TORTURE AND THE QUEST FOR JUSTICE: A SPECIAL ISSUE OF [THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS] IN HONOUR OF THE 20TH ANNIVERSARY OF THE REDRESS TRUST

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WHAT REPARATION DOES A TORTURE SURVIVOR OBTAIN FROM INTERNATIONAL LITIGATION? CRITICAL REFLECTIONS ON PRACTICE AT THE STRASBOURG COURT.

Abstract

Although the Strasbourg Court is primarily a mechanism for the protection of individual human rights, many of the leading cases on violation of Article 3 have a collective or a structural dimension. This is of great importance for the CAT definition of torture, which is that torture must have a purpose. Thus, the author's experience of many Kurdish and Chechen complaints against Turkey and Russia respectively is that they relate to the consequences of self-determination struggles and repressive state responses. Or, as in many of the Russian cases concerning Article 3, they relate to the structural problems of the Russian penitentiary system, in which the officers, mostly ex-military, see the prisoners as the enemy. A successful claimant at Strasbourg in most cases obtains a declaration that a violation has been committed by the government, and a sum of money in "just satisfaction". Compared with the practice of the Inter-American Court, this is minimalist. The enforcement procedure through the Committee of Ministers, for general measures, is opaque and slow. The question remains: why do it?

Introduction

In this paper I reflect critically on more than 20 years' experience in representing applicants at the European Court of Human Rights (ECtHR) against Turkey (from 1992 to 2002) and Russia (from 2000 until the present). The context of many of those cases was armed conflict, and acts perpetrated by the state, in what Menno Kamminga described as "gross and systematic violations".[2] My focus is, for reasons which will become apparent, on torture, although many of the cases concerned inhuman and degrading treatment. In particular, Russia has been condemned for violations of Article 3 in many cases in respect of abusive conditions in pre-trial detention, in the Russian SIZOs, investigative isolators. But the torture survivor deserves special remedies by way of reparation. First I recall the essential ingredients of torture (as distinguished from inhuman and degrading treatment) refined in a succession of judgments by the ECtHR. However, these do

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[2] Menno Kamminga 'Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?' 12 n.2 *Netherlands Quarterly of Human Rights* (1994): 153-164

not capture several vitally important dimensions of torture, which I explore with the help of scholars from other disciplines – social psychology, theoretical criminology and psychotherapy - in the second section. Third, I explore the consequences of inclusion of these dimensions for reparation. Fourth, I explain the ECtHR's principles on the award of "just satisfaction", with reference to the ECHR itself, and to the relevant Practice Direction issued by the ECtHR. Fifth, I examine and analyse the practice of the ECtHR in relation to "just satisfaction" in torture cases, and its extraordinarily minimalist approach. Sixth, I ask whether the ECtHR could do more, and follow a series of cases in which the applicants have endeavoured, without success, to persuade the Strasbourg judges to go further than the usual declaration of violation and award of monetary compensation, and require the offending state to carry out an effective investigation. These are egregious cases in which the state has utterly failed to investigate, and, moreover, has deliberately obstructed the ECtHR by refusing to produce the investigation files. The ECtHR's response is negative and unimpressive. Seventh, I present the substantial recommendations of a number of Russian NGOs on the question of enforcement of judgments in torture cases. Finally, I turn to the very different practice of the Inter-American Court of Human Rights (IACtHR), with its much more serious approach to reparation, albeit in the context of a much lighter case-load.

Torture

The starting point, as for all the articles in this collection, is the absolute nature of the prohibition on torture.[3] The ECtHR has frequently reminded itself that "Article 3 enshrines one of the most fundamental values of democratic society." In the inter-state case of *Ireland v The United Kingdom*[4] the Plenary Court considered the wording of Article 3 of the ECHR "No one shall be subjected to torture or to inhuman or degrading treatment or punishment", and the distinction apparently drawn between torture on the one hand and inhuman and degrading treatment on the other:

> In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted.
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> The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 (art. 3) of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms

[3] The relevant principles and supporting case-law, to 2002, are admirable summarised in Aisling Reidy *The prohibition of torture. A guide to the implementation of Article 3of the European Convention on Human Rights* Council of Europe Human rights handbooks, No. 6, (Strasbourg, 2002) at http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC-42EEBEAD50C3/0/DG2ENHRHAND062003.pdf (accessed on 31 December 2011)

[4] Application no. 5310/71, judgment of 18 January 1978

> attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.
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> Moreover, this seems to be the thinking lying behind Article 1 in fine of Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975, which declares: "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment".[5]

The first case in which the ECtHR made a finding of torture was *Aksoy v Turkey*[6] . It found as follows:

> The Court recalls that the Commission found, inter alia, that the applicant was subjected to "Palestinian hanging", in other words, that he was stripped naked, with his arms tied together behind his back, and suspended by his arms…
>
> In the view of the Court this treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time. The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture.

In the first case in which a Western European state was found to have violated the prohibition on torture, *Selmouni v France*[7], the ECtHR was able to supplement this analysis by reference to the definition contained in Article 1 of the 1984 United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[8], as follows:

> 1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. …"

It is now clear that torture has three essential ingredients:

- the infliction of severe mental or physical pain or suffering
- the intentional or deliberate infliction of the pain
- the pursuit of a specific purpose, such as gaining information, punishment or intimidation

And this infliction must be carried out by or on behalf of the state.

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[5] Ibid, para 167
[6] Application no. 100/1995/606/694, judgment of 26 November 1996
[7] Application no. 25803/94, judgment of 28 July 1999
[8] Into force on 26 June 1987

However, the specificity of torture is not simply a matter of legal definition, but is to be found at deeper levels of social and psychological reality.

