Addressing Gross Human Rights Abuses: Punishment and Victim Compensation

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CHAPTER 16
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Gross Human Rights Abuses:
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Victim Compensation

Diane F. Orentlicher

A. Introduction

International law has long recognized that human rights guarantees rest, above all, on a foundation of law — in particular, on the assurance of an effective legal response when violations occur. Notably, an act of law enforcement inaugurated the modern period of international protection of human rights. Through the prosecution of Nazi leaders for crimes against humanity at Nuremberg, the international community simultaneously asserted that all states are bound to respect fundamental rights, and that the vitality of these rights depends upon the assurance of their enforcement through legal process.

More recently, international law has continued to insist upon legal accountability for at least the most serious violations of human rights. Recently drafted human rights instruments explicitly recognize states' duty to punish violations of physical integrity, and authoritative interpretations of human rights treaties have repeatedly emphasized the role of punishment in securing fundamental rights. Human rights treaties also affirm the importance of civil redress for violations of protected rights, and in recent years interna-
tional responses to gross violations have placed increasing emphasis on enforcement of states' duty to compensate victims.

The principle underlying these duties is straightforward: the only way to assure that rights are protected is to maintain effective legal safeguards against their breach. In particular, those who commit atrocious human rights crimes must be punished, and victims must be assured appropriate redress.

But if international law has been emphatic in asserting states' duty to punish atrocious crimes, states' compliance with that duty has often been deficient, and international efforts to promote better compliance have been patently inadequate. States' compliance has been notably weak where it is most needed: in situations of massive violations. Not coincidentally, a general pattern of impunity has often been the context in which systematic abuses occur. At times, governments have enacted amnesties conferring legal impunity for grave violations of human rights; in other situations, de facto impunity has been the rule. Although international human rights bodies have recently begun to condemn amnesties for gross violations, little serious effort has been made to prevent states from using amnesties to consign atrocious crimes to legal oblivion. Too often, the international community has effectively condoned impunity.

B. Overview of International Law Regarding Legal Accountability for Human Rights Violations

The legal consequences of gross violations of human rights fall into two principal categories: criminal and civil liability. As elaborated below, a growing number of international instruments generally require states to punish those who commit human rights crimes, such as extra-legal killings, disappearances, and torture, and to assure that victims are afforded appropriate redress. Customary law now prohibits wholesale impunity for systematic patterns of these violations.
The civil and criminal consequences of gross violations of human rights share some common rationales: both criminal and civil liability deter abuses by putting potential delinquents on notice that human rights violations have legal consequences. Also, both forms of liability may help rehabilitate victims. While this rationale is more obviously pertinent in respect of civil redress, criminal punishment may also help restore the dignity of human rights victims. It is now widely recognized that public acknowledgement of responsibility for human rights violations — a central function of criminal prosecution — promotes the rehabilitation of victims. Further, both criminal punishment and civil liability help establish and reinforce basic social norms.

Still, in other respects the two serve distinct goals, and at any rate serve similar goals differently. Although justified on several grounds, criminal punishment is based, above all, on a deterrence rationale; international law requires states to bring to justice those responsible for atrocious crimes because criminal punishment is thought to be the most effective means of preventing the crimes' recurrence. Conversely, failure to punish those who violate fundamental norms of human dignity brings the law into contempt, and may serve as a virtual license to repeat the crimes. In this respect, states' duty to punish human rights crimes is owed as much to society as to individual victims.

While civil redress also serves a deterrent function, its principal focus is the victim, and its paramount aim is reparation. Reparation can take a variety of forms beyond financial compensation, and remedies can often be tailored to respond to victims' particular and immediate needs. For example, persons arbitrarily deprived of their jobs because of their political views can be reinstated. Psychiatric (as well as physical) health care can be provided to torture survivors at state expense.

The development of effective civil remedies may promote another value as well: utilizing civil avenues of redress can foster a sense of empowerment on the part of victims, and this itself may promote the recovery process of trauma sur-
vivors. More generally, by enabling individuals to assert and vindicate their rights, a system of effective civil remedies can help deepen a society's civic culture.

1. Criminal Accountability

   a. Current Law

   Although few violations of human rights are international crimes, international criminal law played a crucial role in the development of human rights law. As previously noted, the Allies' prosecution of crimes against humanity at Nuremberg (and then in Tokyo) was a watershed in the development of international human rights protections.

   Yet despite its origins, human rights law has, until recently, placed relatively little emphasis on criminal punishment. Although the Nuremberg precedent was in effect codified in the 1948 Convention for the Prevention and Punishment of the Crime of Genocide, that treaty has never been invoked by states parties as the basis of international criminal enforcement. On their face, the most comprehensive human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (Covenant), are silent about states' duty to punish those who commit serious abuses.

   In recent years, however, the Covenant and its regional counterparts have been authoritatively interpreted to require that states parties bring to justice those who are responsible for certain violations. For example the Human Rights Committee, which monitors compliance with the Covenant, has repeatedly asserted that states parties must investigate torture, disappearances, and extra-legal executions and attempt to bring the wrongdoers to justice.

   Although the European Court of Human Rights has had few occasions to consider the role of punishment in securing rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), its decisions make clear that punishment plays a necessary part in contracting states' fulfillment of certain duties. In X and Y v. Netherlands, for example, the
Court found the Dutch government in breach of the European Convention by virtue of a gap in Dutch law that had precluded a victim of sexual assault from instituting criminal proceedings against her attacker, who escaped punishment. Acknowledging that contracting states enjoy a “margin of appreciation” in determining the means they will use to secure the rights at issue, the Court found, nonetheless, that only the criminal law provides an adequate means of protecting what it regarded as a crucial area of private life.

Like the Covenant and European Convention, the American Convention on Human Rights (American Convention) nowhere explicitly mentions a duty to prosecute violations of the rights it assures. Nevertheless, in recent years both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have interpreted the Convention to require states parties to investigate serious violations of physical integrity, such as torture, disappearances, and summary executions, and to bring the wrongdoers to justice.

In 1988, the Inter-American Court of Human Rights handed down a landmark decision interpreting the American Convention to require states parties to investigate certain violations and to punish the perpetrators. The decision was rendered in the Velasquez Rodriguez Case, which was brought before the Court by the Inter-American Commission against the Honduran government for the unresolved disappearance of Manfredo Velasquez in September 1981. Although the fate of the victim could not be established conclusively, the Court heard testimony indicating that he had been tortured and killed by Honduran security forces. The Court found the Honduran government responsible for multiple violations of the American Convention, basing much of its analysis on states parties’ affirmative duty to “ensure” rights elaborated in the Convention:

This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obliga-
tion, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.\textsuperscript{18}

The Court asserted that states parties' duties persist despite a change in government.\textsuperscript{19} While generally recognizing a duty to punish gross violations of physical integrity, the bodies that monitor compliance with comprehensive human rights treaties did not, until recently, squarely confront the question whether amnesty laws are compatible with states parties' duties. The Human Rights Committee finally did so, however, in April 1992, when it adopted a "General Comment" asserting that amnesties covering acts of torture "are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future."\textsuperscript{20}

The Inter-American Commission on Human Rights reached a similar conclusion in two cases challenging the validity of amnesty laws enacted in Argentina and Uruguay, respectively. In decisions made public in October 1992, the Commission found that the amnesty laws, which precluded punishment of persons responsible for such crimes as disappearance, torture, and political killings, were incompatible with the American Convention.\textsuperscript{21}

A duty to investigate and prosecute grave violations of physical integrity has been explicitly recognized in more recent human rights instruments. These include the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment\textsuperscript{22}; the Inter-American Convention to Prevent and Punish Torture\textsuperscript{23}; the Declaration on the Protection of All Persons From Enforced Disappearance\textsuperscript{24}; and Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.\textsuperscript{25}

The frequent reiteration in international instruments of a duty to punish grave violations of physical integrity is evidence that the duty has become, or is emerging as, a rule of customary law.\textsuperscript{26} The Restatement (Third) of the Foreign Rela-
tions Law of the United States sheds light on the scope this duty. The Restatement asserts that a state violates customary law "if, as a matter of state policy, it practices, encourages or condones" torture, murder, disappearances and several other human rights violations, and suggests that "[a] government may be presumed to have encouraged or condoned [these] acts . . . if such acts, especially by its officials, have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators." Echoing the logic of the Restatement, numerous reports prepared by Special Representatives, Special Rapporteurs, and Working Groups appointed by the United Nations Commission on Human Rights have condemned governments' consistent failure to punish widespread acts of torture, disappearance, and extra-legal executions and have suggested that the resulting impunity encourages further violations.

In sum, in recent years international law has placed growing emphasis on states' duty to assure freedom from serious violations of physical integrity through criminal sanctions. But if the principle itself has been firmly established, international efforts to enforce the law have been patently inadequate. The aftermath of the Velasquez Rodriguez decision is a case in point. Despite the Inter-American Court's decision, no one has been punished for the disappearance of Manfredo Velasquez, and indeed the Court stopped short of ordering the Honduran government to institute prosecutions.

The Court did order the Honduran government to provide information about steps taken to investigate the murders of two individuals, one of whom had testified before the Court in the Velasquez Rodriguez case, while the other was scheduled to do so. Still, no one was prosecuted for these murders.

b. Adequacy of Law

There is thus a paradox in the development of international law prescribing the role of punishment in securing fundamental rights: on the one hand, legal norms requiring states to punish those who commit atrocious crimes have been clarified and strengthened in recent years. At the same time,
however, international bodies responsible for enunciating the norms have been reticent to insist on enforcement.

