

The United Nation's Human Rights Council in Geneva reviews the human rights record of the United States on the 5th of November 2010, on the occasion of the Ninth Session of the Universal Periodic Review (UPR), 1 to 12 November 2010. The following is a presentation given by Prof. Alfred De Zayas in Geneva on 3 November.



Prof. Alfred De Zayas

Professor ALFRED DE ZAYAS is an American like Ramsey Clark, an American who wants to see his Government at the vanguard of human Rights, who wants to see his country set an example. DE ZAYAS is an activist for the Human Right to Peace, for the right of self-determination, for the right of freedom of opinion and expression, for justice in Iraq and Afghanistan. For 22 years he was a senior lawyer with the United Nations, serving as secretary of the Human Rights Committee and Chief of Petitions at the Office of the United Nations High Commissioner for Human Rights. He is the author of 7 books and co-author with Justice Jakob Th. Möller of the handbook UNITED NATIONS HUMAN RIGHTS COMMITTEE CASE LAW, published last year with N.P. Engel in Strasbourg.

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Ramsey Clark and Prof. De Zayas

SUMMARY OF HIS 20-MINUTE STATEMENT

All human rights derive from human dignity, and human dignity encompasses many fundamental rights that are seldom written about -- these are the right to identity, the right to one's culture, the right to truth, and the right to a Remedy when one's rights have been violated.

this morning I will endeavor to revisit the applicable norms when it comes to recognition of the individual and collective right to a remedy. And when I say remedy I mean both the judicial and/or administrative mechanism to demand reparation, the obligation of every country under the rule of law to provide access to such mechanisms and the obligation to implement decisions on reparation.

Article 2 of the International Covenant on Civil and Political Rights stipulates:

" 1. Each State Party to the present Covenant undertakes to respect and to

ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

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

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

(c) To ensure that the competent authorities shall enforce such remedies when granted."

This article engages the State to do a number of things. It must create a mechanism of redress, and it must make sure that judgments are enforced. Some States parties to the ICCPR still do not have the proper mechanisms and some of them try to weasel out of their responsibility by claiming that the ICCPR is not self-executing.

I believe that in the case of the United States of America, Article VI of the US Constitution requires us to give effect to international treaties. The United States ratified the ICCPR in 1992 and by now one would expect that all of its provisions have been transformed and incorporated into domestic U.S. law, thus allowing claims concerning human rights violations to be justiciable.

The Principle of reparation for violations of international law, including human rights law, is not a new normative development attributable to the

work of the League of Nations, or of the United Nations or of the International Law Commission. The obligation to make reparation for violations of international law is *a general principle of law* as referred to in article 38, paragraph 1c of the Statute of the International Court of Justice.

Already the Permanent Court of International Justice stated in its 1928 Judgment in the *Chorzow Factory Case*^[1]:

“It is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation.”

Similarly, article 31 of the International Law Commission's Draft Articles on State Responsibility, which essentially reflect pre-existing international law, stipulates that “the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”

Article 34 stipulates further that “full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation or satisfaction, either singly or in combination.”

More concretely, in the Iraqi case, where enormous destruction was visited on the cultural heritage of thousands of years, the Hague Convention for the Protection of Cultural Property of 1954^[2] and its Protocols give us guidance.

Among other general principles of law that apply in the context of the obligation to make reparation are the principle of “good faith”, the prohibition of “unjust enrichment” the rules on “estoppel”, the principle “*ex injuria non oritur jus*”, which provides that no rights can be derived from a prior violation of law.

Law, however, is not mathematics. And the norms – as good as they may look on paper – are certainly not equivalent to their enforcement. On the other hand, the non-enforcement of norms, even for a prolonged period of time, does not detract from their validity.

As far as compensation is concerned, Article 36 of the Articles on State Responsibility^[3] stipulate the obligation of a State “to compensate for the damage caused ... insofar as such damage is not made good by restitution.”

As far as satisfaction is concerned, Article 37 stipulates “The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by the act insofar as its obligation cannot be made good by restitution or compensation. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.”

In this connection it is useful to recall that in 1993 President Bill Clinton issued an apology^[4] to the people of Hawaii for the crimes and abuses committed in connection with the overthrow of the legitimate government of the Hawaiian Queen one hundred years earlier, in 1893.

Similarly, on 13 February 2008 the Prime Minister of Australia Kevin Rudd issued an apology to the Aborigines of Australia for the injustices visited upon them. It should be noted that title to huge areas of Australia has been returned to the Aborigines, who are now administering these territories in cooperation with Australian authorities.

