

B E T W E E N:

KHALED EL MASRI

Applicant

-and-

THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

Respondent

-and-

THE REDRESS TRUST ("REDRESS")

Intervener

APPLICATION NUMBER 39630/09

SUBMISSIONS OF REDRESS TO THE GRAND CHAMBER

Introduction

1. These submissions are filed with the permission of the Grand Chamber by its letter of 22 March 2012. They may be read in the place of REDRESS' original submissions to the European Court of Human Rights ("the Court") dated 4 April 2011.
2. As anticipated in REDRESS' application for leave to intervene dated 21 March 2012 they focus on the following issues which are before the Court in this application:
 - i. The nature of the obligation to afford an adequate investigation in the context of allegations of extraordinary rendition; and
 - ii. The nature of the obligation to afford an adequate remedy and reparation for an alleged breach of Articles 3 and 5 of the European Convention on Human Rights ("the Convention"), as required by Article 13 of the Convention.
3. In summary, REDRESS makes the following submissions:
 - i. An investigation in the context of allegations of extraordinary rendition must be (a) prompt; (b) independent; (c) thorough; (d) capable of leading to the identification and prosecution of persons responsible; (e) provide for public scrutiny and victim participation; and (f) afford victims with access to information in order to satisfy their right to the truth. Furthermore, a Respondent State is obliged to commence such an

investigation as soon as it becomes aware of credible information suggesting conduct of this nature to have occurred.

- ii. An adequate remedy and reparation must include recognition of, and respect for, the victims of alleged breaches of Articles 3 and 5, so that they, their families and society as a whole can know the truth regarding the violations suffered, including the identity of the perpetrators, the causes of, and factual background to, such violations and the full circumstances under which they occurred.
 - iii. Victims of breaches of Article 3 and secret detention in violation of Article 5 have the right to information about the circumstances relating to their treatment. National security considerations cannot operate so as to bar a victim from access to such information.
 - iv. The right to an effective remedy requires that there be measures taken to safeguard against non-repetition and to restore public confidence in any Governmental agencies found to have been responsible for such violations. It also entails an obligation to ensure the victim has the means for as full a rehabilitation as possible.
4. As explained below, these core propositions are supported by the case law of the Court, and the findings and observations of other leading international courts and bodies and experts, and of domestic courts.
 5. REDRESS notes the comments of the Respondent Government to REDRESS' submissions of 4 April 2011, received under covering letter from the Court dated 10 May 2011. REDRESS notes that the Respondent Government does not cite any authorities in its arguments and REDRESS remains of the view that the position under international law is as described in these submissions.

Investigations: A distinct component of Article 3 and Article 5

6. The prohibition against torture and other prohibited forms of ill-treatment is universally recognised and enshrined in all of the major and regional human rights instruments.¹ The prohibition is recognised as absolute and non-derogable in character.² As well as enshrining substantive responsibilities to protect individuals from torture and inhuman or degrading treatment, Article 3 also enshrines positive obligations embracing, *inter alia*, an obligation to effectively investigate arguable breaches of Article 3 in a manner capable of leading to the identification and appropriate punishment of wrongdoers.³

¹ Universal Declaration of Human Rights 1948 (Article 5); International Covenant on Civil and Political Rights 1966, "ICCPR" (Article 7); American Convention on Human Rights 1969 (Article 5); African Charter on Human and Peoples' Rights 1981 (Article 5), Arab Charter on Human Rights 1997 (Article 13), United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 ("UNCAT") and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987. The prohibition against torture is also reflected throughout international humanitarian law, in e.g. the Regulations annexed to the Hague Convention IV of 1907, the Geneva Conventions of 1949 and their two Additional Protocols of 1977.

