for the next of kin affected by the disappearance, according to their needs and to the opinion of professionals trained in treating the effects of violence and forced disappearance.”²¹¹ The Court granted the request following the expert advice of Dr. Berinstain who stated that

During the interview, [...] the next of kin evinced some problems [...] of excessive consumption of drugs and alcohol[...] as a way of trying not to think or, at times, trying to channel the anger that this caused.

[...]

[...] it is necessary to find ways to alleviate the damage resulting from the disappearance [...] ranging from measures relating to psychological support to health care [...].

[...]

Methods must be found that have a social perspective, that understand disappearance and, at times, generate collective mechanisms [...] provided the people want and accept this. Evidently, there are ways of providing support that will evolve more in collective terms, but the people will also certainly need

²⁰⁷ IACtHR, *Molina Theissen v. Guatemala*, Judgment on Reparations and Costs, 3 July 2004, para. 58 (2).

²⁰⁸ *Ibid*, para. 71.

²⁰⁹ IACtHR, *19 Merchants v. Colombia*, Judgment on the Merits, Reparations and Costs, 5 July 2004, para. 85.

²¹⁰ *Ibid*, para. 254 (i).

²¹¹ *Ibid*.

methods of support or care for their needs in a more individualized way. In this case, it is important to ensure that [the program] is truly appropriate for the needs of the victims and not something designed from outside, [...] it must, in some way, be decided with the next of kin themselves as to their needs and requirements in this area [...].²¹²

The Court emphasised that

To help repair physical and psychological damage, the Court rules that the State has the obligation to provide without charge, through its specialized health institutions, the medical and psychological treatment required by the next of kin of the victims, including the medication they require, taking into consideration that some of them have suffered from drug addiction and alcoholism. Bearing in mind the opinion of the expert, who has evaluated or treated many of the next of kin of the 19 tradesmen [...], psychological treatment must be provided that takes into account the particular circumstances and needs of each of the next of kin, so that they can be provided with collective, family or individual treatment, as agreed with each of them and following individual assessment.²¹³

The Court followed the precedent again in the case of the *Juvenile Re-Education Institute v. Paraguay*,²¹⁴ concerning the terrible detention conditions of juveniles in the Panchito López detention facility, the treatment given to the inmates and the deaths and injuries suffered during three different fires. In this case, the Court not only awarded medical and psychological treatment, including medicine and surgeries that were required but also awarded education and vocational assistance programmes for all former inmates of the Centre. The Court qualified the type of service that the state should provide in relation to mental and health services, it should be free of charge and psychological service should “consider each individual’s particular circumstances and needs. In other words, treatment may be in groups, families or individuals, as decided in each case after an individual evaluation is made. To that end, the State is to create a committee to evaluate their physical and psychological condition, and the measures that each individual requires.”²¹⁵

The case of *Tibi v. Ecuador* establishes an important precedent in terms of rehabilitation since the subject was covered both in the award of pecuniary and non-pecuniary measures. In this case, Mr. Tibi was arbitrarily detained by Ecuadorian authorities between September 1995 and January 1998 and subjected to torture as a result of the belief that he was supplying cocaine hydrochloride in Quito. While in detention he was denied adequate detention conditions and was subjected to torture in order to obtain his confession. For example “he was beaten with fists on the body and in the face; his legs were burned with cigarettes. Subsequently, the beatings and burns were repeated. He also suffered several broken ribs,

²¹² Ibid, para. 276.

²¹³ Ibid, para. 278.

²¹⁴ IACtHR, *Children Re-Education Centre v. Paraguay*, Judgment on Preliminary Objections, Merits, Reparations and Costs, 2 September 2004.