What, then, accounts for this discrepancy? At one level, the answer is simple. It is a lesser intrusion on sovereignty for an international body to enunciate a norm than to insist on its enforcement — particularly when the norm asserts duties in an area traditionally left to the broad discretion of states.

At a deeper level, ambivalence about the desirability of enforcing states’ general duty to punish human rights crimes has at times inhibited efforts to secure prosecutions. This ambivalence is most apparent in the now-common circumstance in which a democratically elected government has replaced one responsible for massive human rights violations. In these situations, issues of accountability frequently pose a daunting dilemma. On the one hand, the balance of power between the ancien régime and the new government is often precarious, and prosecuting depredations of the outgoing regime may seem to place an already fragile democracy at greater risk — particularly when the outgoing regime was dominated by military sectors that retain a monopoly on the use of force. On the other hand, impunity for atrocious crimes of the recent past undermines the law’s authority just when a society is poised to reassert the supremacy of law. A Faustian pact with a brutal regime — a pact to allow impunity in exchange for the end of dictatorship — raises the specter of perpetuating the very lawlessness that is meant to be ended.

This dilemma has proved agonizing for the many nations that have confronted it in recent years — the cases of Argentina, Chile, El Salvador, the Philippines, and Uruguay are a few examples — and also seems to play a part in the reticence of some international human rights bodies to press for prosecutions during periods of transition from dictatorship to democracy. This ambivalence has, for example, been evident in various pronouncements of the Inter-American Commission on Human Rights. In 1986, the Commission expressed a general inclination to allow national authorities to determine the validity of amnesty laws enacted by previ-
ous governments, subject to the qualification that the truth about past violations must be fully known. This view effectively established an exception to the Commission’s general rule that serious violations of physical integrity must be punished — an exception for new democracies precariously emerging in the aftermath of military dictatorship. By 1989, however, the Commission’s chairman voiced strong opposition to amnesty laws that bar prosecution of atrocious crimes:

A compact by which a whole nation is called upon to suspend its memories of torture, murder, forcible “disappearances” of loved ones, a compact which would have citizens pretend that the tragic losses and suffering which they have undergone never occurred, this . . . is no bargain. This is not amnesty; it is forcible amnesia. The “peace” that is bought at this price is supported by a thread slenderer even than the thread by which the sword of Damocles was suspended.

The chairman suggested that such amnesties violate rights set forth in the two key Inter-American human rights instruments: “The rights set out in the American Convention on Human Rights and in the American Declaration of the Rights and Duties of Man by their very nature cannot be subject to extinction by national fiat.” More recently, the Commission seemed to complete its apparent progression by adopting the previously noted reports finding that amnesty laws enacted in Argentina and Uruguay are incompatible with the American Convention. In fact, however, there are some indications that the Commission’s resolve regarding the invalidity of amnesty laws has weakened in recent years. Significantly, the Commission held up releasing its decisions in the Argentina and Uruguay cases for a year after adopting them. Throughout that period, there was intense speculation that the Commission might backpedal, softening its strong stance.

Another striking instance of this ambivalence can be found in the report of the United Nations “Commission on the Truth,” established pursuant to a UN-brokered peace accord between government and insurgent forces in El Salvador. Released to the public on March 15, 1993, the report assigned
responsibility for numerous cases of political violence committed between 1980 and July 1991. Although the Commission’s mandate enabled it to recommend cases for prosecution, it declined to do so. The Commission explained its decision this way:

The Commission feels justice demands punishment for the violations of human rights. But it is not itself constituted to specify sanctions and recognizes that the present Salvadoran judicial system is incapable of fairly assessing and carrying out punishment. Therefore the Commission feels it cannot recommend judicial proceedings in El Salvador against the persons named in its report until after judicial reforms are carried out.

The dilemma identified by the Commission is genuine. It is almost tautological to note that a judiciary that has presided over wholesale impunity for massive violations is in a state of collapse. How to rebuild the law following the decimation of judicial process presents challenges that few states have successfully met. The dilemma is further compounded when, as in El Salvador, those responsible for violations retain the capacity to derail a fragile process of democratic transition through the credible threat of violence.

But the problem with recognizing this dilemma as a justification for impunity is that it becomes the proverbial self-fulfilling prophecy. If the international community is to play an effective role in breaking cycles of impunity, it must do what it can to create a greater space for accountability.

An example of such a role can be found in the pressure applied by the United States government for prosecution in Chile of those responsible for ordering the 1976 assassination in Washington, DC of Chilean opposition leader Orlando Letelier and his U.S. colleague, Ronni Karpen Moffitt. Some participants in the crime were prosecuted in U.S. courts in the 1980s, but the alleged authors of the crime, military officials who held top positions in Chile’s secret police agency, eluded justice for fifteen years. Although resolution of this case has long been a central issue in U.S.-Chile relations, as recently as April 1991 a high-level official in Chile privately admitted that it was unlikely the Aylwin government would
successfully prosecute the case. In his view, although the
government was committed to prosecuting the authors of
the Letelier-Moffitt assassination, it would be unable to do so
in light of the enduring power of the armed forces.

Five months later, the two principal suspects were indicted, and in November 1993 they were convicted and sentenced. What happened in the intervening period? Significant pressure was brought to bear on the Chilean gov-
ernment by the United States government and by human
rights organizations. Clearly, external pressure made a dif-
cerence, providing a counterweight to the internal pressure
from a recalcitrant military. Significantly, too, the very act of
indicting the two suspects — an act that not long ago was
thought likely to provoke military unrest — instead helped
enhance the Aylwin government's power vis-à-vis the
Chilean armed forces.

The correlation of political forces in each country is
unique, of course, and international efforts to assure prose-
cution of military offenders must be sensitive to the peculiar
constraints that each government faces. In some countries,
there may be periods when there is virtually no possibility of
successfully prosecuting the military. Still, it is important to
recognize that, in many transitional societies, the correlation
of political power between a civilian government and the
military fluctuates, and may be susceptible to realignment as
new factors are introduced.

Importantly, international opposition to impunity for
human rights violations can operate as one of the factors that
determine the outcome of a contest between competing cen-
ters of power. Increasingly, respect for human rights has
become a crucial aspect of a government’s legitimacy, both
domestically and internationally. In this setting, international
law can, in effect, take sides in a domestic contest between
military and civilian sectors, bringing its authority to bear on
behalf of civilian authority and the rule of law.

There are, of course, limits to the role that international
law and diplomacy can play in countering domestic pres-
sures for impunity. Indeed, as suggested above, there may be
times when a government lacks the power to institute prosecutions for human rights violations. How, then, should international law and enforcement bodies address these situations? Should international bodies, such as the UN-appointed Commission on the Truth in El Salvador, frankly acknowledge that the Salvadoran judiciary is incapable of discharging the state’s international obligations and decline to press for prosecutions? Should they insist on the principle of legal accountability — knowing that there will be situations in which the principle will not be vindicated?

In addressing these questions, two issues merit special consideration: 1) the scope of states’ obligation to punish human rights violators in situations of massive crimes; and 2) the availability of doctrines of exception, such as the right to derogate in times of emergency. For reasons elaborated below, the following principles should guide both the further elaboration of relevant legal standards and future enforcement efforts:

- States’ general duty to punish gross violations of human rights should be interpreted in a manner that vindicates the rule of law without placing impossible or unreasonable burdens on states. This approach can largely obviate the need even to consider the relevance of doctrines of exception, and can avoid false dichotomies between destabilizing trials and wholesale impunity.

- Appropriate international bodies should clearly articulate the invalidity of laws that establish impunity for atrocious crimes, and should insist upon accountability in their enforcement activities as well.

- In determining the availability of doctrines of exception to excuse states from their general duty to punish atrocious crimes, international bodies should avoid adopting rules that might reward state actors, such as military sectors, for thwarting justice. Instead, established doctrines of exception should be interpreted in a manner that encourages the civilian government to
attempt to bring violators to justice, while recognizing legitimate limits to state power. In this area as others, doctrines of exception should be narrowly interpreted.

c. Scope of General Obligation

If international law generally requires states to punish serious violations of physical integrity, must a newly-elected government attempt to prosecute every such violation committed with impunity during a recent dictatorship? Applying the Restatement rule, customary law would be violated by an amnesty that established complete impunity for systematic violations of the rights against torture, extra-legal execution, and disappearance, but would not require prosecution of every person who committed one of these offenses. Limited prosecutions, focusing in particular on those who were most responsible for designing and implementing a system of atrocities or on especially notorious cases that were emblematic of past violations, would seemingly satisfy states' duty under customary law, provided the criteria used to select defendants did not appear to condone or tolerate past abuses by, for example, cynically targeting a handful of low-level scapegoats. Also, criteria used to limit prosecutions should not generally excuse commission of atrocious crimes on the ground that the perpetrators were executing "superior orders," although this circumstance can legitimately be considered as a defense if the perpetrator had no "moral choice," or in mitigation of punishment.

