

Scope of remedies upon a successful challenge to the lawfulness of detention

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Global Consultation on the Right to Challenge the Lawfulness of Detention
Panel 1: Framework, scope and content of the right to court review of detention

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A. The general right to an effective remedy, including reparation

1. All victims of unlawful or otherwise arbitrary detention are entitled to an effective remedy, which includes reparation.¹
2. The elements of full and effective reparation include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.²

B. The right to be released as a specific element

3. For unlawful detention, the primary form of remedy is to challenge the lawfulness of the detention before a court, and an essential aspect of restitution for unlawful detention is to be ordered released.
 - a. This particular form of remedy is specifically guaranteed by the ICCPR, and the European, American, and Arab Conventions. The African Commission on Human and Peoples' Rights has held it to be implicit in the African Charter. It is also included in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The UN Basic Principles on Remedy and Reparation highlight "restoration of liberty" as an example of restitution.³

¹ International Covenant on Civil and Political Rights (ICCPR), articles 2(3) and 9(1); European Convention on Human Rights (European Convention), articles 5(1) and 13; American Convention on Human Rights (American Convention), article ; African Charter on Human and Peoples' Rights (African Charter), articles 7 and 25; Arab Charter on Human Rights (Arab Charter), articles 14 and 23; Universal Declaration of Human Rights, articles 8 and 9. UN General Assembly, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" (UN Basic Principles on Remedy and Reparation), res 60/147 (16 Dec 2005); Human Rights Committee, "General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 16. See also Inter-American Court of Human Rights, *Velásquez Rodríguez v Honduras*, Series C no 7 (21 July 1989), para 25; and *Vélez Loor v Panama*, Series C no 218 (23 Nov 2010), para 255, where the Court reiterated, in a case involving arbitrary detention of an irregular immigrant, that the right to remedy and compensation under article 63 of the American Convention "reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on a State's responsibility."

² UN Basic Principles on Remedy and Reparation, paras 18-23; Human Rights Committee, General Comment No 31, para 16; Committee against Torture, General Comment no 3, UN Doc CAT/C/GC/3 (13 December 2012), paras 1-18.

³ ICCPR, article 9(4); European Convention, article 5(4); American Convention, article 7(6); Arab Charter, article 14(6). African Commission on Human and Peoples' Rights, "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa" (African Principles), 2001, DOC/OS(XXX)247, Principles M(4) and (5); UN General Assembly, "Body of Principles for the Protection of All Persons under Any Form of Detention" (UN Body of Principles), res 43/173 (9 Dec 1988), Principle 32; UN Basic Principles on Remedy and Reparation, para 19.

- b. For the right to challenge detention to be real and effective, the court must have the power actually to obtain the release of the person, and must in practice exercise that power without delay whenever it finds the detention to be unlawful.⁴ The authorities must respect and promptly implement any court order for release.⁵

C. The right to compensation as a specific element

4. The right to compensation for unlawful detention is also specifically recognised by international instruments and mechanisms.⁶
 - a. The consistency across the global and regional treaty systems suggests that explicit treaty provisions and jurisprudence on compensation reflect an underlying rule of general international law. Like the Working Group,⁷ the Inter-American Court of Human Rights has held the right to reparation and compensation to be part of customary international law.⁸
 - b. The UN Basic Principles on the Right to a Remedy and Reparation reaffirm that compensation should be provided for economically assessable damage resulting from gross violations of international human rights law (a term which has been interpreted to include arbitrary detention⁹), including the following categories of damage:
 - i. Physical or mental harm;
 - ii. Lost opportunities, including employment, education and social benefits;

⁴ E.g. Human Rights Committee, *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (30 April 1997), at para 9.5; *Shams et al. v Australia*, UN Doc CCPR/C/90/D/1255/2004 (20 July 2007), para 7.3. European Court of Human Rights (Grand Chamber), *A and Others v the United Kingdom*, App No 3455/05 (19 February 2009), paras 200-202. European Court of Human Rights, *Benjamin & Wilson v the United Kingdom*, App no 28212/95 (26 Sept 2002), paras 35- 36. Inter-American Court of Human Rights, *Tibi v Ecuador*, Series C No. 114 (7 September 2004), para 131; *Juan Humberto Sánchez v Honduras*, Series C No. 99 (7 June 2003), para 121; *Bámaca Velásquez v Guatemala*, Series C No. 70 (25 November 2000), para 191; *Suárez-Rosero v Ecuador*, Series C No. 35 (12 November 1997), para 63.

⁵ E.g. ICCPR article 2(3)(c); American Convention, article 25(2)(c); African Principles, Principles C(c)(4) and M(2)(h). Human Rights Committee, *Carmen Amendola Masslotti and Graciela Baritussio v Uruguay*, Communication No. R.6/25, UN Doc Supp. No. 40 (A/37/40) at 187 (1982), paras 12-13; *Chambala v Zambia*, Communication no 856/1999 (2003), para 7.2. European Court of Human Rights, *Assanidze v Georgia*, App no 71503/01 (8 Apr 2004), paras 173 and 185-187.

⁶ E.g. ICCPR article 9(5); European Convention, article 5(5); Inter-American Court of Human Rights, *Loayza Tamayo v. Peru*, Judgment on Reparations (1998), para 129; African Principles, Principle M(1)(h); African Commission on Human and Peoples' Rights, *Embaga Mekongo Louis v Cameroon*, Communication 59/91, decided 22 March 1995; Arab Charter, article 14(7); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, article 16(9); Rome Statute of the International Criminal Court, article 85(1).

⁷ See for example, Opinion 15/2011, China (re : Liu Xiaobo), adopted 5 May 2011, UN Doc A/HRC/WGAD/2011/15 (27 February 2011), para 27.