²¹⁵ Ibid, para. 319.

his teeth were broken, and he received electrical discharges on his testicles. Another time he was beaten with a contusive object and his head was submerged in a water tank. Mr. Tibi underwent at least seven such sessions.”²¹⁶ The Court found that:

Mr. Tibi has suffered severe physical damage, including: loss of hearing in one ear, eyesight problems in the left eye, a broken nasal septum, injury of the left cheek bone, scars from burns on his body, broken ribs, broken and deteriorated teeth, blood problems, disk and inguinal hernias, maxillary displacement, he either contracted hepatitis C or this condition worsened, and cancer, called digestive lymphoma.²¹⁷

As a result of these findings, when the representatives of the victim claimed consequential damages as a result of the costs Mr. Tibi and his family had incurred to pay for the medical and psychological treatment and medicine Mr. Tibi needed to overcome his health problems, the Court awarded 4,142 Euros for his 150 psychotherapy sessions; 4,142 Euros for his special food, his hearing, eyesight, respiratory and other health problems, and 16,570 Euros for his dental prosthetics. All of these costs were paid based on equity given that the Court was not presented with documentary evidence of the costs.²¹⁸

The representatives of the victims also alleged that they should be paid, among other grounds, non-pecuniary damages as a result of the physical and psychological problems they had and continue to face today and in the future given the arbitrary detention and torture of Mr. Tibi. The Court recognised such claims only in relation to Mr. Tibi arguing “that compensation for [his] non-pecuniary damages must also include future expenses for psychological and medical treatment,” and awarded a sum of 16,570 Euros for such harm and its future treatment.²¹⁹

In the case of *De la Cruz Flóres v. Peru*, decided two months after Tibi, the Court dealt with the arbitrary detention and inhuman treatment of Ms. De La Cruz, a physician, for a period of eight years. She was detained first for terrorist activities and then for allegedly performing medical activities for the Shining Path, a guerrilla group in Peru.²²⁰ In this case, in contrast to the ones mentioned so far, although the representatives of the victim requested non-pecuniary damages, among other reasons, due to the health damage she suffered and for her to be “able to rehabilitate herself,”²²¹ the Court decided to deal with her physical and mental health under “other forms of reparation”, ordering Peru to provide Ms. De la Cruz, but not her family, with “medical and psychological care to the victim through its health

²¹⁶ IACtHR, *Tibi v. Ecuador*, Judgment on Preliminary Objections, Merits, Reparations and Costs, 7 September 2004, paras. 90.46 to 90.50.

²¹⁷ *Ibid*, para. 90.50.

²¹⁸ *Ibid*, para. 237.b-d.

²¹⁹ *Ibid*, para. 249.

²²⁰ IACtHR, *De La Cruz Flóres v. Peru*, Judgment on the Merits, Reparations and Costs, 18 November 2004, para. 73.

²²¹ *Ibid*, para. 157.c.

services, including the provision of medication without charge.”²²² It should also be noted that the Court did not limit rehabilitation to physical and mental services but also dealt with other important forms of reparation that could be included within the idea of social services present in the Basic Principles. Indeed, the Court ordered Peru to provide Ms. De la Cruz with “the possibility of receiving professional training and updating, by awarding her a grant that allows her to take the professional training and updating courses of her choice,”²²³ and to re-register her in the pensions scheme with retroactive benefits to the moment when she was detained so that she can enjoy her retirement as she had planned.²²⁴ Such a comprehensive package awarded by the Court is the result, in part, of what the Commission and the representatives of the victim claimed in the case.

A case that complements *De la Cruz Flóres* is that of *Gómez Palomino v. Peru*, although it deals with the disappearance of Mr. Palomino. However, the Court found that his next of kin, particularly his mother, daughter and siblings, suffered psychological and physical harm as a result of his disappearance, which affected their life plans. Therefore, the Court not only awarded them medical and psychological treatment²²⁵ but, more importantly, awarded, as other form of reparation, an adult education programme for the siblings so that they can complete their primary and secondary school studies during convenient times so that their employment is not affected by their education. Equally, the siblings could choose between taking up the studies themselves or give the opportunity to their children since new generations are also affected by the violations of the case. Finally, as important, given that the mother of Mr. Gómez Palomino is illiterate and that this limited her access to justice, Peru should also provide her, if she so chooses, with a literacy programme.²²⁶