More complex issues are raised by the question whether a government of a state that has ratified the Covenant, the European Convention, or the American Convention must attempt to prosecute all serious violations of the right to physical integrity committed by or with the acquiescence of a previous regime. Decisions interpreting these conventions include some indications that states parties are generally expected to investigate every violation of the rights to life, freedom from torture, and freedom from involuntary disappearance, and to prosecute those who are responsible. A rigid application of the general rule that a state's international obligations persist despite a change in government
might, then, require successor governments to prosecute virtually every violation of these three rights that has not yet been punished.43

Yet in a country like Argentina, where some nine thousand persons are estimated to have disappeared during the military juntas’ “dirty war against subversion,” such a requirement could place impossible demands on the judiciary. Even a well-functioning judicial system would be incapable of discharging such a burden;44 much less can this be expected following the wholesale collapse of the rule of law.

Further, open-ended prosecutions could exacerbate military opposition and strain an already fragile social fabric.45 A chief lesson of the Argentina experience is not, as some suggest, that prosecutions are destabilizing per se, but that prosecutions of indefinite duration and scope are likely to destabilize. Although the Argentine military opposed prosecutions, it was prepared to allow prosecution of top military commanders. But some factions rebelled when prosecutions began to sweep more broadly, believing this tarnished the military institutionally. Moreover public support for prosecutions, strong at the outset of the Alfonsin government, waned as time elapsed and the trials’ importance was eclipsed by worsening economic conditions. In contrast, human rights trials of finite scope and duration undertaken in Greece in the mid-1970s provoked military discontent, but were far less disruptive and helped consolidate the country’s transition to democracy.46

The contrasting experiences of Greece and Argentina suggest that the demands of legal accountability and political stability may be best reconciled through prosecutions that have defined limits. Exemplary trials can vindicate the authority of the law and deter repetition of human rights crimes, provided the trials comport with popular conceptions of justice.

Is selective prosecution compatible with states’ duties under the international conventions discussed earlier? Although this issue has not been squarely addressed by any of the relevant treaty bodies, exemplary prosecutions can be
undertaken in a manner that is consistent with the pertinent decisional law of these bodies. This conclusion is based on an interpretation of that law guided by the general canon of construction that international treaties should be interpreted in a manner that avoids imposing obligations that are impossible or whose discharge would prove harmful.\textsuperscript{47}

Analyzing the general rule requiring prosecution of torture, extra-legal killings, and disappearances in light of its rationale provides a principled basis for such an interpretation. The duty to punish serious violations of physical integrity is squarely grounded on a deterrence rationale.\textsuperscript{48} Believing criminal sanctions to be the most effective means of securing rights deemed of paramount importance, such bodies as the Human Rights Committee and the Inter-American Commission have found investigation leading to punishment to be the most appropriate response to violations of those rights. This rationale would not, however, compel prosecution by a successor government of every violation committed by a previous regime. While the deterrence model supporting the general rule might require the new government to investigate and seek to punish virtually every violation committed thenceforth, it would simply be too late to apply that model to prevent the violations that have already occurred.

But a failure to punish any of the past violations would frustrate the deterrence objective underlying the general duty to punish. If the new government established complete impunity for atrocious crimes committed on a sweeping scale, its action would, as the Restatement reasoned, have the effect of condoning the violations and thereby encouraging similar ones. This result is plainly incompatible with the affirmative convention-based duty to prevent violations. But even a limited program of exemplary punishment could achieve the deterrence objective that the conventions contemplate.

As this analysis suggests, international law requiring states to punish grave violations of human rights can accommodate several key constraints faced by prosecutors in coun-
tries emerging from prolonged periods of military rule. The

duties imposed by international law are not so exacting that
they would place impossible demands on strained judicial
resources or require transitional states to undertake protract-
ed and debilitating prosecutions. What the law disallows is
wholesale impunity for atrocious crimes committed on a
massive scale. Beyond this, however, the law leaves prosecu-
tors a broad realm of discretion.

\textit{d. Derogation}

If international law allows nascent democracies flexibility
to respond to internal pressures, there nonetheless may be
times when a fragile government lacks the power to comply
with even the modest obligations outlined above. When
instituting prosecutions would pose a genuine threat of a
coup — and not merely provoke military disaffection — can
a government be excused from its general duty to punish
atrocious crimes? The state of international law on this ques-
tion is somewhat ambiguous, in large part because applica-
ble principles do not take adequate account of situations in
which the military occupies an autonomous realm of power.

The three comprehensive conventions discussed in section
B.1.a. allow states parties to derogate from their duties in
time of public emergency that threatens the life of the nation
when various conditions are satisfied.\textsuperscript{49} Under no circum-
stances, however, are derogations from the rights to life and
freedom from torture permitted.\textsuperscript{50} When applicable, the cus-
tomary doctrines of “state of necessity” and force majeure
similarly preclude the wrongfulness of a state’s failure to
comply with its international obligations in exceptional cir-
cumstances.\textsuperscript{51} But the prohibitions of torture, disappearance,
and extra-legal executions are peremptory norms,\textsuperscript{52} and thus
can never be abrogated pursuant to the “state of necessity”
or force majeure doctrines.\textsuperscript{53}

The question arises, then, whether states’ duty to prosecute
these violations should also be treated as nonderogable on
the basis that prosecution is necessary to secure the peremp-
tory rights. Authoritative interpretations of the conventions
analyzed in section B.1.a. offer no clear guidance on this
question; the issue has never been squarely addressed. And a plausible case can be made in support of either possible position.

Although similar considerations would apply to all three conventions, the issue is framed most sharply under the American Convention. Article 27(2) provides both that several substantive rights are nonderogable and that "the judicial guarantees essential for the protection of such rights" are likewise nonderogable. Interpreting this provision, the Inter-American Court has concluded that states parties to the American Convention cannot suspend individuals' right to seek *habeas corpus*. Since the Court has found punishment to be a necessary part of states parties' duty to ensure several nonderogable rights, states parties arguably cannot derogate from their duty to prosecute violations of those rights.

While plausible, this interpretation of the American Convention is not inevitable. *Habeas corpus* and criminal prosecution could be distinguished for purposes of determining whether derogation is permissible. *Habeas corpus* can avert imminent harm or further harm; it can, for example, be used to locate a person who has "disappeared" and thus save her from physical danger, or to prevent a detainee who has been tortured from suffering further abuse. In contrast, criminal prosecution cannot prevent the specific act for which punishment is sought; it can only deter future crimes. Thus, while prosecutions play a necessary part in states parties' fulfillment of their duty to ensure fundamental rights, they may not be deemed "essential" to the protection of those rights for purposes of Article 27(2). Applying similar logic, the duty to institute criminal proceedings pursuant to other conventions may be derogable, at least in principle.

Still, in view of the consistent recognition, reflected in numerous decisions and pronouncements of intergovernmental bodies, that prosecution is necessary to secure enjoyment of several nonderogable rights, a rule of law allowing states to derogate from the duty to prosecute violations of those rights would produce untenable results. Such a rule would place international law in the position of asserting on
the one hand that the rights to life, freedom from torture, and freedom from involuntary disappearance are inviolable, and on the other hand that, under certain circumstances, states need not do that which is necessary to secure the rights.

The customary doctrine of "state of necessity" produces roughly the same effect as the derogations clauses of the comprehensive human rights conventions.\(^{59}\) The International Law Commission's draft articles on state responsibility frame the doctrine this way: the "state of necessity" doctrine precludes the "international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation" if "the State had no other means of safeguarding an essential State interest which was threatened by a grave and imminent peril."\(^{60}\) This justification is not available, however, "if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law . . . ."\(^{61}\) As the earlier discussion makes clear, the customary duty to prosecute torture, disappearances, and extra-legal executions "arises out of" rights that are peremptory norms.

Even if the duty to prosecute certain human rights crimes were derogable in principle, it would be extremely difficult for states to justify suspension of prosecutions. Both the state of necessity doctrine and the derogations provisions of human rights treaties establish a high threshold for application, requiring a grave and imminent threat to an essential state interest.\(^{62}\) And when the applicable threshold is established, states parties to the conventions may derogate only "to the extent strictly required by the exigencies of the situation,"\(^{63}\) while the state of necessity doctrine justifies noncompliance with international obligations only if "the State had no other means" of safeguarding an essential interest that is threatened by grave and imminent peril.\(^{64}\) Similarly, the *force majeure* doctrine has an exceedingly high threshold of application.\(^{65}\) Under each of these standards, governments would not be excused from their duty to prosecute human rights
violations simply to placate restive military forces; the excuses are available only to avert a threat to the life of a nation.

It is unclear, moreover, whether these excuses for noncompliance would apply even if military conduct did pose such a threat. The ILC’s draft articles on state responsibility assert that a state of necessity may not be invoked to justify breach of an international legal duty “if the occurrence of the situation of ‘necessity’ was caused by the State claiming to invoke it as a ground for its conduct.” Similarly, the ILC suggests that the force majeure rule applies only if the event precluding compliance with international responsibilities is “beyond the control of the obligor and not self-induced.” Under the law of state responsibility, conduct of a state organization — including the military — is attributable to the state. Thus if a state failed because of military intimidation to punish human rights crimes that it was otherwise required to prosecute, the state would be in breach of its international obligations.

A decision of the European Commission of Human Rights suggests a different approach under the derogations clause of the European Convention. In the Greek Case, the Commission implicitly rejected the applicant states’ argument that the revolutionary military government of Greece could not invoke the Convention’s derogations provision because it had, by overthrowing the previous government, brought about the revolutionary situation upon which it based its claim of entitlement to derogate.