The social and political context of torture

Torture requires a torturer. The criminologist Ronald D. Crelinsten and his colleagues have carried out a probing empirical study of the "world of the torturer".[9] In a later study, Crelinsten considered the "constructed reality" in which torture is carried out.[10] This is the special role of the state in preparing the necessary conditions for the infliction of torture:

> Torture training usually includes techniques designed to supplant normal moral restraints about harming (innocent) others and to replace them with cognitive and ideological constructs that justify torture and victimization and neutralize any factors that might lead to pangs of conscience or disobedience to authority.[11]

The training of torturers takes place in an alternative reality affecting all the participants:

> When discussing torture's causes, consequences and cures, it is therefore useful to keep in mind that a torture regime engages continually in the creation and maintenance of an alternate reality in which—at least with regard to its victims—conventional morality is largely absent. The degree to which any regime succeeds in establishing such an alternate reality and the extent to which such an alternative definition of the situation permeates other social institutions and sectors of society determine how wide is its influence and how great its impact on the variety of actors and bystanders within that society. It is also important to realize that this new reality affects everyone living within its sphere of influence: perpetrator, victim and bystander alike.[12]

There are, of course, varieties of perpetrators within the general context of the state and its policies. In 1973 the social psychologist Herbert C. Kelman ~~In 1973[13], in~~wrote a seminal paper on "sanctioned massacres",~~,~~[14]~~,~~ and in 1993 ~~the social psychologist Herbert C. Kelman~~ analysed the social context of torture[15]~~. , and i~~In a later text on the policy context of international crimes[16] he explained his conclusion, developed in his work from 1973 onwards:

> The essential phenomenon of torture, however, is that it is not an ordinary crime, but a crime of obedience: a crime that takes place, not in opposition to the authorities, but under

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[9] Ronald D. Crelinsten, 'In Their Own Words: The World of the Torturer' in Ronald D. Crelinsten and Alex P. Schmid (eds) *The Politics of Pain: Torturers and Their Masters* Boulder: Westview Press (1994): 35-61

[10] Ronald D. Crelinsten, 'The World of Torture: A Constructed Reality' 7 no.3 *Theoretical Criminology* (2003): 293-318

[11] Ibid, p.295

[12] Ibid, p.296

[13] Herbert C. Kelman, 'Violence without Moral Restraint: Reflections on the Dehumanisation of Victims and Victimizers' 29 no.4 *Journal of Social Issues* (1973): 25-61

[14] Herbert C. Kelman, 'Violence without Moral Restraint: Reflections on the Dehumanisation of Victims and Victimizers' 29 no.4 *Journal of Social Issues* (1973): 25-61

[15] Herbert C. Kelman, 'The Social Context of Torture: Policy Process and Authority Structure' in R.D. Crelinsten & A.P. Schmid (eds.), *The politics of pain: Torturers and their masters* Leiden, The Netherlands: COMT, University of Leiden (1993) pp.21–38

[16] Herbert C. Kelman, 'The Policy Context of Torture: a Social-Psychological Analysis', *International Review of the Red Cross*, 857, (2005): 123-134.

> explicit instructions from the authorities to engage in acts of torture, or in an environment in which such acts are implicitly sponsored, expected or at least tolerated by the authorities… a crime of obedience as "an act performed in response to orders from authority that is considered illegal or immoral by the larger community."[17]

Kelman took the example of the notorious activities which took place at the US camp at Abu Ghraib in Iraq, as showing that democratic states as well as authoritarian regimes can resort to torture once the requisite "set of social conditions" is in place. As the notorious photographs taken by perpetrators at Abu Ghraib showed, some the US military personnel were positively enjoying their sadistic and abusive activities, and were acting on their own initiative. However, the overall context was that they were under pressure to extract intelligence information from detainees, in respect of whom there was no doubt that (like the detainees at Guantanamo Bay) they were in fact guilty of terrorism, or at least armed resistance to US power. Kelman pointeds out that whether or not some of the specific abuses were ordered by superior officers, there was overwhelming evidence that the behaviour of the perpetrators was "expected, condoned, and encouraged by higher officers".[18] In the enquiries that have followed, officers at every level in the hierarchy have been accused, at the least, of exercising insufficient oversight of the conditions of detention and procedures of interrogation at Abu Ghraib, and other military prisons for suspected terrorists.[19]

Torture, in other words, is justified by reference to the need to protect the State against threats to its security. In this way, the State authorises torture and deliberately trains a profession of torturers within the armed forces and security services. Under these conditions, the use of torture is made routine, and its perpetrators are anaesthetised against the moral outrage they might otherwise feel. On Kelman's analysis, "… the designation of the targets of torture as enemies of the State who are excluded from the State's protection helps to dehumanize the victims."[20] [footnote?] In his 1973 paper he had already identified three social processes which contribute to "weakening the moral restraints against engaging in torture"; authorisation, routinisation, and dehumanisation.[21] These analytical tools serve him in his latest paper for the International Committee of the Red Cross. "These three processes are mediated to a significant degree by the torturers' relationship to the State."[22]

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[17] Ibid p.125

[18] Ibid p.124

[19] Ibid p.124

[20] Ibid p.131

[21] Herbert C. Kelman, 'Violence without Moral Restraint: Reflections on the Dehumanisation of Victims and Victimizers' 29 no.4 *Journal of Social Issues* (1973): 25-61, p.52

[22] Ibid, p.131

The "severe pain and suffering" which distinguish torture from other forms of ill-treatment have another existential dimension, identified by the psychotherapist David Becker and his colleagues in their work on the aftermath of the overthrow of Salvador Allende in Chile[23]:

> The torturers and their bosses also aim to destroy the individual as an opponent of the regime by undermining the victim's will, affective ties, loyalties, beliefs, and physical and psychological integrity. The torturer, as a representative of the repressive system, explicitly or implicitly imposes on his victims an extreme dilemma: to let themselves be mistreated and exposed to intolerable pain with unforeseeable physical and psychological consequences, even death-or to "betray," to transform themselves into executioners of their own political beliefs and companions, delivering the latter to torture and perhaps death. The second alternative may save the victim from physical suffering, but it destroys fundamental parts of the person's self, identity, and collective ties that give meaning to existence.[24]

This extreme dilemma, whichever way it is resolved, is a prime reason why the torture survivor, although still alive, is not only physically damaged but is psychically maimed for life. For Becker, this is "… a paradoxical situation in which, on one hand, human beings are deprived of everything that defines them as human, and on the other hand, they are given the power to make decisions that cannot be made without destroying essential aspects of their identities."[25]

It will already be apparent that these fundamental considerations play no part in the rather minimal definition of torture provided by the ECtHR. In the next section I show an adequate definition and explanation of torture in its social and political context leads to inevitable consequences for an adequate notion of reparation, very different from the ECtHR's rather thin and imprecise concept of "just satisfaction".