² The prohibition of torture and ill-treatment is specifically excluded from derogation provisions: see Article 4(2) of the ICCPR; Articles 2(2) and 15 of the UNCAT; Article 27(2) of the American Convention on Human Rights; Article 4(c) Arab Charter of Human Rights 1997; Article 5 of the Inter-American Convention to Prevent and Punish Torture 1985; Articles 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975). On the absolute nature of the prohibition even in the context of protecting communities from terrorist violence, see *Chahal v United Kingdom* (1996) 23 EHRR 413, para. 49 and *Tomas v France* (27 August 1992, Series A no. 241-A, p. 42), para. 115.

³ See *Krastanov v Bulgaria* (2005) 41 EHRR 1137, para. 57: "...where an individual raises an arguable claim that he has been seriously ill-treated ... in breach of art 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. This investigation should be capable of leading to the

7. In addition, there is an internationally acknowledged principle equivalent to a peremptory norm prohibiting prolonged arbitrary, unacknowledged and incommunicado detention.⁴ This Court has characterised unacknowledged detention without any of the safeguards contained in Article 5 as "a most grave violation" of that article.⁵ The Court has held that – like Article 3 - Article 5 imposes positive obligations in such circumstances on a State to conduct a "prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since".⁶ Given the grave nature of the violation, such positive obligations continue following the reappearance of the victim.⁷
8. It is clear that the obligation to investigate is engaged as soon as credible allegations are raised of violations of such a grave nature that occur or originate in a State's jurisdiction: it is not necessary that the allegations be proved⁸ or even that they may be made directly by the victim. Similarly, the obligation will be engaged where there are credible allegations that a State's agents have transferred a person to another State's jurisdiction where substantial grounds exist to believe that there is a real risk that he or she will be tortured or subjected to unacknowledged detention.⁹ Such obligations will also arise under international law where a State's agents have been complicit in or have participated in torture or unacknowledged detention by another State, regardless of where the violations occur.¹⁰
9. The following characteristics are required for an investigation to be compliant with a State's positive obligations under Articles 3 and 5:

identification and punishment of those responsible." See also *Aksoy v Turkey* (1997) 23 EHRR 553, paras. 98-9. This principle was further explained in *Dedovskiy v Russia* (App. No. 7178/03, 15 May 2008), para. 87: "An obligation to investigate 'is not an obligation of result, but of means': not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible. Thus, the investigation into serious allegations of ill-treatment must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard."

⁴ See the *amicus curiae* submission of the United Nations High Commissioner for Human Rights before the Chamber in this case (hereinafter "UNHCHR brief"), paras. 23-26 and the *amicus curiae* submission of Interights (hereinafter "Interights brief"), para. 10. See also American Law Institute, *Restatement of the Law of the Foreign Relations Law of the United States*, Section 702 (Customary International Law of Human Rights), para. (e) "A state violates international law if, as a matter of state policy, it practices, encourages, or condones (e) prolonged arbitrary detention....". The Restatement recognises this as a principle of *jus cogens* (Reporter's Notes, para. 11). United Nations treaty bodies and office holders have repeatedly characterised prolonged incommunicado detention at secret detention centres as breaching *jus cogens* principles and as potentially constituting torture or inhuman or degrading treatment in and of itself (see e.g. Human Rights Committee, General Comment No. 24: *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6 (2004), para.8; Human Rights Council Joint Study on global practices in relation to secret detention in the context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/HRC/13/42, 19 February 2010 ("HRC Joint Study"), pp. 2, 4, 5 and paras. 20, 32, 34, 35, 49, 55).

⁵ *Kurt v Turkey* (1999) 27 EHRR 373, para. 124.

⁶ *Ibid.*

⁷ See UNHCHR brief, para. 26. The Committee of Ministers of the Council of Europe has adopted the position that investigation as required by the Convention is the appropriate response to allegations of involvement of Council of Europe members in secret detention and illegal transfer of detainees: Reply adopted by the Committee of Ministers on 16 January 2008 at the 1015th meeting of the Ministers' Deputies to Parliamentary Assembly Recommendation 1801 (2007) on "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report", para. 3. See also the International Convention for the Protection of All Persons from Enforced Disappearance 2006, Article 12.