One can fairly question whether the more widely recognized rules of attribution formulated by the ILC are appropriate in the peculiar context of societies in transition from military government to civilian democracy. Legal rules attributing conduct of armed forces to the state presuppose the government’s ability to assert control over its armed forces. But when countries emerge from a protracted period of military rule, the armed forces often continue to occupy a large realm of autonomous power, exerting more control over the civilian government than it asserts over them. In these circumstances, a rule of international law requiring civilian authorities to discipline armed forces may seem
inappropriate, and even nonsensical — if not downright dangerous.

Yet the alternative — excusing states from complying with human rights duties — is also troubling. If transitional governments were excused from international duties when military obstruction impedes compliance, international law would effectively reward the military's behavior.

These issues merit further study and clarification. While applicable rules are probably best clarified on a case-by-case basis, future legal developments should be guided by one overarching concern: legal rules governing derogation should be fashioned to provide incentives for governments to assert control over their armed forces. The law governing state responsibility for injury caused by insurgent forces may offer a productive analogy. International arbitral tribunals have found or intimated that the wrongfulness of a state's noncompliance with international duties toward aliens might be precluded if the injury was caused by revolutionary forces over which the government could not assert control. To avoid liability, a state must establish that it exercised due diligence in seeking to prevent the situation that made compliance with its international duties impossible. This is a question of fact, to be determined on a case-by-case basis, and the state's efforts to control revolutionary forces by punishing their criminal acts are relevant to the analysis.

**e. International Enforcement Efforts**

While some aspects of international law regarding the duty to punish human rights crimes thus remain to be clarified, a more substantial challenge lies in the realm of implementation. As noted above, treaty bodies have been far more effective in enunciating states' convention-based duty to punish grave violations than in enforcing the obligation.

More assertive enforcement efforts might encounter resistance from some governments, but this should not deter treaty bodies from making greater efforts to insist upon states' compliance with their conventional duties. Following the examples of the Inter-American Commission on Human
Rights in its decisions in the Uruguay and Argentina amnesty-law cases\(^7\) and of the European Court of Human Rights in \textit{X and Y v. Netherlands},\(^7\) treaty bodies should, at the very least, consistently award damages for states' failure to institute prosecutions as required under relevant conventions.

International organizations should, moreover, take greater care to ensure that their representatives and subsidiary organs do not adopt positions that condone impunity. The United Nations has an especially strong responsibility to oppose impunity in countries where it has become deeply involved, such as El Salvador, Haiti and Cambodia. As \textit{The New York Times} editorial board concluded when the Salvadorean government enacted an amnesty law following release of the report of the UN-appointed Truth Commission, the "unseemly rush to protect the guilty affronts the United Nations-sponsored peace process, international human rights law and the memory of El Salvador's victims."\(^7\)\(^9\)

Similarly, the United Nations has undermined its own accomplishment in establishing the principle that atrocious crimes must be punished through its efforts to broker an arrangement for the return to office of ousted Haitian President Jean-Bertrand Aristide. In April 1993, the UN's special envoy on Haiti promoted an accord that included an amnesty for grave violations of human rights. Accepting this proposal, President Aristide agreed to grant a political amnesty to Haiti's military; pledged that his government would not initiate criminal prosecutions against members of the armed forces; and promised that he would not oppose any legislation that might be enacted by Haiti's parliament extending the amnesty to prevent private civil suits against soldiers.\(^8\) Despite these concessions, the Haitian military rejected the proposed settlement.\(^9\) But after economic sanctions went into effect against the military government in Haiti, it agreed to a UN-sponsored accord that would result in President Aristide's reinstatement. Like the earlier proposal, this accord, which was signed by both Aristide and the military in July 1993 (and which the military subsequently
breached), included an amnesty provision. The accord required the President to grant an amnesty to the extent of his constitutional powers (essentially, for political crimes), and to implement any broader amnesty that might be adopted by the Haitian parliament. At best, such arrangements leave the impression that the UN’s own diplomats are unaware of the important legal principles that the organization has established, and deeply compromise the law itself.

To the extent that states’ failure to bring wrongdoers to account is due, in part, to weaknesses in their judiciaries, UN technical assistance programs may be able to play a constructive role in strengthening the administration of justice. Such programs should never be used, however, as a substitute for international enforcement action when the latter is called for.

In situations where national courts are simply unable to dispense justice, the international community should develop a meaningful role for international or regional tribunals, starting with the ad hoc tribunal established by the UN for crimes committed during the conflict in the former Yugoslavia, to punish human rights crimes. Such bodies may have more power and resources to assert the rule of law than weak or corrupt national courts, and are more likely than long-politicized national courts to be seen as impartial.

International bodies modeled on the Truth Commission in El Salvador can help establish a significant measure of accountability short of criminal punishment. Such commissions can develop a comprehensive and authoritative account of gross violations committed during periods of sweeping abuse. As in El Salvador and other countries that have recently emerged from protracted periods of grotesque violence, a “truth commission” could play a crucial role in promoting national reconciliation and preventing a recurrence of violence. But while the efforts of such a commission could provide an important complement to the work of a criminal court — whether national or international — they cannot serve as a substitute for criminal prosecution.
f. Greater Attention to Violations of Women’s Rights

One area in which both the development and enforcement of legal standards have been notably weak is the protection of women’s human rights. The gender-specific dimension of human rights violations has not yet received adequate treatment in the jurisprudence of treaty bodies, and violations of women’s human rights similarly have received inadequate attention in the enforcement efforts of the United Nations and regional organizations. In the past year, however, the UN has finally taken several measures to address this deficiency. In 1993, the UN General Assembly adopted a Declaration on the Elimination of Violence Against Women, and the Final Document of the World Conference on Human Rights in Vienna gave unprecedented recognition to women’s human rights.

One initiative that could significantly advance the UN’s work in this area is a proposal, expected to be adopted in the 1994 session of the Commission on Human Rights, to appoint a Special Rapporteur on Violence Against Women. While this rapporteur can play a vital role in advancing women’s human rights, his/her work should be a complement to, and not a substitute for, greater efforts to address gender-specific violations by other rapporteurs, such as the Rapporteur on Torture. In this regard and others, the necessary human and financial resources must be committed to assuring greater integration of women’s rights in the work of UN human rights bodies, as mandated by the World Conference. In particular, the UN should commit greater resources to assure that information and expert analyses relating to violations of women’s human rights are made available to the various treaty bodies.

Issues relating to states’ duty to assure effective legal protection should figure prominently in future developments of the jurisprudence of women’s human rights. Appropriate UN bodies should clearly enunciate states’ obligation to prevent and provide redress for gender-specific violations, such as rape and sexual assault, committed by private, as well as public, actors. At the level of implementation, the UN’s advi-
sory services programs should place greater emphasis on developing protections in national law against gender-specific violence.

The work of the recently established International Tribunal for crimes committed during the conflict in the former Yugoslavia will provide a critical opportunity to clarify and strengthen legal protections of women's human rights. Because the Tribunal is likely to consider cases involving allegations of mass rape, it will be presented with an important opportunity to clarify rape's status as a war crime and as a constituent element of genocide. Further, setting a model for national governments, the Tribunal should utilize procedures that address the special needs of rape survivors, including procedures that protect these witnesses' privacy needs, consistent with defendants' rights.

2. Civil Redress

   a. Current Law

   An assurance of legal redress for violations of protected rights is commonplace in international human rights instruments. For example, Article 8 of the Universal Declaration of Human Rights provides: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Pursuant to Article 2(3) of the International Covenant on Civil and Political Rights, each state party undertakes

   (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

   (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

   (c) To ensure that the competent authorities shall enforce such remedies when granted.
This duty is based on states parties' general duty under Article 2(1) to "ensure to all individuals within [their] territory[ies] and subject to [their] jurisdiction the rights recognized in the . . . Covenant," and "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the . . . Covenant." The Covenant also establishes "an enforceable right to compensation" for those who have been "the victim of unlawful arrest or detention," and provides that someone who has suffered punishment as a result of a wrongful conviction generally "shall be compensated according to law." The right to an effective remedy for violations of human rights is also explicitly recognized in regional human rights treaties.

The scope and content of the right to redress is not entirely clear, however. For example, states parties' general duty to provide an effective remedy for violations of the Covenant does not necessarily require that they assure compensation for every type of violation. Indeed, the travaux preparatoires make clear that the drafters sought to make Article 2 as broad as possible, so that remedies could be tailored to respond appropriately to specific violations. In some instances, injunctive relief might be sufficient; in others, judicially ordered compensation would be in order.

The Human Rights Committee has, however, consistently recognized a right to compensation for torture, disappearances, and extra-legal executions. Further, a UN expert, Theo van Boven, interprets the jurisprudence of the Committee to signify its view that states parties' general duty "to take effective measures to remedy violations" requires, in respect of serious violations of physical integrity, that states investigate the facts and bring the wrongdoers to justice. In this view, states parties' duty to punish atrocious crimes constitutes part of their obligation to provide an effective remedy to the victims.