Reparation for torture

Becker and his colleagues, writing from their experience of therapy in Chile, emphasise that the great pain and suffering of torture survivors is exacerbated because it has not been caused by natural forces, such as an earthquake or tsunami, but by the deliberate action of another human being who intended to hurt and even to destroy her victim. Thus, the experience of torture is much more overwhelming than a natural catastrophe, and, from the individual perspective, contributes to weakening the victim's ability to cope.[26] And, by definition, the torturer is acting as agent for or on behalf of the state, and the torture is perpetrated precisely because the state itself fears an

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[23] David Becker, Elizabeth Lira, María Isabel Castillo, Elena Gómez and Juana Kovalskys, 'Therapy with Victims of Political Repression in Chile: The Challenge of Social Reparation' *Journal of Social Issues* 46, no. 3, (1990): 133–149
[24] Ibid, p.138
[25] Ibid, p.139
[26] David Becker, Elizabeth Lira, María Isabel Castillo, Elena Gómez and Juana Kovalskys, 'Therapy with Victims of Political Repression in Chile: The Challenge of Social Reparation' *Journal of Social Issues* 46, no. 3, (1990): 133–149, at p.139

existential threat. They therefore understand that therapy for the survivor of torture, must acknowledge and "… become engaged in the sociohistorical and political context." [27]

They explain "reparation" as follows.

> The term reparation has a double meaning. First, it is a psychoanalytic concept, developed by Melanie Klein (in 1937), that is used to explain the intrapsychic process of repair. But it is also a legal term used, for example, in connection with economic compensation after a war. This double meaning is significant because repair in the psychoanalytic sense must occur at both the individual and social levels, but it can only take place fully if it is linked to reparation in the legal sense - that is, with truth and justice for the victim and compensation where it is helpful.

In their view, social reparation must be at the same time a sociopolitical and a psychological process. It must aim to establish the truth of political repression, and must demand "justice for the victims of systematic human rights violations, both through the judicial process and through the availability of health and mental health services."[28]

Crelinsten also emphasises that another "important aspect of deconstructing the torture reality from the victims' perspective is to punish the perpetrator". He adds that "… while this may embody elements of revenge—a natural emotion, given the enormity of the wrongs committed—it can also contribute to exposing the underlying logic of the torture regime to public scrutiny and refutation."[29] However, Crelinsten fails to focus at this point on the word "perpetrator". As I have shown above, "the perpetrator" is not only the individual torturer or her colleagues, but the whole hierarchy in the police, military or security services, and to the highest level of state. For example, I was one of the applicants in the attempt (so far unsuccessful), led by the Berlin advocate Wolfgang Kaleck and the European Centre for Constitutional and Human Rights (ECCHR) to prosecute Donald Rumsfeld for the egregious and deliberate war crimes committed at Abu Ghraib in Iraq~~.~~[30] -.[31] The complaint was filed with the German federal prosecutor in Karlsruhe, under the German Code of Crimes against International Law (CCAIL), which entered into force on 30 June 2002. This was an attempt at the prosecution of an individual, whereas ~~I~~in the context of the ECtHR, it is the state itself which is to be brought to justice.

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[27] Ibid, at p.147
[28] Ibid, at p.147
[29] Ronald D. Crelinsten, 'The World of Torture: A Constructed Reality' 7 no.3 *Theoretical Criminology* (2003): 293-318, at p.312
[30] Katherine Gallagher 'Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture' 7 no.5 *Journal of International Criminal Justice* (2009): 1987-1116, at http://jicj.oxfordjournals.org/content/7/5/1087.full (accessed on 1 January 2012)
[31] Katherine Gallagher 'Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture' 7 no.5 *Journal of International Criminal Justice* (2009): 1987-1116, at http://jicj.oxfordjournals.org/content/7/5/1087.full (accessed on 1 January 2012)

International criminal justice is not the focus of this article. But in a perceptive article the feminist human rights scholar Julie Mertus has argued a case which is also relevant to applications to the ECtHR.[32] She contends that:

> Tribunal justice may be meaningful to lawyers drafting pleonastic legal documents in The Hague, diplomats declaring success at stabilising conflicts, and local politicians staking their claims to power amid the smouldering embers of destroyed communities. But little satisfaction will come to survivors. Genocide, mass murder, rape, torture and other crimes may be tried, and a small percentage of the perpetrators may be convicted. International principles will triumph or fail; respect for international law will expand or diminish. The new governments arising out of conflict will be legitimised or de-legitimised. In any case, the voices of survivors will remain largely unheard and unaddressed.[33]

For Mertus, who has extensive experience in the bitter conflicts in the former Yugoslavia, most survivors do not see themselves in the work of judicial processes, at any rate at the International Criminal Tribunals established by the UN Security Council. The individual situations of survivors do not find their way into the legal cases prepared by the prosecutors, either because there are too many crimes to try, or because the experiences suffered by individual survivors did not cross the threshold necessary to constitute crimes under international law. Mertus adds: "There is no crime of destruction of souls, deprivation of childhood, erasure of dreams. There are crimes of murder, torture and inhumane treatment, but there is no crime of being forced to watch helplessly while one's loved one suffers – the injury many survivors swear is most severe."[34]

Mertus concludes with her own passionate outcry:

> Above all, witnesses need a full and public account of what happened – an account in which they see their own memories, an account that exposes the Truths. These Truths have taken on a life of their own. They are so thick with history, power and fear that the actual truth does not matter any more. Allowing competing Truths to float through the air in the same space, unjudged and unquestioned, can be a revolutionary act. The Truths may always exist. But the telling can narrow the gap between Truths, creating a common bridge towards something else – towards an existence beyond these Truths. Since legal institutions attempt to discover truth, they are incapable of fulfilling the need to hear competing Truths.[35]

That is certainly true of the war crimes tribunals, in which the prosecutor must seek to convict an individual perpetrator, and all other considerations must be subordinated to this single imperative. The victims have a place in the ~~ad hoc t~~ ad hoc tribunals and in the International Criminal Court, but telling their stories is not the objective, or even a partial objective. The question raised by this

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[32] Julie Mertus, 'Truth in a Box: the Limits of Justice Through Judicial Mechanisms', in *The Politics of Memory: Truth, Healing and Social Justice*, ed. Abdullahi An-Na'im and Ifi Amadiume, eds. (New York: Zed Books, 2000): 142-161, at http://www.aupeace.org/files/TruthInBox.pdf (accessed 27 December 2011)

[33] Ibid, p.142

[34] Ibid, p.150

[35] Ibid, p.159

article is whether the ECtHR can play a role which is closer to the interests of the victims. I have argued that the motivation of the first six Chechen applicants to Strasbourg, whose children were killed and property destroyed in the murderous assaults of the Russian forces in 1999-2000, who took great risks in pursuing their complaints to victory in 2005, had nothing to do with monetary compensation. In the face of the downright lies of the Russian state, they wanted the highest court in Europe to recognise and enshrine in a final judgment the Truth of what had happened to them. For once, that is precisely what the ECtHR did, in three splendid judgments.[36] In doing so, the ECtHR not only established authoritatively the egregious violations committed by the Russian state, but also contributed to the self-knowledge and understanding of the Chechen people as a whole, even if the ECtHR was unable expressly to engage with the broader social and political context of the violations. [37]