Thus, even “historical inequities” can be partly redressed provided that there be a modicum of good will. Indeed, over the past decades the various governments of Germany have issued countless apologies to the governments and peoples of Poland, Czechoslovakia, Belgium, the Netherlands, France, etc. in connection with the Holocaust. Germany has also made meaningful reparation in the form of both restitution and compensation to the survivors of the victims of the genocide.

In order to obtain reparation, the Iraqis who suffered violations of their rights in connection with the 1991-2003 sanctions regime, or in connection with the illegal war of 2003 (I recall that Kofi Annan in more than one occasion referred to the Iraq War as an illegal war)

should also appeal to international solidarity and to the *erga omnes* obligation not to recognize the effects of war crimes and crimes against humanity.

As to *erga omnes* obligations, one recalls Article 10 of the United Nations Draft Declaration on the Illegality of population transfers of August 1997 stipulates:

“Where acts or omissions prohibited in the present Declaration are committed, the international community as a whole and individual States, are under an obligation: (a) not to recognize as legal the situation created by such acts; (b) in ongoing situations, to ensure the immediate cessation of the act and the reversal of the harmful consequences; (c) not to render aid, assistance or support, financial or otherwise, to the State which has committed or is committing such act in the maintaining or strengthening of the situation created by such act. “[5]

Of particular relevance to the Iraqis are the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly in its Resolution 60/147 of 16 December 2005.[6]

Section VII, paragraph 10 of the Basic principles stipulates: “Remedies ... include the victim’s right to the following as provided for under international law:

“(a) Equal and effective access to justice

(b) Adequate, effective and prompt reparation for harm suffered,

(c) access to relevant information concerning violations and reparation mechanisms.”

Section IX, paragraph 15 stipulates:

“ 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. “

Paragraph 16 stipulates:

“States should endeavour to establish national programmes for reparation and other assistance to victims.”

Paragraph 17 stipulates:

“States shall, with respect to claims of victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgments”

Paragraph 19 stipulates:

“Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. “

Paragraph 20 stipulates:

“Compensation should be provided for any economically assessable damage as appropriate and proportional to the violation and the circumstances of each case... such as “(a) physical or mental harm, (b) lost opportunities, including employment, education and social benefits, (c) material damages and loss of earnings, including loss of earning potential; (d) moral damage; (e) costs required for legal or expert assistance, medicine and medical services and psychological and social services.”

Section XI is of particular relevance. Paragraph 25 stipulates “the application and interpretation of these Basic Principles and guidelines must be consistent with international human rights law and be without any discrimination of any kind or on any ground, without exception.”

These provisions, however, are only what is termed soft law. It is for international solidarity and for the Human Rights Council to strengthen the justiciability of claim of human rights violations.

I do not underestimate the obstacles in obtaining reparation for the injuries suffered in connection with the Iraqi sanctions and the subsequent war and occupation. One problem is that of non-self-executing international norms. This is why Austria and Germany have adopted laws related to the restitution of objects to victims, as has the United States in the form of its Law on Restitution for the World War II Internment of some 120,000 Japanese-Americans and Aleuts. It is the responsibility of politicians to propose such legislation in Congress.

Before finishing this short introduction, I should mention the possibility of entrusting the United Nations with the responsibility to administer a Special Fund for Iraqi Victims. Already the Office of the UN High Commissioner for Human Rights administers several funds, e.g. for the Victims of Torture, and this experience would provide a blueprint for an Iraqi United Nations Fund.

[1] Publications of the Permanent Court of International Justice
Series A - No. 9; Collection of Judgments
A.W. Sijthoff's Publishing Company, Leyden

[2] <http://www.icrc.org/ihl.nsf/FULL/400?OpenDocument>,
<http://www.unesco.org/new/index.php?id=19138&L=0>
http://www.unesco.org.uk/convention_for_the_protection_of_cultural_property_in_the_event_of_armed_conflict_%281954%29

[3] Adopted in second reading 2001.
untreaty.un.org/ilc/texts/instruments/.../9_6_2001.pdf

[4] Resolution 19, 103d U.S. Congress, 23 November 1993. <http://www.hawaii-nation.org/publawall.html>

[5] E/CN.4/Sub.2/1997/23.

[6] <http://www2.ohchr.org/english/law/remedy.htm>