The Inter-American Court's judgment on compensation in the Velasquez Rodriguez case presents a broad view of the reparation owed to victims of serious violations under the American Convention. The Court interpreted the right to
“[r]eparation of harm brought about by the violation of an international obligation” to consist of “full restitution, which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.”95 It also asserted that its earlier judgment on the merits, finding the Honduran government responsible for violations of the American Convention by virtue of the disappearance of certain individuals, “is in itself a type of reparation and moral satisfaction of significance and importance for the families of the victims.”96 But the Court rejected the petitioners’ request for punitive damages, concluding that the principle of punitive damages “is not applicable in international law at this time.”97

A more recent judgment on reparations in the Aloeboetoe et al. Case98 further elaborates the scope of states parties’ duty to provide compensation for violations of the American Convention. The Inter-American Commission of Human Rights brought a contentious case against the government of Suriname based on a 1987 attack by government soldiers against a group of “Bushnegroes.” As a result of the attack, seven men were killed after enduring physical and emotional abuse. After initially contesting its responsibility, the government of Suriname admitted responsibility. In September 1993, the Inter-American Court issued a judgment ordering the government to provide various forms of reparation to the victims.

The Court recognized that, in addition to compensation for the actual deaths of the victims, their successors were entitled to moral damages for the emotional suffering endured by the victims before they were killed.99 The Court reasoned:

The beatings received, the pain of knowing they were condemned to die for no reason whatsoever, the torture of having to dig their own graves are all part of the moral damages suffered by the victims. In addition, the person who did not have to die outright had to bear the pain of his wounds being infested by maggots and of seeing the bodies of his companions be devoured by vultures.100
In light of these facts, the Court held that "no evidence is required to arrive at [the] conclusion" that the victims suffered moral damages; in support of this conclusion, "the acknowledgement of responsibility by Suriname suffices." The Court also awarded moral damages to victims' parents who were not legal successors, reasoning that "it can be presumed that the parents have suffered morally as a result of the cruel death of their offspring, for it is essentially human for all persons to feel pain at the torment of their child." Further, the Court awarded compensation to the next of kin of two victims for expenses incurred in obtaining information about the victims, who were brothers; in searching for their bodies; and in taking up the case with government authorities.

Notably, the Court's judgment gave effect to the customary family law of the Saramaca tribe, to which the victims belonged, in determining the survivors entitled to compensation. Since the customary law of the Saramacas allows polygamy, and the government of Suriname recognizes the tribe's family law, the Court awarded compensation to each wife of the married victims. Still, the Court rejected the Commission's claim that, since Saramacas have special ties not only to their immediate relatives but also to the tribal community, the community itself suffered harm by virtue of the victims' murders and is therefore entitled to compensation.

Also noteworthy was the Court's order that the Suriname government provide for the education of the minor children of the victims until they reach a certain age. Because most of the children live in the village of Gujaba, where the school had been shut down, the Court concluded that:

[As part of the compensation due, Suriname is under the obligation to reopen the school at Gujaba and staff it with teaching and administrative personnel to enable it to function on a permanent basis as of 1994. In addition, the necessary steps shall be taken for the medical dispensary already in place there to be made operational and reopen that same year.]
Significantly, too, the Court ordered the government to deposit a specified sum of compensation in two trust funds for the beneficiaries, and even ordered the creation of a Foundation to serve as trustee. Finally, the Court determined that it would supervise compliance with its order on reparations before closing its file on the case.

Outside the treaty context, various efforts have been made in recent years to identify and strengthen victims' right to an effective remedy for violations. For example, in 1985 the UN General Assembly adopted a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which elaborated general standards relating to compensation of victims of crime and of abuse of government power. Victims of the latter are defined as “persons who, individually or collectively, have suffered harm . . . through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.” The Declaration asserts that both types of victims should, where appropriate, receive restitution and/or compensation, including material, medical, psychological, and social assistance and support.

In 1989 the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) of the UN Commission on Human Rights appointed one of its members, Theo van Boven, to study the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms. His final report, completed in July 1993, presents a comprehensive review of international law and practice in respect of reparation for victims of gross violations of human rights, and also describes several examples of national practice. The report recommends that the United Nations adopt a set of principles and guidelines “that give content to the right to reparation for victims of gross violations of human rights,” and sets forth proposed principles and guidelines.

The first proposed principle recognizes that, “under international law, the violation of any human right gives rise to a right of reparation for the victim.” It goes on to urge
that "[p]articular attention must be paid to gross violations of human rights and fundamental freedoms," which were the subject of the Special Rapporteur's inquiry. These violations include:

- at least ... genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.

While the first principle recognizes victims' right to reparation under international law, the second principle recognizes states' corresponding "duty to make reparation in case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms."115

Another noteworthy principle asserts that the purpose of reparation for human rights violations is to "reliev[e] the suffering of and afford justice to victims by removing or redressing ... the consequences of the wrongful acts and by preventing and deterring violations."116 Other principles elaborate the theme that reparation should include both conventional measures designed to repair harm to victims and measures of criminal justice:

4. Reparation should respond to the needs and wishes of the victims. It shall be proportionate to the gravity of the violations and the resulting harm and shall include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

5. Reparation for certain gross violations of human rights that amount to crimes under international law includes a duty to prosecute and punish perpetrators. Impunity is in conflict with this principle.117

Also significant are the Report's recognition that the right to reparation in international law includes a right to compensation for mental as well as physical harm,118 and its recommendation that states should "make adequate provision for groups of victims to bring collective claims and to obtain collective reparation" where appropriate.119
b. Adequacy of Law

While the right to civil remedies has, until recently, received less attention internationally than states’ duty to prosecute violators, in some respects international human rights machinery appears to be more effective — though scarcely adequate — in addressing the former. For example, both the European and Inter-American Courts of Human Rights have at times ordered governments to pay compensation to victims of violations, and not merely declared that states parties have a duty to afford redress.

Indeed, the only remedial power explicitly given the Court under the European Convention is to “afford just satisfaction to the injured party”; the Court can exercise this power if it finds that a contracting party has violated the Convention and its domestic law “allows only partial reparation to be made for the consequences” of the breach. Using this power, the Court has awarded financial compensation in well over one hundred cases. In the previously-noted case of X and Y v. Netherlands, the Court, finding the Dutch government partly responsible for the harm suffered by the applicant in consequence of the sexual assault upon her, ordered the government to pay compensation. In contrast, the Court has held that it cannot direct a respondent state to institute criminal proceedings.

The Inter-American Court enjoys relatively broad remedial powers pursuant to the American Convention. But while the Court apparently has the power to order states parties to institute criminal proceedings, it has, like the European Court, been more forthcoming in ordering financial compensation. The Court ordered compensatory damages in the Velasquez Rodriguez case, but stopped short of ordering the Honduran government to institute criminal proceedings — despite its earlier judgment on the merits, reaffirmed in the judgment on damages, finding that the Honduran government has a continuing duty to investigate the disappearance of Manfredo Velasquez Rodriguez and bring the wrongdoers to justice. While no prosecutions have been instituted pursuant to the Court’s judgment, the survivors of Manfredo
Velasquez Rodriguez have received a substantial portion of the damages awarded by the Court.

The action of the Commission on the Truth in El Salvador reflects a similar dichotomy in respect of punishment and compensation. While declining to recommend criminal prosecution, the Commission presented innovative recommendations for measures of compensation. Specifically, the Commission asserted that it "believes that justice ... demands that the victims of human rights violations by all sides in the war be publicly recognized and be given material compensation." Its report calls for a special fund to be established for this purpose, which would be given resources by the government, and urges foreign governments to allocate one percent of their aid to El Salvador to that fund.\textsuperscript{126}

Still another example of international bodies demonstrating greater resolve to secure civil compensation than to assure punishment is the United Nations' effort to establish legal redress for violations of international law committed by Iraq in connection with its occupation of Kuwait. On August 2, 1991, the Security Council established a Compensation Commission that would create a fund to pay compensation for claims against Iraq "for any direct loss, damage, including environmental damage and the depletion of natural resources, or any injury to foreign Governments' nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."\textsuperscript{127} The types of violations for which awards have been granted by the Commission "track the fundamental rights, and violations thereof, elaborated in the various human rights instruments ...."\textsuperscript{128} In contrast to its action in establishing a process for civil claims against Iraq, the United Nations never established a tribunal to punish war crimes committed during the Persian Gulf conflict, although the possibility of such prosecutions was widely debated in the aftermath of the war.

The work of the recently established International Tribunal for war crimes committed during the conflict in the former Yugoslavia will present an opportunity for further develop-
ment of international measures of reparation. Although the Tribunal’s jurisdiction is criminal, its statute authorizes the trial chamber of the Tribunal to “order the return of any property and proceeds acquired by criminal conduct ... to their rightful owners” following a defendant’s conviction.\textsuperscript{129}

On the national level, civil forms of redress have been available to varying degrees. Germany’s reparations to victims of Nazi atrocities remain the most extensive effort to compensate victims of human rights crimes. In more recent years, a few countries have acted responsibly and compassionately in developing measures of compensation for victims of human rights violations. In Chile, for example, the government of Patricio Aylwin undertook a number of creative measures to assure redress for those who had suffered serious human rights violations during the preceding period of government under the rule of General Augusto Pinochet. The Aylwin government established a National Commission for Truth and Reconciliation, whose principal task was to investigate “serious violations of human rights perpetrated in Chile between 11 September 1973 and 11 March 1990.” The decree establishing the Commission also directed it to recommend measures to redress the damage suffered by victims of these violations, as well as to suggest legal reforms and other measures to prevent future violations.