The ECtHR cannot itself undertake the prosecution of individual Russian officers or politicians. But in its judgments it named Russian Generals Shamanov and Nedobytko with findings of fact amounting to grounds for investigation of them for war crimes. In their submissions to the Council of Europe's executive body, the Committee of Ministers, in charge of enforcement of judgments, the Chechen applicants have sought individual and general measures of enforcement including the investigation of these officers for criminal offences under Russian law.[38]

The issues of truth, justice and compensation can become extraordinarily complex, even more so than in post-Pinochet Chile. In the Turkish/Kurdish and Russian/Chechen cases with which I have become familiar in the course of more than 20 years, the social context has included discrimination and persecution on historical, ethnic and religious grounds. Individuals have been subjected to torture because they are perceived to pose a threat to the security and even the existence of the state in which they live and of which they are citizens.

Furthermore, the Kurds and the Chechens are also without doubt "peoples" under any description, and are the beneficiaries of the right of peoples to self-determination. This right, originally a political project advanced on behalf of the Irish, Poles, British Indians and others by Marx and Engels in the 19th century, became a central plank of V. I. Lenin's political programme before World War I, and was promoted by US President Woodrow Wilson. In the post-World War II

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[36] See Bill Bowring "Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights" 14 no.3 *Journal of Conflict and Security Law* (2009): 485-498

[37] See Bill Bowring "Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights" 14 no.3 *Journal of Conflict and Security Law* (2009): 485-498; also arguing that International Humanitarian Law would not and could not have provided adequate remedies.

[38] For the submissions of the applicants, the Russian responses, and the information documents prepared by the the Department for the Execution of Judgments of the European Court of Human Rights, see http://www.londonmet.ac.uk/research-units/hrsj/affiliated-centres/ehrac/ehrac-litigation/chechnya---echr-litigation-and-enforcement/enforcement-of-chechen-judgments.cfm (accessed on 1 January 2012)

context of de-colonisation, it became a principle enshrined in the Charter of the United Nations, and finally a right in international law, the subject matter of common Article 1 to the two UN Covenants on Human Rights (1966, into force in 1976).[39] Exercise of this right does not, in most cases, mean secession; but it most certainly means recognition of linguistic, cultural and religious difference, put into practice through appropriate political and legal arrangements, usually forms of territorial or non-territorial autonomy.

It can therefore be seen that "reparation" in the context of torture must engage not only therapy for the individual suffering of the survivor, but also resolute attempts to bring the perpetrators to justice, and a serious engagement with the social and political conditions of discrimination, persecution and denial of recognition in which torture flourishes and becomes normalised.

"Just satisfaction" and the ECtHR

As I have already mentioned, the approach of the ECtHR to the question of reparation is, for the most part, minimal. Article 41 of the ECHR provides:

> Just satisfaction
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> If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

The phrase "just satisfaction is not further explained in the Convention.

In 2007 the Court issued a Practice Direction on "Just Satisfaction Claims".[40] In effect, the judges have provided an extensive and authoritative addition to the Convention. Paragraph 2 states:

> … the Court will only award such satisfaction as is considered to be "just" (équitable in the French text) in the circumstances. Consequently, regard will be had to the particular features of each case. The Court may decide that for some heads of alleged prejudice the finding of violation in itself constitutes adequate just satisfaction, without there being any call to afford financial compensation. It may also find reasons of equity to award less than the value of the actual damage sustained or the costs and expenses actually incurred, or even not to make any award at all… In setting the amount of an award, the Court may also consider the respective positions of the applicant as the party injured by a violation and the Contracting State as responsible for the public interest. Finally, the Court will normally take into account the local economic circumstances.

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[39] Bill Bowring, 'Marx, Lenin and Pashukanis on Self-Determination: Response to Robert Knox' 19 no.2 *Historical Materialism* (2011): 113-127; see also Bill Bowring 'Self-determination, the revolutionary kernel of international law' Chapter 1 in *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* Routledge (2008)

[40] At http://www.echr.coe.int/NR/rdonlyres/8227A775-CD37-4F51-A4AA-1797004BE394/0/PracticeDirectionsJustSatifactionClaims2007.pdf (accessed on 1 January 2012)

The Practice Direction also gives detailed guidance as to the meaning of "just satisfaction".

Given their importance to the argument of this article, I set them out *in extenso*:

> 1. Damage in general
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> 7. A clear causal link must be established between the damage claimed and the violation alleged. The Court will not be satisfied by a merely tenuous connection between the alleged violation and the damage, nor by mere speculation as to what might have been.
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> 8. Compensation for damage can be awarded in so far as the damage is the result of a violation found. No award can be made for damage caused by events or situations that have not been found to constitute a violation of the Convention, or for damage related to complaints declared inadmissible at an earlier stage of the proceedings.
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> 9. The purpose of the Court's award in respect of damage is to compensate the applicant for the actual harmful consequences of a violation. It is not intended to punish the Contracting State responsible…
>
> 2. Pecuniary damage
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> 10. The principle with regard to pecuniary damage is that the applicant should be placed, as far as possible, in the position in which he or she would have been had the violation found not taken place – in other words, restitutio in integrum. This can involve compensation for both loss actually suffered (damnum emergens) and loss, or diminished gain, to be expected in the future (lucrum cessans). …
>
> 3. Non-pecuniary damage
>
> 13. The Court's award in respect of non-pecuniary damage is intended to provide financial compensation for non-material harm, for example mental or physical suffering.
>
> 14. It is in the nature of non-pecuniary damage that it does not lend itself to precise calculation. If the existence of such damage is established, and if the Court considers that an award in money is necessary, it will make an assessment on an equitable basis, having regard to the standards which emerge from its case-law. …

Finally, the Practice Direction makes it clear that the Court will very rarely go further than an award of monetary compensation:

> IV. The form of the Court's awards
>
> 23. The Court's awards, if any, will normally be in the form of a sum of money to be paid by the respondent Government to the victim or victims of the violations found. Only in extremely rare cases can the Court consider a consequential order aimed at putting an end or remedying the violation in question. The Court may, however, decide at its discretion to offer guidance for the execution of its judgment.

That is, the Court may give guidance to the Committee of Ministers.