⁸ See references cited in n. 3, above. On the procedural obligations of States to investigate alleged cross-border violations originating in their jurisdiction see *Rantsev v Cyprus & Russia* (2010) 51 EHRR 1, paras. 307-9. See also *Alzery v Sweden*, UN Human Rights Committee, UN Doc. CCPR/C/88/D/1416/2005 (2006), para. 11.7; *Goiburí et al. v. Paraguay*, Judgment of 22 September 2006, Inter-Am. Ct. H.R. (Ser. C) No. 153 (2006), para. 93.

⁹ On torture or ill-treatment see *Soering v United Kingdom* (1989) 11 EHRR 439, para. 90. On unacknowledged detention through extraordinary rendition see *Babar Ahmad & Ors v United Kingdom* (2010) 51 EHRR SE6, para. 114 ("It would be incompatible with a Contracting State's obligations under the Convention if it were to extradite or otherwise remove an individual from its territory in circumstances where that individual was at real risk of extraordinary rendition. To do so would be to collude in the violation of the most basic rights guaranteed by the Convention"); on removal to a flagrant breach of Article 5 see *Othman (Abu Qatada) v. United Kingdom*, App. no. 8139/09, Judgment of 17 January 2012, para. 233. See also HRC Joint Study para. 43; see further Interights brief, para. 14.

¹⁰ See further Interights brief, paras. 17-27. In this regard it should also be noted that the obligations to establish jurisdiction over a State's own nationals for complicity in torture under Article 5 of the Convention Against Torture, including the obligation to investigate credible allegations of such complicity, is engaged regardless of whether the torture took place within the State's jurisdiction: see Manfred Nowak, Elizabeth McArthur, and Kerstin Buchinger, *The United Nations Convention Against Torture: a Commentary* (Oxford: Oxford University Press, 2008), pp. 254-5. Similarly, the obligation to establish jurisdiction over an accomplice to or participant in enforced disappearance who is a national of a State under Article 9 of the International Convention for the Protection of All Persons from Enforced Disappearance (not yet in force but signed by the Respondent party) is engaged regardless of where the enforced disappearance occurred. See also HRC Joint Study, paras. 39-42.

- i. **Promptness:** An investigation into alleged torture or ill-treatment by State agents must be prompt and expedient (*Mikheyev v Russia* [2006] ECHR 77617/01, para. 109).
- ii. **Independence:** An investigation into serious violations of Convention rights by State agents must be independent (*Ogur v Turkey* [1999] ECHR 21954/93, paras. 91-2; see also *Mehmet Emin Yuksel v Turkey* [2004] ECHR 40154/98, para. 37). The independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms.¹¹
- iii. **Thoroughness:** An investigation into serious allegations must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions (*Assenov v Bulgaria* [1998] ECHR 24760/94, paras. 103 et seq.). They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence.¹² Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard.
- iv. **Capable of leading to the identification and prosecution of persons responsible:** There must be an effective official investigation capable of leading to the identification and punishment of those responsible (*Krastanov v Bulgaria* (2005) 41 EHRR 1137, para. 57 (see paragraph 6 above)).
- v. **Public scrutiny and victim participation:** There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability (in practice as well as in theory), to maintain public confidence in the authorities' adherence to the rule of law and to prevent any appearance of collusion in or tolerance of unlawful acts (*Anguelova v Bulgaria* [2002] ECHR 38361/97, para. 140).

10. In short, the investigation must be capable of revealing the truth. These requirements have recently been explicitly affirmed by the Committee of Ministers of the Council of Europe, in the "Guidelines on eradicating impunity for serious human rights violations" ("Impunity Guidelines").¹³

The obligations to effectively investigate under Articles 3 and 5 of the Convention include the right of the victims and their next-of-kin to have access to information in order to satisfy their right to truth

11. As outlined above, it is well established that sufficient public scrutiny and meaningful participation on the part of the victims is required for an investigation to be considered truly effective. This approach has been supported by the Committee of Ministers of the Council of

¹¹ See e.g. *Ergi v Turkey* [1998] ECHR 23818/94, paras. 83-4, where the public prosecutor investigating the death of a girl during an alleged clash between security forces and the PKK showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident.