In the case of *Plan de Sánchez v. Guatemala*, a massacre committed by the military, and other State authorities and people acting under their acquiescence, in Guatemala in July 1982 and where approximately 268 people were killed, girls were raped and indigenous peoples displaced among other facts,²²⁷ the Court dealt with rehabilitation for hundreds of victims. It did so by considering that the mental and physical health of the surviving victims was damaged, requiring treatment. Therefore, this constituted one of the grounds for the award of non-pecuniary damage by the Court. The Court awarded for this and other grounds USD\$20,000 to 317 victims.²²⁸

²²² Ibid, para. 168. The Court treated in the same way the case of *Caesar v. Trinidad and Tobago* where a man who was detained was subjected to corporal punishment and therefore to torture and also to inhuman treatment given his detention conditions. See, *Caesar v. Trinidad and Tobago*, Judgment on the Merits, Reparations and Costs, 11 March 2005, paras. 130-131.

²²³ Ibid, para. 170.

²²⁴ Ibid, para. 171.

²²⁵ IACtHR, *Gómez Palomino v. Peru*, Judgment on the Merits, Reparations and Costs, 22 November 2005, para. 143.

²²⁶ Ibid, paras. 144-148. A similar measure is also found in the case of *García-Asto v. Peru*, an arbitrary detention and inhuman treatment case. See, Judgment on Preliminary Objections, Merits, Reparations and Costs, 25 November 2005, para. 281.

²²⁷ IACtHR, *Plan de Sánchez v. Guatemala*, Judgment on Reparations and Costs, 19 November 2004, para. 49.

²²⁸ Ibid, para. 87.g.

More importantly, given the request of the Commission²²⁹ and the representatives of the victims to award rehabilitation and social services as forms of reparation, the Court despite the amount of victims was not timid and awarded: a) a housing programme; b) medical and psychological treatment; and c) a development programme.²³⁰ As part of the housing programme the State was ordered to provide adequate housing to the inhabitants of Plan de Sánchez within 5 years of the judgment since the majority of them lost their houses during the massacre. As part of the health package, the Court ordered Guatemala to provide the victims with access to adequate medical treatment through its specialised health institutions, free of charge, including medication. A parallel system for psychological and psychiatric treatment should be established free of charge. Such a system should bear in mind the community, family and individual circumstances of each victim in order to provide them with “collective, family and individual treatment.” Each person should be consulted on the treatment to be followed. Finally, the development programme could be considered to provide victims with a certain degree of rehabilitation since it provides the community with a health centre with adequate personnel and equipment to provide psychological and mental health, dissemination of the Maya culture and sewage system and potable water.²³¹ For the implementation of the health package awarded by the Court, the tribunal identified the need to create a Committee with the presence of an NGO to “evaluate the physical and mental health of the victims.”²³²

Future cases have almost repeated, word by word, the health package awarded by the Court in the *19 Tradesmen* and *Plan de Sánchez* cases, but some of them have also included the establishment of some kind of impartial body to assess the health needs of the victims. New cases have added important implementation measures to such orders such as that the state should inform the victims of the health establishments that would provide such psychological or physical services within a specified period of time.²³³

The case of *Moiwana v. Suriname* is one of the cases where the Court has dealt with more aspects of rehabilitation beyond health and education, by granting the community of Moiwana a development fund and programme. This case concerns a massacre in Moiwana that took place in November 1986, where 39 members of the community were killed, the

²²⁹ The final submission to the Court by the Commission reminds the Court, following the 1990 report on the Basic Principles and Guidelines on the Right to a Remedy and Reparations written by Theo van Boven, that rehabilitation is a form of reparation under international law, and requested the Court to award two items as rehabilitation: a) the State should take measures to strengthen the Maya-Achi culture and its transmission across generations; and b) health and other measures. Under this item the Commission requested the Court to award health measures to the community, particularly including their own beliefs and to particularly generate health attention for women who were victims of rape. The Commission also requested the pavement of roads, supply of potable water, and the implementation of development projects. See, IACommHR, *Final Submission to the Inter-American Court*, 24 May 2004, p. 17 and 22.