These two mandates were intimately connected, as the Commission repeatedly asserted. The Chief of Staff of the Commission explains:

[I]n situations of past human rights violations, an obligation arises for the state and for all of society to involve itself in [the] reparative process.

It became clear early to the members of the Commission that a full disclosure of the truth had enormous links with the beginning of a reparative process and in the way we came to understand it. The report frequently insists that a meaningful reparative process must express a recognition of the truth, both by the state and society. “The reparative process presupposes the courage to face the truth and to bring about justice . . . .”\textsuperscript{130}
The Commission’s insights sound a theme that has swept Latin America, and has been taken up by human rights advocates throughout the world: Establishing the truth about massive violations of the recent past is an essential obligation of governments, and a critically important measure of reparation for the victims.

The need for truth is especially important with respect to the fate of those who disappeared; so long as the fate of the principal victim remains unclarified, his or her loved ones continue to endure suffering that has itself been recognized as a form of torture or cruel, inhuman or degrading treatment. Thus, the Chilean Commission attempted not only to establish a comprehensive and authoritative “truth” about the violations committed during the years covered by its mandate, but also sought to identify the “individual truth” about the fate of those who had disappeared.

While seeing “the disclosure of the truth and the end of secrecy as reparation” in itself, the Commission also emphasized the importance of official action signaling the government’s “recognition of the dignity of the victims and the pain of their relatives” as a key component of reparation. With this in mind, the Commission recommended various measures that the government should undertake to restore the dignity of victims, such as creating national monuments.

The Commission also recommended a series of more tangible forms of compensation, demonstrating exemplary creativity and compassion in this aspect of its work as well. For example, the Commission recommended that the government exempt from mandatory conscription the sons of the victims of human rights violations chronicled in its report, to spare them further suffering. As for financial compensation, the Commission recommended that this include various social benefits, such as health care (including psychological care), and financial support for the education of children of persons killed or disappeared.

While some countries have adopted appropriate measures to rehabilitate victims of human rights violations, the
response of governments to gross violations has often been wholly inadequate. In some countries, little if any financial compensation has been made available to victims. Depleted national resources often render significant financial compensation for massive violations a formidable challenge. Further, impunity for violations of the recent past, a widespread pattern in Latin America, has often impeded victims' ability to obtain civil redress. In many countries, amnesties extinguishing the possibility of criminal liability have effectively destroyed the possibility of civil compensation as well, as they render virtually impossible a potential claimant's ability to establish facts critical to his or her claim. The operation of statutory and other limitations in national law have frequently deprived victims of gross violations of any remedy.

The advisory services program of the United Nations might be able to make a useful contribution in addressing at least some of these issues. In countries whose legal systems have not yet developed adequate forms of legal redress, the UN could work with the government to develop strengthened procedures that are appropriate to the national situation and legal framework, while responsive to victims' needs.

Further, in the area of women's rights there is a special need to develop stronger international machinery, as well as to articulate standards of redress appropriate to national systems. As to the former, the United Nations should adopt an optional protocol to the Convention on the Elimination of All Forms of Discrimination Against Women establishing an individual petition procedure. With respect to the latter, special attention should be given to measures of redress to protect women from domestic violence.

Finally, the UN should take effective steps to ensure that the Japanese government provides long-overdue compensation to the so-called "comfort women" who were forced into sexual slavery during World War II. Although the Japanese government finally acknowledged in August 1993 that the Imperial Army had forced thousands of women (principally
Korean) into sexual slavery during the war, it has not yet agreed to provide compensation.

C. Summary of Recommendations

The following recommendations, designed to strengthen both substantive international law prescribing legal consequences for gross violations of human rights and efforts to secure compliance with the law, are based upon the preceding analysis:

1. Every effort should be made to secure ratification of human rights instruments establishing a duty to assure that individuals who commit gross violations are brought to justice, and that the victims receive adequate and appropriate redress.

2. Appropriate international bodies should continue to insist upon the principle of accountability, and should make greater efforts to secure compliance with that principle. Following the example of the Inter-American Commission on Human Rights in cases challenging amnesty laws adopted in Uruguay and Argentina, and of the European Court in X and Y v. Netherlands, international bodies should award damages for states' failure to prosecute human rights crimes as a distinct breach of states' conventional obligation to ensure freedom from grave violations of physical integrity, as well as for the violation that gave rise to the duty to prosecute.

3. The invalidity of amnesty laws that establish impunity for atrocious crimes should be clearly articulated in future standard-setting instruments.

4. In no circumstances should international bodies adopt positions that seem to condone impunity. The United Nations has an especially strong responsibility to oppose impunity in countries where the UN has become deeply involved, such as Cambodia, El Salvador, and Haiti.

5. In determining the availability of doctrines of exception to excuse states from their general duty to bring to justice
those who are responsible for atrocious crimes, international bodies should avoid adopting rules that might reward state actors, such as military sectors, for thwarting justice. Instead, established doctrines of exception should be interpreted in a manner that encourages the civilian government to attempt to bring these sectors under the rule of law. In this area as others, doctrines of exception should be narrowly interpreted.

6. Appropriate UN bodies should clearly enunciate states' obligation to prevent, and provide redress for, violations of women's human rights, such as rape and sexual assault, committed by private, as well as public, actors. The UN Commission on Human Rights should appoint a Special Rapporteur on Violence Against Women. UN advisory services programs should focus on protections in national law against gender-specific violence.

7. The recent establishment of an International Tribunal for the former Yugoslavia provides a critical opportunity to clarify and strengthen legal protections of women's human rights under international law. The Tribunal should explicitly recognize that rape is a war crime, as well as a potential constituent element of crimes against humanity and genocide. Further, setting a model for national governments, the Tribunal should utilize procedures that show due regard for rape survivors' need for privacy, consistent with respect for defendants' due process rights.

8. In situations where national courts are unable or unwilling to assure accountability for gross violations of human rights, the international community should take responsibility for doing so. Where appropriate, the international community should establish international tribunals, starting with the International Tribunal for violations committed in the former Yugoslavia, to bring to justice those who are responsible for atrocious crimes. Such bodies may have more power and resources to assert the rule of law
than weakened or corrupt national courts, and they are more likely to be seen as impartial.

9. Building on its precedent in El Salvador, the United Nations should continue to take effective measures to assure that, in situations of massive human rights violations, an authoritative and comprehensive account of the violations is prepared and made public. In situations where the government itself fails to establish and acknowledge the truth, the international community should discharge that responsibility. The duty to establish and acknowledge the truth about gross violations is owed to individual victims as well as society, and is a crucial foundation for both national reconciliation and the rehabilitation of victims. But while international bodies modeled on the El Salvador Truth Commission can play an important role in establishing accountability, they should not be seen as a substitute for criminal prosecution.

10. To the extent that states’ failure to bring wrongdoers to account is due, in part, to the weakness of national courts, UN technical assistance programs may play a constructive role in strengthening the administration of justice. Such programs should never be used, however, as a substitute for international enforcement action when the latter is called for.

11. International organizations should consider creative means of establishing funds for victims of systematic violations of human rights in situations where the responsible national government is unable to meet its responsibilities in this regard. Such funds would be particularly useful and appropriate in situations where a new democracy replaces a government responsible for massive violations of basic rights, but lacks the resources to rehabilitate victims. Building on the approach recommended by the El Salvador Truth Commission, national governments should consider earmarking part of their bilateral aid to such countries for a compensation fund for victims.
NOTES


3 The Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights, Dec. 16, 1966, GA Res. 2200, 21 UN GAOR Supp. No. 16 at 52, UN Doc. A/6316 (1966); 999 UNTS 171, 6 ILM 368 (1967), has repeatedly found that states parties must bring to justice those who are responsible for disappearances, but has nonetheless rejected the claim that the Covenant establishes an entitlement on the part of victims "to see another person criminally prosecuted." H.C.M.A. v. the Netherlands, Comm. No. 213/1986, 44 UN GAOR Supp. No. 40, UN Doc. A/44/40 (1989). Nevertheless, the Committee has repeatedly asserted that, when individuals' rights against torture and extra-legal execution have been violated, the responsible state party must investigate the violation and bring the wrongdoer to justice. See cases cited infra note 9. A recent UN study interprets these cases to signify the Committee's view that a duty to investigate and bring to justice those responsible for gross violations of human rights is one form of remedy owed to victims of these abuses. Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8, at 26, para. 56 [hereinafter Van Boven Report].

4 Compensation schemes for victims of massive abuses can, however, be so burdensome and degrading that they have the opposite effect. See Yael Danieli, "Preliminary Reflections from a Psychological Perspective," in SIM Report, supra note 1, at 202-205.


6 The statute for an International Tribunal for crimes committed since 1991 in the territory of the former Yugoslavia, adopted by the UN Security Council on May 25, 1993 (SC Res. 827), provides for jurisdiction over genocide, and uses the definition set forth in the Genocide
Convention. See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, May 3, 1993, Annex, art. 4 [hereinafter Statute of IT]. The report of the Secretary-General proposing the statute seems to suggest, however, that this jurisdiction is based upon customary law as embodied in the Convention rather than directly on the Convention. See id. at 12, para. 45.

7 GA Res. 217, UN Doc. A/810, at 71 (1948).
8 See note 2, supra.
10 Nov. 4, 1950, 213 UNTS 221, Europ. T.S. No. 5.
12 Id., para. 24.
13 The Court wrote:

This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.

Id., para. 27.