¹² See, *mutatis mutandis*, *Salman v Turkey* [2000] ECHR 21986/93, para. 106; *Tanrikulu v Turkey* [1999] ECHR 23763/94, paras. 104 et seq.; and *Gul v Turkey* [2000] ECHR 22676/93, para. 89.

¹³ Adopted by the Committee of Ministers on 30 March 2011. See Article VI (referring to "adequacy" (being capable of leading to the identification and punishment of those responsible), "thoroughness", "impartiality and independence", "promptness", and "public scrutiny" as requirements of effective investigations) and Article VII (requiring involvement of victims in the investigation).

Europe,¹⁴ the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT),¹⁵ and features in the EU Council Framework on the Standing of Victims in Criminal Proceedings.¹⁶

12. The right of participation on the part of the victims (in particular, victims of gross violations of human rights such as treatment prohibited by Article 3 and unacknowledged detention prohibited by Article 5) entails access to any hearing as well as to all information relevant to the investigation.¹⁷
13. This element of effective investigation has been codified by the UN General Assembly in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("the Basic Principles and Guidelines"),¹⁸ which affirm unequivocally that "*victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization*".¹⁹
14. The Impunity Guidelines similarly recognise that the investigation of serious human rights violations should be "*capable of identifying any systematic failures that led to the violation*"²⁰, and that there should be "*a sufficient element of public scrutiny of the investigation or its results to maintain public confidence in the authorities' adherence to the rule of law*".²¹ States must ensure that victims may "*participate in the investigation and the proceedings*" and "*receive information regarding the progress, follow-up and outcome of their complaints, the progress of the investigation and the prosecution, the execution of judicial decisions and all measures taken concerning reparation for damage caused*" to the extent necessary to safeguard their legitimate interests.²²
15. The Inter-American Court of Human Rights has also recognised that, in so far as allegations of torture are concerned, "*[t]he victim must have full access and be able to act in all stages and levels of investigation*".²³ The right to the truth is extended in the Inter-American jurisprudence to the family members of victims of serious human rights violations.²⁴
16. In addition, the International Convention for the Protection of All Persons from Enforced Disappearance which deals specifically with the subject matter which closely resembles the facts of the present case and which has been signed by the Respondent State, expressly provides that "*[e]ach victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation*".²⁵

¹⁴ *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies ("Impunity Guidelines"), Articles VI and VII.

¹⁵ CPT General Report No. 14. CPT/Inf (2004) 28, para. 36.

¹⁶ 2001/220/JHA, Article 4, para. 2.

¹⁷ Impunity Guidelines, Article VII(1) and (2); *OHCHR Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Istanbul Protocol* (2001), para. 80.

¹⁸ Resolution 60/147 of 16 December 2005. The Council of Europe Commissioner for Human Rights has emphasised recently that the Basic Principles and Guidelines contain established principles of international law (CommDH(2011)11, para. 187).

¹⁹ Basic Principles and Guidelines, para. 24 (emphasis added).

²⁰ Article VI. Impunity Guidelines.

²¹ *Ibid.*

²² *Ibid.* Article VII (1) and (2).

²³ See *Tibi v. Ecuador* Judgment of 7 September 2004, Inter-Am. Ct. H.R. Ser. C No. 114 (2004), para. 258, Series C No. 114.

²⁴ See *Moiwana Community v. Suriname*, Judgment of 15 June 2005, Inter-Am. Ct. H.R. Ser. C No. 124 (2005), para. 204; *Gomez-Paquiyaury Brothers v. Peru*, Judgment of 8 July 2004, Inter-Am. Ct. H.R. (Ser. C) No. 110 (2004), para. 230, Series C No. 110.

²⁵ Article 24(2).

