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**DRAFT Restoration of Historical Memory and Dignity for Victims of the Armenian
Genocide:
A Human Rights Law Approach to Effective Reparations**

Richard J. Wilson*

In this short essay, I will draw on my own experiences in the Inter-American system for the protection of human rights in analyzing some of the options available today to victims of the Armenian Genocide during World War I. Although the Inter-American human rights system has been more expansive than the European in the interpretation of its reparations authority, I believe that recent developments in the European human rights system, together with recognized international principles regarding victim reparations, provide a functional framework for possible human rights remedies. While reconciliation may be an admirable long-term goal, recognition and acceptance of state responsibility must precede any such speculative future.

For purposes of this paper, I accept as incontrovertible the historic evidence of the Armenian genocide.¹ While I recognize that there is resistance, sometimes adamant, to this conclusion among both some governments and some scholars, the project of this paper is not to dispute that issue, but to move beyond it to a realistic appraisal of appropriate remedies for the victims, using the framework of international human rights law. My proposals do not contemplate criminal prosecution; notions of individual responsibility, the non-retroactive jurisdiction of new international criminal tribunals, and the passage of time make that alternative

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¹ See, e.g., Taner Akçam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* (2006); Kevork K. Baghdjian, *The Confiscation of Armenian Properties by the Turkish Government Said to be Abandoned* (2010); M. Bibliowickz, 'The Armenian Genocide: Legacies and Challenges of a Silenced Past,' 16 *Sri Lanka Journal of International Law* 27 (2004).

unrealistic if not impossible, in my view. Instead, I will draw on principles of restorative justice to fashion what I believe to be a viable reparations framework for victims, particularly those who lost property, land and buildings, during the period of the genocide.

I also assume, for the purposes of this paper, the fundamental notion in human rights law that such rights are not effective and fully realized until there are full and adequate remedies for their violation: there is no effective right without an effective remedy. In contrast to this principle, however, is the reality that human rights law has not dealt well in the past with mass atrocity; such atrocities seem to lie within the particular ambit of criminal law. Human rights law has tended to focus instead more on individual than collective or group wrongs, with precious few exceptions.

Finally, I am a teacher of law, but I am a clinical practitioner as well. I have taught and practiced international human rights law with students for more than twenty years, working on real cases with real clients, with lives sometimes at stake. Mine is not the theoretical realm of the pure academic, but the real world of blood and tears, of deep psychological damage and loss, and hopefully, of restoration and justice for victims and survivors.

I will explore this topic through three related perspectives. First, I will examine the general human rights framework of relevant U.N. principles relating to the legal framework of remedies for victims of mass atrocity. Second, I will discuss what I believe to be analogous litigation to that faced by victims of the Armenian genocide in the Inter-American system, using the case of *Arbenz v. Guatemala*, a case litigated and settled in that system by my own International Human Rights Law Clinic. Finally, I will offer some suggestions as to how those frameworks and experience might be found to apply in the European system for human rights

protection, where both Turkey and Armenia are parties to the European Convention on Human Rights.

1. The UN Human Rights Law Framework of Remedies for Victims of Mass Atrocity

There are two major human rights documents adopted by the United Nations that resonate with the history of the Armenian genocide and the failure of Turkey to recognize its international legal responsibility for it. The first carries the somewhat ponderous name of *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* (hereafter, “Basic Principles”), adopted by resolution of the UN General Assembly in 2006.² The second document is the updated *Principles for the Protection and Promotion and Protection of Human Rights through Action to Combat Impunity* (hereafter, “Principles to Combat Impunity”), adopted in 2005 by what was then called the UN Commission on Human Rights.³

In her excellent treatise on remedies for human rights violations, Professor Dinah Shelton reminds us of a basic premise too often forgotten: human rights obligations are not the mutual obligations of state to state, as in most multi-lateral treaties,⁴ but the still-radical notion that a

² United Nations 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 Doc. A/RES/60/147, 21 March 2006.

³ United Nations Commission on Human Rights, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, with Addendum Set of Updated Principles, UN Doc. E/CN.4/2005/102 and /Add.1, 18 Feb. 2005. The Commission was replaced by the UN Human Rights Council in 2006. The principles remain as a legacy of the Commission. Impunity arises, states the First Principle, “from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished, to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.” (Emphasis added).