²³⁰ *Ibid.*, paras. 105-111.

²³¹ *Ibid.*

²³² *Ibid.*, para. 108.

²³³ See, for example, IACtHR, *Serrano Cruz Sisters v. El Salvador*, Judgment on Merits, Reparations and Costs, 1 March 2005, para. 200.

village was destroyed and surviving victims were displaced within the country or became refugees in French Guyana.²³⁴ The Court ordered Suriname to “establish a developmental fund, to consist of US \$1,200,000 ..., which will be directed to health, housing and educational programs for the Moiwana community members.”²³⁵ Although the aim of this fund is to provide survivors with rehabilitation, it is nothing else than monetary compensation to cover health, education and housing. Yet, the Court ordered, as it did in *Plan de Sánchez*, the establishment of an implementation committee to allocate the money for such services during a 5 years period. The Committee was ordered to have three members (one chosen by the State, one by the victims and the last one chosen by mutual agreement between the State and the victims).²³⁶

In *Gutiérrez Soler v. Colombia*, the Court also awarded as other forms of reparation medical and psychological treatment, in the same way that it did in *Plan de Sánchez* and other cases already mentioned. However, in this case, the treatment was granted not only to Mr. Gutiérrez Soler, the victim of torture and arbitrary detention in 1994, but also to his close next of kin given the impact his treatment had on them and the subsequent fear they endured given the reprisals of the Colombian government against Mr. Gutiérrez Soler and his family. Noteworthy, since Mr. Gutiérrez Soler and his son had to flee to the United States, the Court awarded USD\$25,000 for such treatment.²³⁷

Finally, and although the Court continues without defining rehabilitation as a reparation measure, the Court has clearly stated that “under the Convention, integral and adequate reparation requires measures of rehabilitation and satisfaction, and guarantees of non-repetition”²³⁸ and has given a further move in the direction of implicitly integrating the framework established by the Basic Principles and Guidelines (restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition). In *Tiu Tojin v. Guatemala* for the first time the Court rather than referring exclusively to “other forms of reparation” or to “satisfaction and guarantees of non-repetition”, named the heading “Other Forms of Reparation: Obligation to investigate, Measures of Satisfaction, Rehabilitation, and Guarantees of non-repetition.”²³⁹ Nevertheless, since Guatemala acknowledged its

²³⁴ IACtHR, *Moiwana v. Suriname*, Judgment on Preliminary Objections, Merits, Reparations and Costs, 15 June 2005, para. 86.

²³⁵ *Ibid*, para. 213-215.

²³⁶ *Ibid*, para. 215. Another development fund was ordered in the *Yakye Axa v. Paraguay* case, related to indigenous rights, their customary land and their inhuman conditions of living but as a reparation for non-pecuniary damage. Equally, the Court ordered the immediate supply of potable water, regular medical care and medicines, food, latrines and bilingual materials for education. See, Judgment on Merits, Reparations and Costs, 15 June 2005, paras. 205-206 and 221. Similar treatment is also found in the case of *Sawhoyamaya v. Paraguay*, another indigenous peoples case related to their land. See, Judgment on the Merits, Reparations and Costs, 29 March 2006, paras. 224-225 and 229-233.

²³⁷ IACtHR, *Gutiérrez Soler v. Colombia*, Judgment on the Merits, Reparations and Costs, 12 September 2005, paras. 101-103. The payment of money as other form of reparation for victims living outside the country has also taken place in the case of *Castro Castro Prison v. Peru*, Judgment on the Merits, Reparations and Costs, 25 November 2006, para. 450.

²³⁸ IACtHR, *Valle Jaramillo v. Colombia*, Judgment on the Merits, Reparations and Costs, 27 November 2008, para. 202.