17. There is therefore the inherent right to truth which is closely connected to the victims' right to have the circumstances of the violations of their rights effectively investigated by the State.²⁶ The updated 'Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity'²⁷ submitted to the United Nations Commission on Human Rights on 8 February 2005 place significant weight on this right,²⁸ and the importance of respecting and ensuring the right to the truth was recently affirmed by the UN Human Rights Council.²⁹ Worldwide recognition of the right to truth is also confirmed by the establishment and activities of numerous international and domestic truth commissions in many countries, especially those operating in the context of transition.³⁰

The impact of national security concerns on the process of accessing the truth

18. States have attempted in the past to withhold information about the progress of an investigation from the victims, their next-of-kin and legal representatives, citing national security concerns. Without touching upon the issue of how genuine those concerns are, it is our submission that the right to the truth for victims of Article 3 violations and secret detentions in contravention of Article 5, in the absence of extraordinary circumstances coupled with cogent evidence, should not be curtailed.

19. The EU Impunity Guidelines recognise that the duty to investigate serious human rights violations has an absolute character, and that any legitimate restrictions and limitations must be restricted to the minimum necessary to achieve their aim.³¹

20. The UN Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism has raised significant concerns about States' use of doctrines such as state secrets privilege. In a 2009 report,³² he indicated that the invocation of the state secrets doctrine renders the right to a remedy illusory and may amount to a violation of the ICCPR.³³ Similarly, the Parliamentary Assembly of the Council of Europe has recently called on the Committee of Ministers to "*draw up a recommendation on the notion of state secrecy and the use to be made of it, specifying that the legislation of a member state cannot rely on state secrecy and national security in a way which would prevent an independent, effective and impartial investigation of alleged human rights violations, prevent perpetrators from being held accountable, prevent victims from having an effective*

²⁶ Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, UN Doc. A/HRC/19/61 (2012), para. 48.

²⁷ UN Doc E/CN.4/2005/102/Add.1 (2005).

²⁸ Principle 2 provides "Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations". Principle 4 states "Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate."

²⁹ UN Human Rights Council Resolution 12/12 of 12 October 2009 entitled "Right to the truth", para. 1. See also *Study on the Right to the Truth*, Commission on Human Rights, UN Doc. E/CN.4/2006/91, 8 February 2006.

³⁰ See e.g. Correa C., Guillerot J., Magarrell L., 'Reparations and Victim Participation: a Look at the Truth Commission Experience', in *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (eds. C. Ferstman, M. Goetz, A. Stephens) (Leiden, Boston: Martinus Nijhoff Publishers, 2009), pp. 385-414. See also Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, supra note 26, para. 29.

³¹ Articles V(1) and XIV.

³² Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism*, U.N. Doc. A/HRC/10/3 (2009).

³³ "The blanket invocation of State secrets privilege with reference to complete policies, such as the United States secret detention, interrogation and rendition programme or third-party intelligence ...effective investigation and renders the right to a remedy illusory. This is incompatible with article 2 of the International Covenant on Civil and Political Rights" (emphasis added), *ibid* para. 60.

remedy and from receiving an effective reparation, or prevent public disclosure of the truth about the alleged human rights violations".³⁴

21. The Court of Appeal of England and Wales recently overruled the objection of the Foreign Secretary which referred to intelligence-sharing arrangements between the UK and their allies, and ordered publication of several redacted paragraphs from the lower court's decision. That court reasoned "*The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law... [T]he principle of open justice represents an element of democratic accountability*".³⁵ The principle of open justice must extend to the investigation stage of proceedings as a necessary pre-requisite to trial.
22. Even if the information is sensitive enough to prevail over the public's right to know, arrangements can be made to disclose it to the victims on an *inter partes* basis, with attached guarantees that the victims (or the victims' counsel, if applicable) will not communicate it any further.³⁶ If national security concerns are allowed to prevail over the victims' right to access to information, the non-derogable and absolute character of Article 3 and the prohibition of unacknowledged detention will be undermined.
23. There is no reference to any national-security exception in the above international instruments which provide for the right to truth. It should be noted that such an exception is not unknown to the drafters of international treaties. For example, the Convention itself contains national-security clauses where necessary (cf. Articles 8(2), 10(2), 11(2), and 15), they are also present in other treaties.³⁷ There is no such exception in the International Convention for the Protection of All Persons from Enforced Disappearance. There is, therefore, no room to imply such exception.
24. In the specific circumstance of renditions, whose effectiveness relies on secrecy, Governments should not be allowed to utilise national security arguments in order to bar processes which seek to redress the violations masked by that secrecy.