⁴ For that reason, I shall not dwell here on the more general issue of state responsibility for wrongful acts, although that issue is now dealt with comprehensively by UN General Assembly Resolution 56/83 of 28 January 2002,

state in breach of its human rights obligations guarantees those rights to human beings, whether individually or collectively.⁵

Let us turn then to the relevant provisions of the Principles to Combat Impunity. The Armenian genocide is, without question, a situation of impunity, where a state has failed to recognize its responsibility to investigate and take appropriate measures to remedy the wrong. Thus, Principle 2 applies. It provides for an inalienable right to the truth:

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.⁶

Similarly, Principle 3, which calls for a duty to preserve memory, also applies. It provides:

A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfillment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.⁷

A corollary of the third principle, I would argue, is the obligation of the *restoration* of historical memory when that memory has been repressed or ignored. The restoration of historical memory is suggested in Principle 4, on the victims' right to know:

adopting the longstanding work of the International Law Commission on its draft principles on *Responsibility of States for Internationally Wrongful Acts*. For a particularly helpful exposition of the law on reparation for state injuries in Articles 34 through 39, including numerous international cases, see the draft articles with commentary in the *Yearbook of the International Law Commission* 2001, vol. II, Part Two, as corrected. See, e.g., a case from the International Court of Justice in which the Court found that Thailand was under an obligation to "restore to Cambodia any objects . . . which may, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities." *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962: I.C.J. Reports 1962, p. 6*, at p. 37.

⁵ Dinah Shelton, *Remedies in International Human Rights Law* 47-48 (2005).

⁶ Principles to Combat Impunity, *supra* note 3.

⁷ *Ibid.*

Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate.⁸

The right to know includes, the drafting commentary suggests, the importance of broad participation of the victims themselves in deliberations about the collective right to know. Those deliberations may be judicial in nature, or through other administrative bodies such as truth commissions or other commissions of inquiry, as suggested elsewhere in the Principles, particularly Principle 32.⁹

Finally, I would point to Principle 34, which sets out the recognized framework of the victims' right to reparations, similar to what we refer to as "damages" after a favorable judgment for the plaintiff in civil law suits in the United States. The right to reparation includes "all injuries suffered by victims; it shall include measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law."¹⁰ Principle 34, in its first paragraph, notes that remedies must be "readily available, prompt and effective." Delay in a remedy, however, does not negate the necessity for negation of other requirements. Ideally, the Commentary further suggests, the program for reparations "should be 'complete' in the sense that the class of beneficiaries coincides with the whole class of victims."¹¹

Similar sentiments, particularly on reparations, are reflected in the Basic Principles. Principle 15, in Section IX on Reparation for Harm Suffered, reads, in part:

⁸ Ibid. Imprescriptibility, in this context, means that the right may not be extinguished by the passage of time, or by efforts of the offending state to set a statute of limitations. Principle 4 also mentions disappearance, a phenomenon that occurred with frequency during the Armenian genocide. The International Convention for the Protection of All Persons from Enforced Disappearance is the most recent UN multilateral human rights treaty, entering into force in December of 2010. Armenia and 32 other countries are parties to the Convention as of 2 July 2012; Turkey and the United States have neither signed nor ratified the treaty.

⁹ Commentary to the Principles on Impunity, *supra* note 3, at ¶¶ 7, 17-19.

¹⁰ Principles on Impunity, *supra* note 2. Definitions and scope of the various terms used in the reparations framework are set out in greater detail in Principles 31-38, the commentary and the parallel *Responsibilities of States for Wrongful Acts*, *supra* note 4, at 34-39.

¹¹ Commentary to the Principles on Impunity, *supra* note 3, at ¶ 58(a).

Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. ***¹²

That reparation, the Basic Principles go on to provide, may be in the form of restitution, compensation, rehabilitation, satisfaction, and/or guarantees of non-repetition.¹³

2. Restoration of Historical Memory and Honor in the Inter-American Human Rights System: The Case of *Árbenz v. Guatemala*

This section recounts the work of students and professors in the International Human Rights Law Clinic at American University, which works extensively in the Inter-American human rights system. Over five years, from 2006 through 2011, we represented the descendants – wife, children and grandchildren – of Jacobo Árbenz Guzmán in a case against the state of Guatemala. Jacobo Árbenz was elected as Guatemala's constitutional president in 1951. On June 27, 1954, he was overthrown in a military coup d'état, and the *de facto* government confiscated his property and awarded it to the State. He died in exile on January 27, 1971. The forcible removal of President Árbenz led to almost 40 years of instability that saw chaos, violent civil war, repression, genocide, and gross violations of human rights in that country. Guatemala remained under repressive military rule until the signing of peace accords in 1996.

On December 27, 1999, frustrated by repeated attempts to gain back their property and honor in Guatemala's domestic legal system, and years of inaction by the government, President Árbenz' next of kin, acting without counsel, lodged a complaint with the Inter-American Commission on Human Rights (hereafter "IACHR" or "Commission"), with headquarters in Washington, DC. That complaint was declared admissible by the Commission on March 14,

¹² Basic Principles, *supra* note 2, at 7.