²³⁹ IACtHR, *Tiu-Tojin v. Guatemala*, Judgment on the Merits, Reparations and Costs, 26 November 2008, para. 67.

international responsibility for the disappearances of a mother and a daughter, the Court did not award rehabilitation measures as they had been already awarded under the heading on compensation.²⁴⁰ After this case the Court has tried to deal with “rehabilitation” to deal with physical and psychological treatment although it has not dealt with this heading in all recent judgments.²⁴¹

Although the jurisprudence of the Court could be considered to be important to recognise the health (physical and psychological health) of rehabilitation, it has been less so for the award of education although, as already seen, there are some important contributions that could allow important future developments in the area. However, the jurisprudence of the Court is really poor in dealing with other forms of rehabilitation such as employment or vocational services, pension facilities and legal services. The jurisprudence dealing with pension schemes as reparations measures is almost inexistent and although the Court has dealt with legal costs, they refer to the reimbursement of money to those who represented the victims before the Court rather than with ordering the relevant State to set up particular legal aid programmes and the like.

It should be stated that although there is important jurisprudence related to rehabilitation, the approach by the Court to the subject has not been consistent. Indeed, there are cases with similar facts where the Court has not awarded similar reparations measures. For example, the Court has not always awarded both medical and psychological treatment in cases that involve serious human rights violations. For example, in *Huilca Tecse v. Peru*, related to killing of Mr. Huilca by State authorities, the Court only awarded psychological treatment to his next of kin.²⁴² Equally, in the massacre of Mapiripán, a case against Colombia, where approximately 49 persons were killed or disappeared, the Court only awarded adequate psychological treatment to all the next of kin of the victims who were killed.²⁴³ This seems to respond to the fact that if the Commission and/or the representatives of the victim do not allege a strong understanding of rehabilitation as a result of damage endured, the Court will not try to fill the gap *motu proprio* (as was exceptionally seen in the case of *Bulacio v. Argentina*). Further, the parties to the cases do not have a clear understanding of rehabilitation or how best to argue before the Court such damage, and, as a consequence, allegations of such harm are badly proven before the Court.²⁴⁴

Conclusions – Facing the challenges of rehabilitation

²⁴⁰ Ibid, para. 109-111.

²⁴¹ See, for example, *Ticona Estrada v. Bolivia*, Judgment on the Merits, Reparations and Costs, 27 November 2008, paras. 166-169.

²⁴² IACtHR, *Huilca Tecse v. Peru*, Judgment on the Merits, Reparations and Costs, 3 March 2005, para. 110.

²⁴³ IACtHR, *Mapiripán v. Colombia*, Judgment on the Merits, Reparations and Costs, 15 September 2005, para. 312.

²⁴⁴ For important analysis on the implementation of these judgments and reparation measures see Beristain, C., *Diálogos Sobre la Reparación: Experiencias en el Sistema Interamericano de Derechos Humanos* (Costa Rica, IIDH, 2008, Vol.I and II).

This Discussion Paper aimed at clarifying the reasons why rehabilitation, despite being expressly incorporated in different international instruments such as CAT, the ICPPED and the Rome Statute, remains an elusive form of reparation. Certainly, and as is the case with many other rights/obligations under international law, problems of implementation and enforceability are partly the result of lack of political will of states. Nevertheless, this is not the only problem that rehabilitation faces for its adequate implementation. After carefully considering the meaning of rehabilitation under human rights treaty law as well as in other relevant instruments such as the Basic Principles, the following problems were identified:

1. It is not possible to define rehabilitation (as a form of reparation) by interpreting relevant treaties or international instruments. Either they do not provide an explicit working definition of rehabilitation, as is the case of CAT or there are competing concepts of rehabilitation that can be deduced after applying standard rules of treaty interpretation found in the Vienna Convention on the Law of Treaties (Articles 31 and 32). Other instruments such as the Basic Principles limit themselves to state that rehabilitation includes “medical and psychological services as well as social and legal services” but they fail to list other services (financial for instance) and to precisely indicate what each of these services means. For example, do medical services include the provision of diagnostic tests or medicines? Are those services available only for victims of torture? Or also to their next of kin, and given the particular circumstances of the case, to their communities? What is a social service? Is employment, housing and education part of social services?
2. Equally, the preparatory works of these instruments do not help to clarify the meaning of rehabilitation. Clearly, as happened with CAT or with the Basic Principles, some states expressed their views about the ambiguity and open-ended nature of “rehabilitation” as a form of reparation during the negotiations of CAT or during the consultations of the Basic Principles, yet they agreed that nonetheless rehabilitation should be included as a form of reparation.
3. One of the most serious problems of defining rehabilitation within treaty law is whether it goes beyond medical and psychological care so as to include other types of services, and if so which ones. Therefore, there are competing concepts of rehabilitation at stake.
4. How best to fulfil rehabilitation as a reparation measure is also a question that needs to be considered. While treaties do not indicate to States or treaty monitoring bodies/Courts how they should go about providing/ordering such services, from the different reparation measures available under international law there are three direct ways of doing so: monetary compensation; the provision of services or a combination of the two. Now, given that rehabilitation as a reparation measure under public international law is uncommon, while compensation is more common, when relevant State practice on rehabilitation is considered, either it does not exist or it has been mainly channelled through the payment of compensation, and/or the available state practice (provision of services) has not been properly systematised because, for example, states do not provide treaty bodies with such information (as seen with

CAT and state reports) or because there are no efforts (in academia or NGOs) to try to document and systematise such practice.

In relation to this last point, and an area not documented in this Discussion Paper, is rehabilitation as a reparation measure in domestic/administrative reparations programmes such as Sierra Leone, Chile, South Africa and Peru. It is very important to understand and clarify a) what those states understand by rehabilitation (as a form of reparation) and b) how successful they were/are in implementing rehabilitation (either in terms of the payment of compensation or the provision of services). Some important literature on the topic is already available but all of it looks at different forms of reparations within those programmes rather than exclusively or particularly at rehabilitation.²⁴⁵

In connection to this, and a mistake that can be easily done, is to confuse rehabilitation as a form of reparation owed by states to victims of human rights violations with rehabilitation as a form of humanitarian assistance by other states, international organisations or NGOs. The first is a legal consequence of states breaching their international obligations while the latter is not the result of any binding obligation and cannot be seen as a substitute of the former.

5. Soft Law instruments and similar initiatives by UN bodies and civil society have been crucial to clarify important issues related to the right to a remedy and reparations for violations of international human rights law. Such has been the role of the Basic Principles, the Updated set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity²⁴⁶ and the Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation.²⁴⁷ Nevertheless, there is no such similar instrument (soft law or otherwise) clarifying the meaning of rehabilitation as a form of reparation for human rights violations and serious breaches of international humanitarian law. Such gap can only be regretted.
6. Although rehabilitation remains an elusive term, some clear rules can be derived from some of the international instruments referred to in this discussion paper. Rehabilitation is not always an element of adequate, prompt and effective reparation. Indeed, the Basic Principles conditioned its application when using words like "*In accordance with domestic law* and international law, and taking account of individual

²⁴⁵ De Greiff, P., (ed.) *The Handbook on Reparations* (Oxford, Oxford University Press, 2006); Ferstman, C, Goetz, M, and Stephens, A., (eds.) *Reparations for Victims of Genocide, War Crimes, and Crimes Against Humanity: Systems in Place and System in the Making* (The Netherlands, Martinus Nijhoff Publishers, 2009); Rubio-Marín, R., *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge, Cambridge University Press, 2009).

²⁴⁶ Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>.

²⁴⁷ Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation, 2007, available at: http://www.womensrightscoalition.org/site/reparation/signature_en.php; see also Couillard, V., "The Nairobi Declaration: Redefining Reparation for Women Victims of Sexual Violence" in 1(3) *International Journal of Transitional Justice* 2007, pp. 444-453.

circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, *as appropriate and proportional to the gravity of the violation and the circumstances of each case*, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”²⁴⁸ Equally, the ICPPED indicates that “the right to obtain reparation referred to in paragraph 4 of this article [compensation] covers material and moral damages and, *where appropriate*, other forms of reparation such as: ... rehabilitation...”²⁴⁹ Such treatment is also visible in General Comment 31 of the Human Rights Committee.