⁸ Inter-American Court of Human Rights, *Vélez Loor v Panama*, Series C no 218 (23 Nov 2010), para 255. See also Inter-American Commission on Human Rights, Case 11.436, *Victims of the tugboat "13 de Marzo" v Cuba*, report no. 47/96, 16 Oct 1996, at paras 77 and 110;

⁹ E.g. Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 30; "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 (2 July 1993), paras 13 and 137(1).

- iii. Material damages and loss of earnings, including loss of earning potential;
- iv. Moral damage; and
- v. Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.¹⁰

D. Release and compensation are not necessarily exhaustive

5. While the right to be ordered released and to compensation are frequently specified in a treaty, and apply to all cases where a detention is found to be unlawful, this does not exclude or exhaust the more general right to remedy and reparation, as guaranteed for instance by article 2(3) ICCPR, similar provisions in regional treaties, and customary international law. Where orders for release and compensation do not provide full reparation for an unlawful detention, the more general right to remedy and reparation may require additional measures.¹¹
6. The remedy provisions of treaties do not attempt generally to catalogue all possible additional forms of remedy, as what may be required in any given case very much depends on the facts of the case. For instance, in particular cases:
 - a. Investigation may be required as part of an effective remedy and reparation where the detention has been found to be unlawful but questions remain, for instance as to who was responsible and whether they have been held accountable.¹²
 - b. The State may need to refer persons responsible for a deliberate unlawful detention for prosecution or other accountability (disciplinary) proceedings as part of ensuring the victim has a full remedy and reparation.¹³
 - c. The State may be required to make a formal acknowledgement of responsibility and/or apology, and to publicize the judgment.¹⁴

¹⁰ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("UN Basic Principles on Remedy and Reparation"), adopted and proclaimed by General Assembly in resolution 60/147 of 16 December 2005, Principle 20. Similar heads of damage are applied by, for instance, the Inter-American Court of Human Rights, e.g. *Velez Loo v Panama*, paras 299-314 including both pecuniary damage (loss of earnings, consequential damages e.g. costs of legal assistance), and non-pecuniary damages (suffering, distress, other harm of non-financial nature) and the European Court of Human Rights, e.g. (Grand Chamber), *Assanidze v Georgia*, App no 71503/01 (8 April 2004), paras 196 to 203.

¹¹ In addition to particular cases mentioned below, see generally Human Rights Committee, "draft General Comment no 35 on article 9 of the Covenant", UN Doc CCPR/C/GC/R.35/Rev.3 (10 April 2014): "Paragraph 5 of article 9 of the Covenant provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Like paragraph 4, paragraph 5 articulates a specific example of an effective remedy for human rights violations, which States parties are required to afford. These specific remedies do not replace, but are included alongside, the other remedies that may be required in a particular situation by article 2, paragraph 3 of the Covenant."

¹² E.g. Inter-American Court of Human Rights, *Velez Loo v Panama*, para 270; European Court of Human Rights (Grand Chamber), *El Masri v former Yugoslav Republic of Macedonia*, app no 39630/09 (13 Dec 2012), paras 254-162. See also, more generally, Human Rights Committee, General Comment no 31, para 15.

¹³ E.g. European Court of Human Rights (Grand Chamber), *El Masri v former Yugoslav Republic of Macedonia*, paras 254-162. See also generally Human Rights Committee, General Comment no 31, para 16.

¹⁴ E.g. Inter-American Court of Human Rights, *Velez Loo v Panama*, para 266. See also Human Rights Committee, General Comment no 31, para 16.

- d. The State may be required to make a public memorial.¹⁵
- e. Where the person who is or was held in unlawful detention is missing, a remedy capable of identifying the person's fate and whereabouts may be required.

E. Opinion and recommendations on relevant Draft Principles

7. Based on the above:

- a. In my opinion, draft Principle 11 as contained in the Working Group background paper correctly and succinctly addresses the right to be released and to receive compensation:

"If the court finds the deprivation of liberty unlawful, the court must order the unconditional release from the deprivation of liberty. Upon such a decision the person shall have an enforceable right to compensation."
- b. The Principles should also explicitly recognise that, in certain cases, release from detention and compensation may not on their own be sufficient to provide the victim of an unlawful detention with full and effective remedy, including reparation. To this end, the Working Group could consider inserting before Principle 11 a more general principle, affirming that the victim of an unlawful detention must have access to a remedy or remedies capable in appropriate cases of providing restitution, compensation, rehabilitation, satisfaction, and guarantees of non-recurrence. A sentence could be added to Principle 11 to affirm that the specific right to release and compensation is without prejudice to the right of a victim to additional forms of remedy and reparation in appropriate cases. This would ensure consistency of the Principles with the General Assembly's Basic Principles on Remedy and Reparation, and general comments of the Human Rights Committee and Committee against Torture.
- c. In order to ensure that the Principles provide useful guidance to states on the scope of compensation that must be available, I recommend that the Working Group consider including a non-exhaustive list that includes physical or mental harm (including pain and suffering); lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
- d. Given the phenomenon whereby persons remain in detention despite a formal order for their release, including as documented by the Working Group's own work, I recommend that the Principles explicitly affirm the obligation of other officials of the state to implement an order for release (based for instance on ICCPR article 2(3)(c) "the competent authorities shall enforce such remedies when granted").

¹⁵ E.g. Inter-American Court of Human Rights, *Gelman v Uruguay*, 24 February 2011, Series C no 221, para 267 ("within one year, the State should unveil, in the SID building where the victims were detained, a plaque containing an inscription with their names, the period of time in which they were illegally detained there"). See also Human Rights Committee, General Comment no 31, para 16.