Effective remedies: Article 13

25. Articles 3 and 5 impose specific obligations on the State to investigate credible allegations in a particular way. Those are obligations of means, not of result. Article 13 goes further - requiring that victims of torture are *in fact* provided with an effective remedy, including reparation.³⁸ The investigations required by Articles 3 and 5 form part of, and are essential to, other aspects of the remedy required by Article 13.

³⁴ Recommendation 1983 (2011), *Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, Text adopted by the Assembly on 6 October 2011 (34th Sitting). See also Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, supra note 26, para. 33.

³⁵ R. (on the application of Binyam Mohamed) v. The Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ. 65, paras. 38-9.

³⁶ This technique is well-known in the proceedings before the International Criminal Court as well as in the domestic criminal proceedings in many jurisdictions.

³⁷ See e.g. the Council of Europe Criminal Law Convention on Corruption (1999). ETS No. 173. Article 26(2).

³⁸ In relation to the analogous provision of the International Covenant on Civil and Political Rights, Article 2(3), see Human Rights Committee, General Comment 31, *Nature of the Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 (2004), para. 16: "*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*".

The importance of disclosure of the truth to the right to remedy and reparation

26. A thorough and effective investigation is a prerequisite to the overall procedural aspect of the right to remedy and reparation: access to justice.³⁹ It is important to ensure that the victim or his or her family is involved in the procedure to the extent necessary to safeguard his or her legitimate interests.⁴⁰ In cases of serious human rights violations including torture and unacknowledged detention, the State is in the position of power and will almost always have access to the overwhelming amount of the evidence. Without such an investigation (and information about its outcome) a victim may not have the evidence to bring a claim for reparations, or be in a position to bring a private prosecution against a perpetrator.⁴¹
27. However, verification of the facts and public disclosure of the truth is also vital of itself as part of the *substantive* reparations owed to victims. The basic principle of international law is that “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed”.⁴² In the case of torture and unacknowledged detention, investigation and disclosure of the truth are crucial in achieving that aim.
28. International law recognises that victims of serious human rights abuses require more than compensation. Other important components which address the long-term restorative aims of reparation must also be provided, including satisfaction, guarantees of non-repetition and rehabilitation.⁴³ An adequate and effective investigation and full disclosure of the facts by the State have a key role in each of these other substantive forms of reparation:

³⁹ See *Bámaca Velásquez v Guatemala*, Judgment of 25 November 2000, Inter-Am. Ct. H.R. (Ser. C) No. 70 (2000), para. 32 (Separate Opinion of Judge Cançado-Trindade); *Abdulsamet Yama v Turkey* (Applic. No 32446/96) [2004] ECHR 572 (2 November 2004), para. 53 “the notion of an “effective remedy” entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.” On the positive obligations States have towards victims, see also the Basic Principles and Guidelines, para. 12(c): “A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. To that end, States should ... (c) Provide proper assistance to victims seeking access to justice”.

⁴⁰ *Anguelova v. Bulgaria* [2002] ECHR 38361/97, para. 140; *Cicek v. Turkey* (Applic. No. 25704/94) ECHR Judgment (27 Feb. 2001, Final 5 Sep. 2001), para. 178; see also *Caracazo Case*, Judgment of 29 August 2002, Inter-Am Ct. H.R. (Ser. C) No. 95 (2002), para. 118: “The next of kin of the victims and the surviving victims must have full access and the capacity to act during all stages and levels of said investigations, pursuant to domestic law and to the provisions of the American Convention.”; European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 14th General Report on the Committee’s Activities, para. 36 “In all cases, the victim (or, as the case may be, the victim’s next-of-kin) must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.”; Impunity Guidelines, Article VII.