17 The principal findings of the Inter-American Court in the Velasquez Rodriguez Case were reaffirmed in the Godinez Cruz Case, Inter-Am. Ct. H.R. (ser. C) No. 5 (1989).


19 Id., para. 184.

20 General Comment No. 20 (44) (article 7), UN Doc CCPR/C21/Rev.1/Add.3, para. 15 (April 1992). The Committee periodically adopts “General Comments” elaborating the nature of states parties’ obligations under particular articles of the Covenant. These “General Comments” have become a major vehicle for developing the Committee’s jurisprudence under the Covenant.

21 Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 (Argentina), Report No. 24/92; Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375 (Uruguay), Report No. 29/92.


26 See Filartiga v. Pena-Irala, 630 F.2d 876, 882-884 (2d Cir. 1980).


28 Id., comment b.

29 See, e.g., UN Doc. A/38/385, para. 341 (1983) (report of Special Rapporteur on Chile, concluding that impunity enjoyed by Chilean security organs “is the cause, and an undoubted encouragement in the commission, of multiple violations of fundamental rights”); UN Doc. E/CN.4/1987/21, para. 60 (report of Special Rapporteur on El Salvador, observing that failure of Salvadoran courts to render convic-
tions that bear reasonable relationship to number of violations of right to life creates a "climate of impunity"); UN Doc. E/CN.4/1989/18, para. 312 (report of Working Group on Disappearances, asserting that impunity in the face of repeated instances of disappearances "creates conditions conducive to the persistence of such practices").


31 See id.


34 Further, successive versions of the Draft Inter-American Convention on the Forced Disappearance of Persons, prepared by the Inter-American Commission, have been significantly weakened. While earlier versions condemned impunity and followed the Nuremberg precedent rejecting a "superior orders" defense, a more recent draft explicitly authorizes this defense.

35 The Commission's main tasks were to 1) clarify the worst human rights abuses of the war by all sides; 2) study with special care the impunity with which the Salvadoran military and security forces committed abuses; 3) make legal, political, or administrative recommendations to prevent a repeat of past abuses; and 4) stimulate national reconciliation.


37 In July 1991, a delegation representing the New York-based International League for Human Rights visited Santiago, where the team pressed for progress in the Letelier-Moffitt case on behalf of the families of the victims. Their visit received considerable publicity in the Chilean press and, according to one account, the visit itself "changed the political climate" in Chile with respect to the Letelier-Moffitt case. One week after their visit, Chile’s Supreme Court designated one of its own members to investigate the case, and he later indicted the two principal suspects. Progress in the case is, to be sure, the result of a confluence of various sources of pressure, including concerted efforts by influential senators such as Edward Kennedy (D.-Mass.).
38 See Diane F. Orentlicher, "Chile Awakening From Pinochet Night-

39 See Section B.1.a., and notes 27 and 28 supra.

40 That an individual acted pursuant to "superior orders" was explicitly
rejected as an absolute defense to crimes against humanity and other
Nazi violations of international law prosecuted at Nuremberg, and its
rejection as a valid defense was subsequently ratified by the United
Nations. Since then, this principle has been incorporated into numer-
ous human rights instruments and into the municipal law of virtually
all major legal systems.

41 For example, in the Velasquez Rodriguez Case the Inter-American Court
repeatedly asserts that a state party to the American Convention must
investigate and punish "any" and "every" violation of the rights pro-
tected by the convention. See Velasquez Rodriguez Case, Inter-Am. Ct.
pean Court found the Dutch government responsible for violating the
European Convention because a gap in Dutch law prevented the
applicant from instituting criminal proceedings against her attacker,
even though Dutch law generally provided for such a procedure and,
more generally, for prosecution of sexual offenses.

42 See L. Henkin, R. Pugh, O. Schacter & H. Smit, International Law 266
(2d ed. 1987).

43 In the Velasquez Rodriguez Case the Inter-American Court suggested
that the American Convention is not necessarily violated by a state
party's failure to punish a violation: "In certain circumstances, it may
be difficult to investigate acts that violate an individual's rights. The
duty to investigate, like the duty to prevent, is not breached merely
because the investigation does not produce a satisfactory result. Nev-
evertheless, it must be undertaken in a serious manner and not as a
mere formality preordained to be ineffective." Velasquez Rodriguez
also id., para. 181 (alluding to "the hypothetical case that those indi-
vidually responsible for crimes . . . cannot be legally punished under
certain circumstances"). The Court presumably intended to acknowl-
edge that legitimate factors such as insufficiency of evidence may jus-
tify a failure to prosecute, provided an investigation was undertaken
in good faith.

44 It has been observed that a key reason why some continental Euro-
pean countries have been able to maintain a system of mandatory
prosecution for serious offenses is that their criminal justice systems
are capable of processing such cases. See Langbein, "Controlling Pros-
ecutorial Discretion in Germany,” 41 U. Chi. L. Rev. 439, 466-67 (1974); Damaska, “The Reality of Prosecutorial Discretion: Comments on a German Monograph,” 29 Am. J. Comp. L. 119, 122-124 (1981). In contrast, prosecutorial discretion is thought to have developed in the United States in large part because the combined impact of high crime rates and extensive procedural rights makes it impossible for the U.S. court system to process every serious crime that is potentially prosecutable. See Langbein, supra, at 445-46; Langbein, “Understanding the Short History of Plea Bargaining,” 13 Law and Soc’y 261, 265, 267 (Winter 1979). As these analyses suggest, a prerequisite of any law requiring prosecution of particular types of offenses is that the national judiciary must be capable of handling the burden imposed by the law.

45 A number of analyses of the prosecutions in Argentina have stressed the fact that, while there was strong public support for prosecutions at the outset of President Alfonsin’s term, this waned as time elapsed and public attention turned toward other, increasingly urgent issues, such as the deteriorating economy. See, e.g., Malamud-Goti, “Transitional Governments in the Breach: Why Punish State Criminals?” 12 Hum. Rts. Q. 1, 4 (1990). Telford Taylor, who led the United States prosecutions of Nazi war criminals in Nuremberg following the joint Allied prosecution of Major War Criminals, reached strikingly similar conclusions about the U.S. prosecutions. Writing of the effect of delays that prevented the beginning of those prosecutions by almost one year, he wrote:

“In retrospect, it can be seen that the loss of this year was costly. The complexion of international events changed with surprising rapidity, and German affairs rapidly . . . sank into relative obscurity in the press and, one must assume, in the public mind . . . . If the trials . . . had started and been finished a year earlier, it might well have been possible to bring their lessons home more effectively.”


47 Cf. [1978] 2 Y.B. Int’l L. Comm’n (pt. 1), at 75, para. 33, UN Doc. A/CN.4/315 (1977) (quoting Schwarzenberger’s view that treaty obligations “are likely to be interpreted in a manner which circumscribes them so as to exclude situations of both absolute and relative impossibility from the very scope of such duties”); id. at 133 (quoting assertion by Prof. Alfred von Verdross of principle that “international duties must not be taken so far as to result in self-destruction”).

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This is implicit in the fact that the duty to prosecute is consistently identified with, and based upon, states parties' obligation to "ensure" or "secure" the full enjoyment of rights set forth in the conventions. And, as the European Court explicitly stated in its decision in X and Y v. Netherlands, 91 Eur. Ct. H.R. (ser. A) (1985) (judgment), only criminal punishment is deemed an adequate deterrent to violations of rights that are of crucial importance. See note 13, supra.

Covenant, supra note 3, art. 4(1); American Convention, supra note 14, art. 27(1); European Convention, supra note 10, art. 15(1).

Covenant, supra note 3, art. 4(2); American Convention, supra note 14, art. 27(2); European Convention, supra note 10, art. 15(2). None of these conventions proscribes disappearances as such. Accordingly, the right against forced disappearances is not explicitly made non-derogable.


See Orentlicher, "Settling Accounts," supra note 1, at 2582.

Although the principal effect of a rule's status as jus cogens is that it "cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect," Ian Brownlie, Principles of Public International Law 513 (4th ed. 1990), a peremptory norm's nonderogability in this sense also connotes its nonderogability for purposes of applying doctrines of exception, such as state of necessity. See Theodor Meron, Human Rights in Internal Strife: Their International Protection 60 (1987).

Although the other comprehensive conventions do not explicitly provide that judicial guarantees essential to the protection of nonderogable rights are nonderogable, it is implicit in the establishment of certain rights as nonderogable that states parties must do what is necessary to ensure the enjoyment of those rights.

See Section B.1.a, supra.


While the Convention Against Torture requires states parties to prosecute acts of torture, its nonderogation provision does not explicitly address the duty to prosecute, providing only that “[n]o exceptional circumstances whatsoever . . . may be invoked as a justification of torture.” (Article 2(2).) Article 5 of the Inter-American Convention to Prevent and Punish Torture, supra note 23, establishes a similar rule.

Although circumstances in which the state of necessity doctrine is applicable are similar to those in which derogation is permitted under the comprehensive human rights treaties, the parameters of the conventional rules of derogation and the customary “state of necessity” doctrine may not be identical. See Theodor Meron, “On a Hierarchy of International Human Rights,” 80 Am. J. Int’l L. 1, 20 (1986).


Id., Draft article 33(3)(a). Although the ILC does not elaborate what it means by “arises out of,” a commonsense interpretation is “is reasonably necessary to secure the observance of.”