The practice of the ECtHR in torture cases

I have already mentioned the 1996 judgment in *Aksoy v Turkey*[41], and the very serious instances of torture disclosed by the facts as found by the ECtHR. However, the ECtHR did not consider reparation of any description other than monetary compensation:

> 113. In view of the extremely serious violations of the Convention suffered by Mr Zeki Aksoy and the anxiety and distress that these undoubtedly caused to his father, who has continued with the application after his son's death… , the Court has decided to award the full amounts of compensation sought as regards pecuniary and non-pecuniary damage.

In the 1999 judgment in *Selmouni v France*[42], the ECtHR, having held (para 98) that "pain or suffering was inflicted on the applicant intentionally for the purpose of, *inter alia*, making him confess to the offence which he was suspected of having committed", and found the following with regard to torture carried out by the French police while the applicant was in their custody:

> 102. The Court is satisfied that a large number of blows were inflicted on Mr Selmouni. Whatever a person's state of health, it can be presumed that such intensity of blows will cause substantial pain. Moreover, a blow does not automatically leave a visible mark on the body. However, it can be seen from Dr Garnier's medical report… that the marks of the violence Mr Selmouni had endured covered almost all of his body.
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> 103. The Court also notes that the applicant was dragged along by his hair; that he was made to run along a corridor with police officers positioned on either side to trip him up; that he was made to kneel down in front of a young woman to whom someone said "Look, you're going to hear somebody sing"; that one police officer then showed him his penis, saying "Here, suck this", before urinating over him; and that he was threatened with a blowlamp and then a syringe…. Besides the violent nature of the above acts, the Court is bound to observe that they would be heinous and humiliating for anyone, irrespective of their condition.
>
> 104. The Court notes, lastly, that the above events were not confined to any one period of police custody during which – without this in any way justifying them – heightened tension and emotions might have led to such excesses. It has been clearly established that Mr Selmouni endured repeated and sustained assaults over a number of days of questioning.
>
> 105. Under these circumstances, the Court is satisfied that the physical and mental violence, considered as a whole, committed against the applicant's person caused "severe" pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention.

Once again, the Court's approach to reparation was minimal (para. 123):

> … having regard to the extreme seriousness of the violations of the Convention of which Mr Selmouni was a victim, the Court considers that he suffered personal injury and non-pecuniary damage for which the findings of violations in this judgment do not afford sufficient satisfaction. It considers, having regard to its previous conclusions, that the

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[41] Application no. 100/1995/606/694, judgment of 26 November 1996
[42] Application no. 25803/94, judgment of 28 July 1999

> question of the application of Article 41 is ready for decision and, making its assessment on an equitable basis as required by that Article, it awards him FRF 500,000.

While *Aksoy* was torture carried out in the context of the armed conflict in South-Eastern Turkey, *Selmouni* concerned the actions of the French police with regard to a person suspected of drug-smuggling.

Another landmark case was *Mikheyev v Russia*[43], in which the Russian government (para. 103-4) refused, without any good reason, to submit to the ECtHR copies of the criminal investigation files relevant to the Government's investigation of the applicant's complaints. The ECtHR considered in the circumstances that it could draw inferences from the Government's conduct and examine the merits of the case on the basis of the applicant's arguments and existing elements in the ECtHR's own file. It should be noted that this was the constant practice of the Russian authorities in many cases including Chechen cases. The ECtHR identified a series of very serious shortcomings during the course of the investigation, and concluded (para.121) that it was not adequate or sufficiently effective. There had been a violation of Article 3 of the Convention under its procedural limb in that the investigation into the alleged ill-treatment was ineffective.

As to the allegations of torture, the ECtHR held (para.135) that while in custody the Applicant was seriously ill-treated by agents of the State, with the aim of extracting a confession or information about the offences of which he was suspected. The ill-treatment inflicted on him caused such severe physical and mental suffering that he attempted suicide, resulting in a general and permanent physical disability. This amounted to torture.

This is another case in which the investigation was of prime importance, especially if the perpetrators were to be brought to justice. One problem identified by the ECtHR was (para.115) the "…evident link between the officials responsible for the investigation and those allegedly involved in the ill-treatment." At the very least, the Applicant should have been entitled to a new, effective, investigation.

Once again, however, the Applicant was awarded only a – large – sum in monetary compensation.

Most recently, in July 2011, the ECtHR delivered its judgment in the case arising out of the conflict in the North Caucasus, *Velkhiyev and Others v Russia*[44] , in which the Applicant complained of his own detention and torture, and the death of his brother. They were represented by me and other lawyers at the European Human Rights Advocacy Centre (EHRAC) which I founded with a grant from the European Commission in 2003 and which works in partnership with

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[43] Application no. 77617/01, judgment of 26 January 2006
[44] Application no. 34085/06, judgment of 5 July 2011

the leading Russian NGO *Memorial*.[45] The ECtHR held (para.116) that there were very serious shortcomings in the Government's investigation of the Applicants' complaints, and a violation therefore of the procedural limb of Article 3 ECHR. As to the ill-treatment the Applicant and his brother suffered, leading to his brother's death, the ECtHR held (para.124) that "throughout the period of their detention they were subjected to particularly cruel forms of violence which led to very serious injuries…. the pain and suffering were inflicted on them intentionally, in particular with a view to extracting from them a confession that they had been connected with the attack by rebel fighters… [in] 2004." The Court found multiple violations of the Convention, and ordered payment of just satisfaction by Russia as follows:

> (i) EUR 15,000 (fifteen thousand euros) in respect of pecuniary damage to the second to seventh applicants,
>
> (ii) EUR 55,000 (fifty-five thousand euros) in respect of non-pecuniary damage to the first applicant,
>
> (iii) EUR 60,000 (sixty thousand euros) in respect of non-pecuniary damage to the second to seventh applicants jointly,

But as I show in the next section, the Court could and should have done more.

Can the ECtHR do anything other than declare violations and award monetary compensation?

In the *Velkhiyev* case, the Applicants did indeed request an effective investigation. The ECtHR dealt with this request in the following way:

> 1~~175~~. The applicants also requested, referring to Article 46 of the Convention, that an independent investigation which complied with the requirements of the Convention be conducted into their relative's death. They relied in this connection on the cases of *Assanidze v. Georgia* ([GC], no. 71503/01, §§ 202-203, ECHR 2004-II) and *Tahsin Acar v. Turkey* ((preliminary objection) [GC], no. 26307/95, § 84, ECHR 2003-VI).
>
> 2~~176~~. The Court notes that in numerous cases in comparable circumstances (see, among others, *Kukayev v. Russia*, no. 29361/02, §§ 131-34, 15 November 2007; *Medova v. Russia*, no. 25385/04, §§ 142-43, ECHR 2009-... (extracts); and *Lyanova and Aliyeva v. Russia*, nos. 12713/02 and 28440/03, §§ 159-60, 2 October 2008), it decided that it was most appropriate to leave it to the respondent Government to choose the means to be used in the domestic legal order in order to discharge their legal obligation under Article 46 of the Convention. The Court does not discern any exceptional circumstances which would lead it to reach a different conclusion in the present case.