CAT, on the other hand, does not contain such a clause since fair and adequate compensation should always include “the means for as full rehabilitation as possible.”²⁵⁰ This article, if read in connection with the UN Convention on the Rights of Persons with Disabilities, provides rehabilitation for torture victims in even stronger terms if the torture survivor is also classified as a disabled person (in most cases they have an arguable claim of this). According to the CRPD, a person with disabilities “include[s] those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”²⁵¹ The relevance of the CRPD for torture victims is found in the way it expels out, like no other international instrument, some of the key obligations of states. Indeed, as highlighted in this Discussion Paper, it orders states parties to

[...] take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:

- (a) Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;
- (b) Support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.

²⁴⁸ Basic Principles, *supra*. n. 4, para. 18.

²⁴⁹ ICPPED, Article 24.5, *supra*. n. 28.

²⁵⁰ CAT, Article 14.1, *supra*. n. 3.

²⁵¹ CRPD, Article 1, *supra*, n. 30.

2. States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.

3. States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.²⁵²

Therefore, the treaty calls upon states to provide services and to design programmes for disabled persons. The services it mentions are not restricted to health, education, employment and social services but should, particularly, cover those areas. It also highlights that services should be available at the earliest opportunity and should not be the result of a programme that applies equally to all disabled person but that takes into account the specificities and needs of every single individual. Two other important features of such services are that they should be the result of multidisciplinary discussion, something that, as highlighted in this paper, is essential to fulfil as full rehabilitation as is possible, and such services should be voluntary in nature.

7. When the legal practice of UN bodies/special procedures and regional human rights courts was considered in this Discussion Paper it was clear that rehabilitation has not been thoroughly considered by such bodies, with the notable exception of the Inter-American Court of Human Rights and the Special Rapporteur on Violence against Women.

The UN bodies are united in their reference to several key minimum standards that should be in place in relation to the right to rehabilitation. Although not always systematically, they highlight the need for states to design and establish national programmes and policies on rehabilitation. Equally, they highlight the need for rehabilitation services to be provided by qualified personnel. They also regularly remind that no one should be forced to undergo rehabilitation as it should always be the result of the free choice of the person.

Besides these commonalities among UN bodies, the Human Rights Committee and the Committee against Torture have missed important opportunities to clarify the scope of the right to rehabilitation. For instance, General Comment 31 of the Human Rights Committee which refers to rehabilitation as one form of reparation does not define what it entails. Such an opportunity was also missed in respect of its General Comments 7 and 20 on the prohibition of torture. While the HRC has at least considered rehabilitation in some of its General Comments, the Committee against Torture has been completely silent on this point in its two General Comments. The developments referred to earlier in this Paper in each of these bodies are mostly the result of the initiative of individual members of the Committees who were committed to advancing understanding on rehabilitation. Sørensen, a physician and

²⁵² Ibid, Article 26.

former member of the Committee against Torture, is a good example of someone who sought to advance such an understanding even if to draw attention to the health dimension (physical and psychological) of rehabilitation. This example underlines the need for multidisciplinary and interdisciplinary dialogue on rehabilitation.

Among the UN Special Procedures, the work of the Special Rapporteur on Violence against Women is to be commended. Despite the fact that different women have carried out the mandate, it is clear that all of them have tried to advance a gender approach to rehabilitation even though they have not fully clarified the meaning of rehabilitation. It should be noted that the SRVW has highlighted that states should have available data on support services: from helplines to counselling services; equally, it has been highlighted that services should be available and accessible to all those who need them, particularly in post-conflict situations. To this end, emphasis has been placed on the creation of one-stop places able to provide different services and of mobile services units (particularly to respond to health needs). Further, the SRVW has stressed that rehabilitation should be about empowerment of women and that it should include child support.