⁴¹ See, for example *Hajrizi Dzemajl et al. v Yugoslavia*, UN Doc. CAT/C/29/D/161/2000, (2002), para. 9.5, where the UN Committee Against Torture found that the State’s failure to inform the victims of the results of an investigation into allegations of torture “by, inter alia, not serving on them the decision to discontinue the investigation” violated Article 13 of the Convention (right to complain) because it “effectively prevented them from assuming “private prosecution” of their case”. Similarly, in *Dimitrov v Serbia and Montenegro*, Comm. No. 171/2000, 3 May 2005, UN Doc. U.N. Doc. CAT/C/34/D/171/2000 (2005), paras. 7.2-7.3, this was held to amount to a breach of Article 12 (obligation to investigate), 13 and 14 (right to a remedy).

⁴² *The Factory At Chorzow (Claim for Indemnity)(Germany v Poland)* (The Merits), Permanent Court of International Justice, 13 September 1928, p. 47.

⁴³ See Impunity Guidelines, Article XVI (“States should take all appropriate measures to establish accessible and effective mechanisms which ensure that victims of serious human rights violations receive prompt and adequate reparation for the harm suffered. This may include measures of rehabilitation, compensation, satisfaction, restitution and guarantees of non-repetition”); Basic Principles and Guidelines, para. 18: “... 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 ... which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition”; The Rome Statute of the International Criminal Court 1998, Article 75(1): “The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”; Convention Against Torture, Article 14: “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. ...”; see *Guridi v Spain*, Communication No. 212/2002, U.N. Doc. CAT/C/34/D/212/2002 (2005), para.6.8: “[A]rticle 14 of the Convention not only recognizes the right to fair and adequate compensation but also imposes on States the duty to guarantee compensation for the victim of an act of torture. The Committee considers that compensation should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case” (emphasis added); International Convention for the Protection of All Persons from Enforced Disappearance, Article 24(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.” UN Human Rights Committee, General Comment 31 (2004), para. 16: “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”.

- i. Satisfaction includes steps such as acknowledgement of the breach, an expression of regret, or a formal apology, and should include where applicable “[v]erification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim...”.⁴⁴
- ii. Guarantees of non-repetition are steps put in place to prevent the recurrence of the breach in the future.⁴⁵ An investigation is essential to understand where those steps need to be taken. This was recognised by Judge Cançado-Trindade, then of the Inter-American Court of Human Rights, when he said that “*the right to truth is essential to the struggle against impunity, and is ineluctably linked to the very realization of justice, and to the guarantee of non-repetition of those violations*”.⁴⁶ The right to an effective remedy requires that there be measures taken to safeguard against non-repetition and to restore public confidence in any Governmental agencies found to have been responsible for such violations.
- iii. Rehabilitation has been defined as “*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.*”⁴⁷ As explained in the report of Dr Mary Robertson dated 23 March 2011 (discussed further below) public truth-telling is an important and necessary step for healing to occur (page 13). As such it can, at the very least, have an important role to play as the supporting context for rehabilitation measures.

Psychological importance of disclosure of the truth and identification of the perpetrators

29. The Committee of Ministers of the Council of Europe has recognised in the EU Impunity Guidelines that “*impunity for those responsible for acts amounting to serious human rights violations inflicts additional suffering on victims*”.⁴⁸
30. The psychological benefits for the victim of the public disclosure of the truth and identification of the perpetrators (linked to the above forms of reparation) is explained in the attached report of Dr Mary Robertson dated 23 March 2011. She says there is “*strong support among mental health professionals for the view that the pursuit of reparation has a therapeutic benefit for the survivor. A public process in which events are disclosed and the guilty are named can empower the survivor by allowing them to overcome feelings of isolation and pain. This can also help to allay feelings of powerlessness and disenfranchisement and acknowledge that what was done to them was wrong and deserving of punishment*” (page 10).