[45] See http://www.londonmet.ac.uk/ehrac, a website which contains a wealth of information and links to documentation concerning hundreds of cases against Russia, as well as analytical materials.

It should be noted, first, that the ECtHR did not give any details of the Applicants' submissions on this issue, made on their behalf by EHRAC. In fact, in *Assanidze* the ECtHR held (para.199) that the Applicant had been held arbitrarily in breach of the founding principles of the rule of law, and was in a frustrating position that he was powerless to rectify. He had had to contend with both the Ajarian authorities' refusal to comply with the judgment acquitting him handed down three years earlier, and the failure of the Georgian central government's attempts to compel those authorities to comply. The ECtHR (para.202) reminded itself that, subject to supervision by the Committee of Ministers, in order to put an end to the violation that has been found, that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the judgment. However the violations found in *Assanidze*, by their very nature, did not leave any real choice as to the measures required to remedy them. In these conditions, having regard to the particular circumstances of the case and the urgent need to put an end to the violations, the ECtHR considered (para.203) that the Governmment must secure the Applicant's release at the earliest possible date, and so held.

That is, the *Assanidze* case provides a clear precedent which the ECtHR can if it wishes follow in an appropriate case. That is, it can do more than simply find a violation and award some money by way of just satisfaction. It can actually order the State to do something, namely to secure the Applicant's release.

Support was provided by a passage (para.84) in the ECtHR's judgment on the *Tahsin Acar (Preliminary Objections)* case[46], where the Government sought to force a settlement on the Applicant.

> … a full admission of liability in respect of an applicant's allegations under the Convention cannot be regarded as a condition *sine qua non* for the Court's being prepared to strike an application out on the basis of a unilateral declaration by a respondent Government. However, in cases concerning persons who have disappeared or have been killed by unknown perpetrators and where there is prima facie evidence in the case-file supporting allegations that the domestic investigation fell short of what is necessary under the Convention, a unilateral declaration should at the very least contain an admission to that effect, combined with an undertaking by the respondent Government to conduct, under the supervision of the Committee of Ministers…, an investigation that is in full compliance with the requirements of the Convention as defined by the Court in previous similar cases

The Government was not prepared to give any such undertaking.

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[46] Application no. 26307/95, judgment of 6 May 2003

The ECtHR was prepared to insist that to obtain a settlement a government must undertake to carry out an effective investigation; but this was not, apparently, a sufficient precedent for a similar practice by the ECtHR itself.

Kukayev v Russia was another of the cases in which the Applicant was represented by me and my colleagues at EHRAC; the Applicant complained of the abduction and disappearance of his son. Relying on *Assanidze* and *Tahsin Acar*, we endeavoured to request "an independent investigation which would comply with the Convention standards be conducted into his son's disappearance" (para.131). The Government had once again (para.121) refused to allow the ECtHR to see the prosecution investigation file. This was despite the fact that the ECtHR was able to find that the Applicant's son died whilst being detained by the federal forces; that is, murder by the Russian State, proven beyond reasonable doubt.

The ECtHR held:

> 3~~1~~33. The Court reiterates that, in the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which it finds a breach imposes on the respondent State a legal obligation under that provision to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). However, its judgments are essentially declaratory in nature and, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's … This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1) …
>
> 4~~1~~34. In the Court's opinion, the present case is distinguishable from the ones referred to by the applicant. In particular, the *Assanidze* judgment ordered the respondent State to secure the applicant's release so as to put an end to the violations of Article 5 § 1 and Article 6 § 1, whereas in the *Tahsin Acar* judgment the effective investigation was mentioned in the context of the Court's examination of the respondent Government's request for the application to be struck out on the basis of their unilateral declaration. The Court further notes its above finding that in the present case the effectiveness of the investigation had already been undermined at the early stages by the domestic authorities' failure to take essential investigative measures… It is therefore very doubtful that the situation existing before the breach could be restored. In such circumstances, having regard to the established principles cited above and the Government's argument that the investigation is currently under way, the Court finds it most appropriate to leave it to the respondent Government to choose the means to be used in the domestic legal order in order to discharge their legal obligation under Article 46 of the Convention.

It may be seen that the ECtHR entirely failed to give reasons distinguishing *Kukayev* from *Assanidze* or *Tahsin Acar*, and gave instead the extraordinary reason, notwithstanding the Government's wilful refusal to comply with the request to allow access by the ECtHR to the

investigation file, that the Government's own lamentable failure to carry out an effective investigation provided grounds for allowing the Government in effect to do nothing, and for absolving the ECtHR from ordering the Government to do what it is obliged to do by virtue of its treaty obligations under the ECHR. *Medova v Russia* was another EHRAC case, while *Lyanova and Aliyeva v. Russia* was a case in which the applicants were represented by EHRAC's sister organisation Stichtung Russian Justice Initiative (SRJI). In both cases the same arguments were made, and dismissed, as in *Velkhiyev*, in short order.

Plainly, the ECtHR does not intend to budge an inch, despite the repeated and well-founded arguments of the applicants in a series of important cases.

Russian NGO proposals

In 2010 the Russian NGO *Public Verdict*, based in Moscow, presented to the Council of Europe a report and recommendations[47] prepared by an authoritative group of regional NGOs.[48] This was based on consideration of a large number of decided cases.[49] What all these cases had in common was the fact that no effective investigation was conducted into the complaints of torture and ill-treatment committed by the police. The report noted that the Committee of Ministers had already sought to analyse problems arising from complaints arising from the Chechen cases.[50] It found that the problems were systemic and not confined to one region of Russia.