The SRT has also made some important comments on the subject. It has stated that the next of kin of victims of torture can also require rehabilitation given the harm they endure.²⁵³ Such rehabilitation, for the main victim and for the next of kin should be available in two forms: as an urgent response and as long-term assistance.

The UN Voluntary Fund for Victims of Torture is, as indicated, the main body in the UN that, through funding of civil society initiatives, assists victims of torture achieve rehabilitation. Yet, it should be highlighted that the function of this fund is not to provide reparations but to support victims of torture in the rehabilitation process.

The two regional human rights courts awarding reparations today have different approaches. Thus far, the European Court has only been prepared to deal with compensation and, very rarely, award monetary compensation to cover future medical expenses. As for the IACtHR, its jurisprudence is certainly more detailed than that of the European Court but there is still room for improvement and greater consistency. Although aspects of the IACtHR awards have been aimed at rehabilitating victims (e.g., monetary compensation and/or services), these have not been awarded under the heading of “rehabilitation”. Aside from some cases and the award of interesting satisfaction measures,, the IACtHR has emphasised the psychological and physical dimensions of rehabilitation, with more limited consideration of social, communitarian or other broader dimensions of rehabilitation. Among the features of the jurisprudence of the IACtHR when awarding physical and psychological treatment is the consideration that such treatment should be dictated by the particular circumstances and needs of the victim; that medication and diagnostic treatment should be included and covered by the state, and that, psychological treatment should not be limited to the direct victim of the violation but

²⁵³ See section of this Discussion Paper on the SRT.

could be for groups, families or individuals. The Court also highlights the need to get consent from the victim so that no treatment would be imposed.

In cases before both regional courts, one reason why the rehabilitation measures awarded (as compensation or services) have been limited, is because those appearing before them (the IACommHR and/or the legal representatives) have a limited understanding of what rehabilitation entails. Consequently, they have framed their demands in very narrow terms (only health related) and/or have demanded more but without adequate evidence. This is also visible in treaty body communications.

REDRESS hopes that this Discussion Paper will generate further debate and dialogue about some of the issues raised amongst the range of stakeholders and policy makers.

Key Recommendations

1. To further clarify the existing gaps under international law

This Discussion Paper provides only a slim overview of key areas. A more comprehensive consideration of the subject would be necessary to have a full overview of the challenges facing the legal right to rehabilitation. In particular, the following issues would need to be canvassed further:

- a) Consideration of the meaning of rehabilitation and the implementation of rehabilitation measures in domestic/administrative reparations programmes in countries undergoing transition;
- b) Relevant state practice on rehabilitation policies/programmes and their implementation, including laws, policies and programmes defining access to services, level and nature of services, funding levels and sources;
- c) A set of reports documenting positive non-state practice in the provision of assistance (rather than rehabilitation as a form of reparation) in relation to social services, legal services, psychological services, medical services and financial services for victims of serious human rights and humanitarian law violations.

2. The need to clarify the legal meaning of rehabilitation

Workshops should be organised with key members of the UN bodies mentioned in this Discussion Paper to discuss the importance of dealing with rehabilitation in a more holistic way in their work. Such workshops should involve leading experts from a range of disciplines on different rehabilitation services and should document good practice.

3. To clarify the meaning of rehabilitation under international law

Key relevant stakeholders from across the spectrum of services that rehabilitation requires, should consider drafting, after careful discussion and consideration, a set of guidelines to deal with rehabilitation. Such an initiative could ideally be supported by the Office of the High Commissioner of Human Rights.

The Committee against Torture could, if determined to be appropriate, be called upon to write a General Comment on Article 14 of CAT so as to clarify the meaning of an adequate remedy for torture victims and, more particularly, to define the scope of rehabilitation under this provision.

4. To impact the jurisprudential treatment of rehabilitation by regional human rights courts and relevant treaty monitoring bodies

Dialogue and information-sharing should be held with lawyers involved in cases before the European Court, the IACtHR, the HRC and the Committee against Torture to raise awareness on the importance of the legal treatment of rehabilitation.