⁴⁴ Basic Principles, Principle 22(b). See also *Goiburú et al. v. Paraguay*, Judgment of 22 September 2006, Inter-Am. Ct. H.R. (Ser. C) No. 153 (2006), para. 164 (“*The State is obliged to combat the situation of impunity that reigns in this case by all possible means, because impunity fosters the chronic repetition of human rights violations and the total defenselessness of the victims and their next of kin, who have the right to know the truth about the facts. When this right to the truth is recognized and exercised in a specific situation, it constitutes an important measure of reparation, and is a reasonable expectation of the victims that the State must satisfy*”).

⁴⁵ See Basic Principles and Guidelines, Principle 23.

⁴⁶ *Bámaca Velásquez v Guatemala*, Judgment of 25 November 2000, Inter-Am. Ct. H.R. (Ser. C) No. 70 (2000), para. 32 (Separate Opinion of Judge Cançado-Trindade). See also *Monsignor Oscar Arnulfo Romero y Galdamez v. El Salvador* Judgment of 13 April 2000, Inter-Am. Commission of H.R. Case 11.481, Report No. 37/00 (2000), para. 148: “*The right that all persons and society have to know the full, complete, and public truth as to the events transpired, their specific circumstances, and who participated in them is part of the right to reparation for human rights violations, with respect to satisfaction and guarantees of non-repetition.*”

⁴⁷ Shelton, D., *Remedies in International Human Rights* (Oxford, Oxford University Press, 2005), p. 275.

⁴⁸ Impunity Guidelines, Preamble.

31. In Dr Robertson's opinion, the right to a remedy can contribute to healing and recovery in torture victims because it allows injustice to be acknowledged by wider society, thereby helping victims to reclaim their dignity and legitimise their suffering (page 10). The right to a remedy also allows a victim to assign blame for their treatment to a perpetrator, thereby freeing them from the burden of shame or guilt (page 11). Moreover, the process of being able to speak the truth and having the truth heard by the wider public allows torture victims to overcome feelings of worthlessness and weakness arising out of the torture experience (page 11).
32. Dr Robertson's report notes that many torture survivors fear that other people will not believe or understand their experiences. They may have been told by their perpetrators that nobody will believe them if they disclose what happened or that they or members of their family will be punished if they expose the truth (page 13). Others may be overwhelmed by feelings of shame, which makes it difficult to tell their story. A healing environment is one in which the torture survivor is able to talk about their experiences in a context in which they feel understood and validated. Public truth-telling is an important and necessary step for healing to occur. Public truth-telling requires reparation and a thorough and complete investigation.
33. In Dr Robertson's opinion, mental health professionals working with survivors of torture support the view that impunity for perpetrators contributes to social and psychological problems and impedes healing processes in survivors (page 14). In particular, if perpetrators are not brought to justice, any other form of reparation is likely to be perceived as inadequate. Impunity for the perpetrator denies and invalidates the experience of the individual and results in psychological reactions of worthlessness, disempowerment and shame. It can impede the bereavement process, induce self-blame and guilt, enhance re-experiencing of trauma and generate feelings of helplessness, isolation or resentment towards the social environment. Survivor guilt and other traumatic stress reactions such as nightmares, insomnia, depression and somatisation may also ensue. As Dr Robertson explains, some reports describe the negative impact of impunity on survivors and indicate that a high percentage of survivors show an elevated mental vulnerability caused by impunity (page 14).
34. Dr Robertson concludes that the process of truth recovery and successful vindication has therapeutic benefits for victims (page 14). Public recognition of the truth and proper acknowledgement through some form of redress can play an integral role in the survivor's journey to recovery. Conversely, if the truth remains hidden and the perpetrators walk free, this can compound the survivor's sense of helplessness and struggle to create meaning and obtain closure. Accordingly, thorough investigations, as envisaged by the positive obligation enshrined by Article 3, forms a critical aspect in a victim's recovery process.

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