As noted, the state of necessity doctrine, as formulated by the ILC, applies only to situations in which the otherwise wrongful conduct was the only means available of “safeguarding an essential State interest threatened by a grave and imminent peril.” Article 4(1) of the Covenant similarly allows derogation “[i]n time of public emergency which threatens the life of the nation . . . ,” and the derogations clauses of the European and American Conventions use similar language. Bodies responsible for supervising states parties’ compliance with these conventions have made clear that derogation is not justified if the threat is remote or speculative, even if the threat has some basis in fact. See, e.g., The Greek Case, [1969] Y.B. Eur. Conv. Hum. Rts. (Eur. Comm’n Hum. Rts.), paras. 152-165.

Covenant, supra note 3, art. 4(1); European Convention, supra note 10, art. 15(1). The corresponding language in article 27(1) of the American Convention, supra note 14, is: “to the extent and for the period of time strictly required by the exigencies of the situation . . . .” See Comm. No. R.3/34, Jorge Landinelli Silva v. Uruguay, 36 UN GAOR 469
Supp. No. 40, para. 8.4 (1981) (Human Rights Committee asserts that, even if situation of emergency existed in Uruguay, measures taken by government exceeded those that could be justified as necessary to restore peace and order).


65 The ILC's draft articles on state responsibility frame the *force majeure* rule in the following terms: "The international wrongfulness of an act of state not in conformity with what is required of it by an international obligation is precluded if it is absolutely impossible for the author of the conduct attributable to the State to act otherwise." Draft Article 31, [1979] 2 Y.B. Int'l L. Comm'n (pt. 1) at 66, UN Doc. A/CN.4/318/Add.1-4 (1979). The *force majeure* doctrine has sometimes been applied to situations of insurrection causing injury to aliens, see I. Brownlie, *supra* note 53, at 466; [1978] 2 Y.B. Int'l L. Comm'n (pt. 1) at 106-124, UN Doc. A/CN.4/315 (1977), as well as to acts of nature rendering compliance with international duties impossible. The appropriateness of the former application has been questioned on the basis that general rules for establishing state responsibility for injury to aliens caused by non-state actors, such as those requiring states to exercise due diligence, determine the responsibility of the state without having to resort to such doctrines as *force majeure*. See C. Eagleton, *The Responsibility of States in International Law* 125-126 (1928).


67 [1978] 2 Y.B. Int'l L. Comm'n (pt. 1), UN Doc. A/CN.4/315, at 69, para. 15 (1977). Indeed, publicists have distinguished the *force majeure* doctrine from the state of necessity doctrine on the basis that the former involves conduct that is "involuntary," having been brought about by an external and irresistible force that operates beyond the control of the state, while the latter involves a deliberate course of state action chosen to avert imminent harm to the life of the state. See id. at 72-74, paras. 25-30; [1980] 2 Y.B. Int'l L. Comm'n (pt. 1), UN Doc. A/CN.4/318/Add.5-7 (1980), at 14, paras. 1-2.

68 This is true even if the state organ exceeded its competence or contravened its instructions pursuant to domestic law. [1975] 2 Y.B. Int'l L. Comm'n 61, 66, UN Doc. A/CN.4/SER.A/1975/Add.1 (1976).

mining whether conduct “contributing to” the occurrence of a situation of material impossibility restores full responsibility when *force majeure* doctrine would otherwise preclude the wrongfulness of a state’s conduct).

70 The *Greek Case*, [1969] *Y.B. Eur. Conv. Hum. Rts.* (Eur. Comm’n Hum. Rts.) at 27, para. 58. Although the Commission did not explicitly rule on the applicant governments’ argument, it rejected the Greek government’s claim that the Commission could not pass judgment on its conduct since it was a revolutionary government. *Id.* at 22-23. The Commission found, however, that the political circumstances prevailing at the time of the Greek government’s derogation did not pose a sufficiently imminent and grave threat to justify the derogations. See *id.* at 71-76, paras. 152-65; 100, paras. 206-07.

71 Cf. C. Eagleton, *supra* note 65, at 26 (“When a state has been recognized by the community of nations, it is presumed to be capable of exercising the rights and duties of membership in that community.”). Moreover the reasons why international law holds states to a high standard of accountability for behavior of their armed forces may not be fully pertinent in the circumstances considered here. It is unclear whether standards of strict accountability designed, inter alia, to protect citizens of one state from dangerous activity of organs of another state are equally appropriate when applied to protect the rights of citizens vis-à-vis their own government.

72 The availability of the right of derogation has invariably been subject to substantial abuse by governments. See generally N. Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, UN Doc. E/CN.4/Sub.2/1982/15 (1982).

73 E.g., J.N. Henriquez (Netherlands/Venezuela), Mixed Claims Comm’n (1903), reprinted in 10 R.I.A.A. 714-17 (1903); *In re Gill (Great Britain v. Mexico)*), 6 Ann. Dig. 203 (British-Mexican Claims Tribunal 1931-32), reprinted in 5 R.I.A.A. 157, 159 (1931).

74 See C. Eagleton, *supra* note 65, at 146.

75 *Id.*

76 According to Eagleton, “the grant of amnesty to insurgents ... has sometimes been regarded [by arbitral tribunals] as revealing the lack of a sufficient desire on the part of the government to repress the rebellion.” *Id.* at 151. See also I. Brownlie, *supra* note 53, at 454. In the *Gill* case, the British-Mexican Claims Tribunal applied the rule that, when conduct of revolutionaries causing injury to aliens was brought to a government’s attention, or was so notorious that the government
could presume to have known of it, and it was not shown that the
government "took any steps to suppress the acts or to punish those
responsible," the Commission could assume "that strong prima facie
evidence exists of a fault on the part of the authorities." *In re Gill,*
*supra,* at 158. Still, others have suggested that states can be presumed
to have exercised due diligence to suppress an insurrection against
themselves, though such a presumption can be overcome by evidence
to the contrary. *See* I. Brownlie, *supra.*

77 *See supra,* p. 430.

78 *See supra,* pp. 428-29.

79 "See *Getting Away With Murder*" (editorial), *New York Times,* March
24, 1993.

80 Michael Tarr, "UN Envoy on 5th Try for Haitian Accord; Caputo Said
to Have Aristide's Pledge on Amnesty if General Quits," *Wash. Post,*

81 Howard French, "Haiti Army Spurns Offer of Amnesty," *New York
Times,* Apr. 16, 1993.

82 *See Report of the Secretary-General, The Situation of Democracy and
5(6).


84 The Tribunal, which has already held organizational meetings in The
Hague, was established pursuant to UN Security Council Resolutions
808 (Feb. 22, 1993) and 827 (May 25, 1993).

85 *See* Tina Rosenberg, "Terror, Tribunals and the Truth: El Salvador, Not
the Balkans, Is the First Place to Seek Justice," *Wash. Post,* Mar. 14,
1993.

86 GA Res. 48/104 (Dec. 20, 1993).

87 Although the Tribunal's statute does not explicitly designate rape as a
war crime, it lists rape as a possible constituent element of crimes
against humanity. *See Report of the Secretary-General Pursuant to Para-
graph 2 of Security Council Resolution 808* (1993), Annex, arts. 2 and 5,

88 For proposals to this effect, see *Int'l Hum. Rts. L. Group, Justice for All:
Accountability for Rape and Gender-Based Violence in the Former
Yugoslavia* (June 1993).

89 Covenant, *supra* note 3, art. 9(5).
90 Id., art. 14(6).


94 Van Boven Report, supra note 3, at 26, para. 56.


96 Id., para. 36.

97 Id., para. 38.


99 Id., paras. 50-52.

100 Id., para. 51.

101 Id., para. 52.

102 Id., para. 76.

103 Id., para. 79.

104 See id., paras. 62-63; 98.

105 Id., paras. 83-84.
106 Id., para. 96.
108 Id., para. 116(6).
110 Id., para. 18.
111 Id., paras. 8 and 19.
114 Id. at 56, para. 137(1).
115 Id. at 56, para. 137(2).
116 Id. at 56, para. 137(3).
117 Id. at 56, para. 137(4)-(5).
118 See, e.g., id. at 14, para. 33(3); 26, para. 57; 37-38, paras. 90-91.
119 Id. at 56, para. 137(7).
120 European Convention, supra note 10, art. 50.
121 See Van Boven Report, supra note 3, at 34, para. 81. In addition, the European Commission of Human Rights has also secured financial compensation for victims through a friendly settlement. See id. at 36, para. 86.
122 See supra note 11, para. 40.
124 Article 63(1) of the American Convention provides:
"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."

125 See Velasquez Compensation Judgment, supra note 95, paras. 34-35.


128 Larisa Gabriel, "Victims of Gross Violations of Human Rights and Fundamental freedoms Arising from the Illegal Invasion and Occupation of Kuwait by Iraq," in SIM Report, supra note 2, at 34.

129 Statute of IT, supra note 6, art. 24. In addition to these situation-specific efforts to compensate victims of gross violations of human rights, the United Nations has established a Voluntary Fund for Victims of Torture and a Voluntary Trust Fund on Contemporary Forms of Slavery. See Van Boven Report, supra note 3, at 53, para. 133.


132 See Correa, supra note 130, at 1478.

133 Id.

134 Cecilia Medina Quiroga, "The Experience of Chile," in SIM Report, supra note 2, at 108 and n. 12.