> 11. The Court has delivered 16 judgments finding that the competent bodies of the Respondent Government failed to abide by their obligations to conduct an effective investigation into the reported torture committed by police. The number of the judgments itself shows that the lack of effective investigation of torture complaints is not accidental.
>
> 12. In addition, mentioned Court' judgments are given on the cases reported in 11 different regions of the Russian Federation: Moscow, Bryansk oblast, Primorskiy krai, Lipetsk oblast, Kemerovo oblast, Kostroma oblast, Nizhniy Novgorod oblast, Rostov oblast,

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[47] Public Verdict 'The execution of judgments of the European Court of Human Rights concerning the effectiveness of the investigation into torture and cruel treatment committed by the police' June 24, 2010 at http://eng.publicverdict.ru/topics/researches/7387.html (accessed on 1 January 2012)

[48] Krasnoyarsk Committee for Human Rights Protection, Memorial Human Rights Commission of Komi Republic, Interregional Public Organization "Committee against Torture" (Nizhni Novgorod), Regional Public Organization "Women of the Don Union" (Rostov on Don), Regional Public Organization "Man and Law" (Yoshkar Ola), Public Verdict Foundation (Moscow), Center of Civic Education and Human Rights (Perm).

[49] *Akulinin and Babich v. Russia* (no. 5742/02, 2 October 2008); *Antipenkov v. Russia* (no. 33470/03, 15 October 2009); *Antropov v. Russia* (no. 22107/03, 29 January 2009); *Barabanshchikov v. Russia* (no.36220/02, 8 January 2009); *Belousov v. Russia* (no. 1748/02, 2 October 2008); *Vladimir Fedorov v.Russia* (no. 19223/04, 30 July 2009); *Gladyshev v. Russia* (no. 2807/04, 30 July 2009); *Denisenko and Bogdanchikov v. Russia* (no. 3811/02, 12 February 2009); *Maslova and Nalbandov v. Russia* (no. 839/02, 24 January 2008); *Menesheva v. Russia* (no. 59261/00, 9 March 2006); *Mikheyev v. Russia* (no. 77617/01, 26 January 2006); *Nadrosov v. Russia* (no. 9297/02, 31 July 2008); *Oleg Nikitin v. Russia* (no. 36410/02, 6 September 2008); *Polonskiy v. Russia* (no. 30033/05, 19 March 2009*); Samoylov v. Russia* (no. 64398/01, 2 October 2008); *Toporkov v. Russia* (no. 66688/01, 1 October 2009).

[50] Ministers' Deputies Information documents CM/Inf/DH(2008)33 of 11 September 2008 "Actions of the securityforces in the Chechen Republic of the Russian Federation: general measures to comply with the judgments of theEuropean Court of Human Rights".

> Ivanovo oblast, Volgograd oblast and Kirov oblast. Hence, the lack of effective investigation in the cases considered by the Court cannot be explained by improper organisation of the work of investigative bodies of a certain region or city. The geographical distribution of the cases of ineffective investigation of torture complaints proves that these violations of the Convention are systematic. The Court makes a similar conclusion by emphasising that the fact of repeated terminations and resumptions of the pre-investigation inquiries and investigations into the torture complaints may disclose a serious deficiency in the domestic prosecution system.

The recommendation made by the Russian NGOs to the Committee of Ministers was that discussions with the Russian Government should proceed on the basis of the following proposed "general measures":

- to increase the independence of investigations of torture by means of organisational and functional division of the investigation of torture and that of general crimes;
- to improve the assessment system of investigative bodies' performance, which will help to get rid of obstacles to prompt initiation of criminal investigation of torture complaints and will introduce control over investigation quality in addition to the quantitative induces;
- to expand availability of well-timed and high-quality medical forensic examinations as a part of inquiries and investigations of torture complaints, including the relevant training of medical forensic experts and investigators;
- to increase the knowledge of investigators about the methods of investigation of torture, including the publication of methodological manuals on how to investigate crimes of this type;
- to improve judicial control over the effectiveness of the investigation of torture and increase the quality of the judicial examination of the torture complaints filed by the accused during the criminal trial involving him/her.

These are highly relevant and constructive proposals. But they do not – and were not intended to – address the question of the very limited scope of the judgments of the ECtHR.

The Inter-American Court sets a good example

The Inter-American Court of Human Rights (IACtHR) has adopted a very different practice. In an analysis of the question of compliance comparing the ECtHR and IACtHR[51] Darren Hawkins and Wade Jacoby noted that

> at the regional level, the European partial compliance regime differs strongly from the American partial compliance regime. In Europe, the European Court of Human Rights (ECHR) exercises delegative compliance where it identifies a violation but leaves it up to the states to decide how to end the violation, compensate for its effects, and avoid future violations. In the Americas, the Inter-American Court of Human Rights (IACHR) exercises checklist compliance where it orders a series of clear, specific steps and then observes

[51] Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American American Courts for Human Rights', *Journal of International Law and International Relations* 6 no.1 (2010): 35-85 at http://www.stevendroper.com/ECHR%20Hawkins%20and%20Jacoby%20APSA%202008.pdf (accessed on 27 December 2011)

> whether states in fact comply with those measures. This difference has major implications for any study of partial compliance. For example, the conventional wisdom is that Europe has a much higher compliance rate, but this may be because it is relatively easy to comply when states get to decide the method of compliance.[52]

Which is perhaps an understatement.

In the 2003 *Maritza Urrutia Case*,[53] the IACtHR held that Guatemalan Army had inflicted psychological torture on the Applicant (para.94): she was "subjected to acts of mental violence by being exposed intentionally to a context of intense suffering and anguish, according to the practice that prevailed at that time… The Court also considers that the acts alleged in this case were prepared and inflicted deliberately to obliterate the victim's personality and demoralize her, which constitutes a form of mental torture."

The IACtHR's judgment contained the following.

> 176. The Court observes that, at the time of this judgment, more than eleven years after the facts of the instant case occurred, those responsible for the abduction, detention, torture, and cruel, inhuman or degrading treatment committed against Maritza Urrutia have still not been identified, prosecuted and punished; therefore there is a situation of impunity…, which constitutes a violation of the State's obligation that harms the victim, her next of kin, and the whole of society, and encourages chronic repetition of the human rights violations in question.
>
> 177. The State must conduct an effective investigation of the facts of this case, identify those responsible for them, both the intellectual authors and the perpetrators, as well as possible accessories, and punish them administratively and criminally, as applicable. The respective domestic proceedings should relate to the violations of the right to humane treatment and to personal liberty, referred to in this judgment. The victim should have full access and capacity to act at all stages and in all instances of the investigation and the corresponding trial, in accordance with domestic law and the norms of the American Convention. The results of the trial must be published.

And the IACtHR decided:

> That the State shall investigate effectively the facts of this case, which resulted in the violations of the American Convention on Human Rights and non-compliance with the obligations of the Inter-American Convention to Prevent and Punish Torture; identify, prosecute and punish those responsible, and also publish the results of the respective investigations, in the terms of paragraph 177 of this judgment.