¹³ *Id.*, at 7, Principles 19-23. The framework for reparations is thus repeated a third time.

2006.¹⁴ That decision extends the jurisdiction of the Commission well beyond the time that Guatemala had become a party to the American Convention on Human Rights, back to the original wrong in 1954. It did so by finding that the wrong was endorsed *after* Guatemala had ratified the American Convention by the actions of its Constitutional Court in 1996, when it agreed with the family that the original decrees of the military government confiscating their property were improper and illegal. Moreover, the Commission found, “the effects of the confiscation of President Árbenz’s property have remained constant over time,” making the human rights violation one of a continuing nature, before and after Guatemala signed into the system.¹⁵

The Árbenz family sought legal representation from the Human Rights Clinic during the summer of 2006. In a working meeting at the IACHR on October 20, 2006, the parties agreed to begin efforts to reach a possible friendly settlement of the case. The case moved forward on two tracks, one pursuing the ongoing litigation on the merits and one seeking ways to settle the matter to the satisfaction of both parties. This resulted in ongoing correspondence with the Guatemalan government’s human rights office, as well as a series of meetings over the next five years, formal and informal, at the Commission.

A friendly settlement was reached in the spring of 2011, and an agreement embodying that decision was signed on May 19, 2011, in a meeting that took place at the Commission’s headquarters in Washington. The State recognized its international responsibility for “failing to comply with its obligation to guarantee, respect, and protect the human rights of the victims to a fair trial, to property, to equal protection before the law, and to judicial protection, which are

¹⁴ *Arbenz v. Guatemala*, Report No. 27/06, March 14, 2006, available at <www.cidh.oas.org/annualrep/2006eng/GUATEMALA.569.99eng.htm>, visited on 3 July 2012.

¹⁵ *Id.* at ¶¶ 44-46.

protected in the American Convention on Human Rights and which were violated against former President Juan Jacobo Árbenz Guzmán, his wife and his children.”¹⁶

The agreement is unique in providing multiple forms of reparations for the next of kin of President Árbenz. All are firmly grounded in the principles set out in the first section of this paper: the right to know and the restoration of historical memory, as well as family honor and dignity. The agreement included a commitment by the government to hold a public ceremony recognizing its responsibility and to present a letter of apology to the next of kin; to name a hall of the National Museum of History and the highway to the Atlantic after the former president; to revise the basic national school curriculum; to establish a degree program in Human Rights, Pluriculturalism, and Reconciliation of Indigenous Peoples; to hold a photographic exhibition on President Árbenz and his legacy at the National Museum of History; to recover the wealth of photographs of the Árbenz family; to publish a book of photos; to reissue a biography on President Árbenz by his wife; and to prepare and publish a new biography of the former President and issue a series of postage stamps in his honor.¹⁷

All of these remedies are relevant to the Armenian genocide for at least four significant reasons. First, the settlement was truly friendly. The passage of time, from 1954 to the present, had changed the composition and demeanor of the Guatemalan government and made it more disposed to recognize its historical error in the overthrow of the Árbenz government. The settlement was a win-win remedy, with all parties satisfied with the agreed outcome, as contrasted with the winner-take-all outcomes of contentious litigation, which might have proceeded, at great cost to all, in the Inter-American Court of Human Rights.

¹⁶ By agreement of the parties, the agreement itself remains confidential. See, Inter-American Commission on Human Rights, Press Release, *IACHR Satisfied with Settlement Agreement in Arbenz Case Involving Guatemala*, May 20, 2011.

¹⁷ *Ibid.*

Second, as noted above, the agreement made concrete many elements of what the law and principles of human rights remedies calls “satisfaction.” These non-monetary remedies were available not through adjudication but through the creativity of the family and the Guatemalan government in designing its elements. Third, and perhaps most important, the non-monetary reparations not only made clear the acceptance of state responsibility, but made concrete the ways in which human rights remedies could restore historical memory and dignity, both of which had been effectively erased from Guatemalan culture.

Fourth, many scholars would argue that these remedies are more extensive than what has been the historical willingness of the European Court of Human Rights to apply a similar model of reparations in this region. And yet, there is no impediment to the European Court’s application of Article 41’s “just satisfaction” provision to violations of the European Convention, particularly under the new pilot judgment procedure set out in the following section.

3. The European Court of Human Rights Pilot Judgment Program: *Broniowski v. Poland* as a Possible Model for the Armenian Genocide

In 2004, the European Court of Human Rights began a new procedure to deal with its now prodigious backlog of pending cases, many of which involve Turkey.¹⁸ The friendly settlement decision in one of the early pilot judgment cases, *Broniowski v. Poland*,¹⁹ provides a possible model to deal with the Armenian genocide, extending the rationale and creativity of

¹⁸ Philip Leach, Helen Hardman & Svetlana Stephenson, ‘Can the European Court’s Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? Burdov and the Failure to Implement Domestic Court Decisions in Russia,’ 10 *Human Rights Law Review* 346 (2010). Further support for this view of the powers of the European Court is suggested in Valerio Colandrea, ‘On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdovic Cases,’ 7 *Human Rights Law Review* 396 (2007); and more generally in Thomas Antkowiak, ‘An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice,’ 47 *Stanford Journal of International Law* 279 (2011).

¹⁹ *Broniowski v. Poland*, App. No. 31443/96, Just Satisfaction/Friendly Settlement, 29 Sept. 2005, reported at <sim.law.uu.nl/sim/caselaw/Hof.nsf/e4ca7ef017f8c045c1256849004787f5/b9159ec7b98e456cc1257088002e1bdc?OpenDocument>, visited on 3 July 2012.

reparations outcomes from the *Arbenz* case into Europe. The settlement provides that Poland accept its responsibility to a group estimated at 80,000 victims of lost property, abandoned between 1944 and 1953 in the Bug River region of Poland after the Nazi invasion of World War II. The Polish government had passed a new law in July of 2005, setting the ceiling for compensation to victims of the Bug River property loss at 20 per cent of its original value, thus attempting to avoid the financial burdens of its historical responsibility to those victims who had lost property so many years ago. By taking this contemporary action in violation of human rights, the government had given validity to the historical wrong, thus extending its responsibility back through history to the 1940s and '50s.

As part of the friendly settlement on behalf of the collective group of victims, the Polish Government undertook the following:

- to implement as rapidly as possible all the necessary measures in terms of domestic law and practice to secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu;
- to intensify their endeavors to make the new Bug River legislation effective and to improve the practical operation of the mechanism designed to provide the Bug River claimants with compensation;
- to ensure that the relevant State agencies do not hinder the Bug River claimants in enforcing their "right to credit"; and
- to make available to the remaining Bug River claimants some form of redress for any material or non-material damage caused to them by the defective operation of the Bug River legislative scheme.²⁰

The analogy of this case to the Armenian losses in Turkey should be obvious. If, as in the *Broniowski* and *Arbenz* cases, one can find a parallel contemporary wrong that perpetuates the historical wrong of Turkey against the Armenians, an effective and full remedy could be found in the European Court of Human Rights. On the second day of the conference in Beirut, Turkish historian Prof. Akçam Taner, from Clark University in the United States, described his historical

²⁰ Council of Europe, Press Release, *European Court of Human Rights - Grand chamber Friendly Settlement judgment Broniowski v. Poland* 496(2005), at <wcd.coe.int/ViewDoc.jsp?id=923573&Site=COE>, visited on 3 July 2012.

research showing that the Turkish government used the ruse of telling victims of property losses during the genocide that they were holding the property “in trust” for them. If this fabrication were to be challenged in contemporary Turkish courts, the scenario of *Broniowski* might be replicated.

4. Conclusion

The Armenian genocide occurred long ago, and is largely forgotten in the everyday life of Europeans and Americans, but it lives on in the memories of the victims, whose losses were devastating, both financial and emotional, as well as prolonged diaspora. The regime of human rights provides a structure by which memory can be restored and preserved; the structures of the principles set out here make clear that it is the role of human rights law never to forget. It is true, as set out above, that human rights law does not deal well with mass atrocity in practice. Perhaps mass atrocity itself challenges our conceptions of justice, whether retributive or restorative.²¹ It is our responsibility, however, to fashion adequate and effective reparations for human rights victims, even when, by historic inaction and denial, they cannot be prompt. In time, justice calls for action.

²¹ My U.S. colleague, Prof. Naomi Roht-Arriaza, wrote a perceptive article on this issue in 2004. Naomi Roht-Arriaza, ‘Reparations Decisions and Dilemmas,’ *27 Hastings International and Comparative Law Review* 157 (2004). During my presentation in Beirut, I offered her three models of collective reparation after mass atrocity: reparation for development, reparation as community-level acknowledgement and service, and reparation as preferential access. *Id.* at 185 et seq. I will not develop the models here as I did there, but believe they too provide valuable tools to the Armenian community in constructing an effective and adequate reparations regime.