The contrast could not be greater; between the ECtHR's minimalist approach, giving the government the maximum leeway whatever the lack of cooperation and however egregious the violations; and the IACtHR's serious approach to reparation.

Hawkins and Jacoby wrote the following on this case:

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[52] Ibid, p.36

[53] Judgment of November 27, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 103 (2003), at http://www1.umn.edu/humanrts/iachr/C/103-ing.html (accessed on 1 January 2012)

> In *Maritza Urrutia v. Guatemala*, the IACHR ruled that the state should investigate, publish, and punish those who committed human rights violations against the victim (including torture) and pay compensation for material and moral damage. In 2005, the Court declared that Guatemala had paid the compensation in full and requested information about the state's investigation. Guatemala subsequently submitted information, but in a 2007 report the Court found that the information submitted by Guatemala concerned measures adopted from 1992-99 and that the Court had already reviewed that information. Here, it is not difficult to see how Guatemala's government might more easily pay a fine than investigate a difficult human rights case that might implicate powerful people. [54]

In another case, *Daniel Tibi v Ecuador*[55], the IACtHR held that the Applicant, a French citizen, had suffered torture: prison guards inflicted physical violence sessions on him with the aim of obtaining his self-incrimination. During those sessions, he suffered fist blows on the body and face, cigarette burns on his legs, and electrical discharges on his testicles. Once, he was hit with a contusive object, and another time his head was submerged in a water tank. Mr. Tibi suffered at least seven such "sessions".

The reparation ordered by the IACtHR included, in addition to monetary compensation, the following:

> 9. This Judgment constitutes per se a form of reparation…
>
> 10. The State must, within a reasonable term, effectively investigate the facts of the instant case, with the aim of identifying, trying, and punishing all those responsible for the violations committed against Daniel Tibi. The results of this process must be publicly disseminated, in the terms set forth in … the instant Judgment.
>
> 11. The State must publish, at least once, in the official gazette Diario Oficial and in another Ecuadorian daily with a national coverage, both the Section on Proven Facts and operative paragraphs One to Sixteen of the instant Judgment, without the respective footnotes. The State must also publish the above, translated into French, in a widely read daily in France, specifically in the area where Daniel Tibi resides, in the terms set forth in paragraph 260 of the instant Judgment.
>
> 12. The State must make public a formal written statement issued by the high authorities of the State, acknowledging the international responsibility of the State for the facts addressed in the instant case, and apologizing to Mr. Tibi and to the other victims mentioned in the instant Judgment, in the terms set forth in … this Judgment.
>
> 13. The State must establish a training and education program for the staff of the judiciary, the public prosecutor's office, the police and penitentiary staff, including the medical, psychiatric and psychological staff, on the principles and provisions regarding protection of human rights in the treatment of inmates. Design and implementation of the training program must include allocation of specific resources to attain its goals, and it will be conducted with participation by civil society. For this, the State must establish an inter-institutional committee to define and execute the training programs on human rights and

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[54] Ibid, p.41

[55] Judgment of September 07, 2004, at http://www.corteidh.or.cr/docs/casos/articulos/seriec_114_ing.pdf (accessed on 1 January 2012)

> treatment of inmates. The State must report to this Court on the establishment and functioning of said committee, within six months…

Hawkins and Jacoby conclude as follows. There are

> two quite different regional human rights courts. The IACHR essentially tells state violators, "Complete this list of remedies, and tell us when it's finished. We will then check what you have done." By contrast, the ECtHR essentially tells states, "You've done wrong. Find a way to undo or compensate for the harm you've caused and to avoid future harm. When it's done, tell our designated third party, and they will check." Our central finding is that notwithstanding these very different approaches, states in both systems often find various forms of partial compliance to be a preferred response, which they often attempt to sustain in the face of monitoring and explicit warnings not to do so. [56]

These scholars are unwilling to pass judgment on either system. On the contrary, in a sophisticated reference to political science literature, they show how the often protracted and indecisive process of monitoring of state compliance in fact yields positive outcomes.

> … courts facilitate repeated interaction between legal specialists and state policy-makers. Those interactions are potentially costly to both sides, though those costs are frequently intangible, involving goods such as bureaucratic, state or court reputations and precedents for future cases. The interactions also involve careful legal reasoning and repeated discussion. In these interactions, various actors may adjust their positions on issues to preserve their reputations, to advance shared understandings that they prefer, to set particular precedents for future cases, or to engage in reciprocity. These repeated small scale interactions that occur in the give and-take of the legal process may shape state behaviour in important ways. Partial compliance seems like an optimal outcome in such an environment. State officials and judges sometimes win and sometimes lose, but they both want to keep playing the game of bringing cases and implementing decisions. State behaviour changes slowly and gradually, not merely as a result of rewards and punishments on the one hand or deep changes in values and interests on the other, but also due to the legal processes of institutional negotiations.[57]

This process is, however, far from the gaze of the torture survivor, especially in the search for justice. What is striking, especially from the point of view of the survivor, is the very much more serious approach of the IACtHR to the question of reparation, as discussed earlier in this article.

Conclusion

This article has not addressed the current crisis of the ECtHR, in which, despite the recently implemented Protocol 14 reforms, the backlog of applications pending a decision or adjudication exceeds 150,000, and less than 10% of applications are communicated to the state in question, much less achieve a judicial resolution.[58] But then findings of violation of Article 3, that is conviction of a state of torture itself on findings beyond reasonable doubt – rather than findings of

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[56] Ibid, p.84
[57] Ibid, p.85
[58] See Bill Bowring, "The Russian Federation, Protocol No. 14 (and 14bis), and the Battle for the Soul of the ECHR" 2 no.2*Goettingen Journal of International Law* (2010): 589-617

failure to carry out a prompt and effective investigation, or findings of inhuman and degrading treatment – are relatively rare. In this article I have examined the findings of scholars working in several disciplines, and have concluded that torture, because of its context and consequences, makes special demands in respect of reparation. In this respect, the Inter-American system is far ahead of its European counterpart. It remains to ask whether there a torture survivor should be advised to complain to Strasbourg, in the knowledge that the case will take a minimum of 5-6 years before conclusion, and that in the event of victory the results will be so meagre in terms of reparation. My answer is that survivors should be encouraged despite all negative considerations to pursue a case, and to continue to press for more substantive orders from the ECtHR. In any event, as I have noted above, the judgment of the ECtHR will not only vindicate the truth as the applicant knows it to be, but will also condemn the government concerned.

10,455~~211~~ words