

University for Peace
Universidad para la Paz

Department of International Law and Human Rights

Independent Studies Paper

Ramiro Oscar Barriga Machicao

**Analyzing the Inter-American Court on Human Rights reparations:
A comparative Analysis on Forced Disappearances case-law**

28 June 2010



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The Inter-American Court of Human Rights plays an important role dealing with different human rights violations in the Latin American region. Some of the violations it deals with are related to countries that suffered during periods of repressive governments. One of the common human rights violations occurred during those times was the crime of forced disappearances of persons. The Court has dealt with these cases since its beginnings and has evolved greatly. It became one of the most coherent and advanced human rights entities in the world by granting reparations for victims and their relatives. Nevertheless, this study is dedicated to observe, in a sample of cases, the evolution and some of the critical aspects, as well as deficiencies of the resolutions of the Court on reparations regarding forced disappearances. Also, this study pretends to show how the Court is perceived by key actors of the Inter-American system when it comes to address justice for victims of past human rights violations, and how its resolutions to preserve and protect human rights can be improved.

This Independent Studies Paper is submitted in partial fulfillment of the requirements for the degree of Master of Arts in International Law and Human Rights.

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Introduction

Latin American history has been marked by dark periods of authoritarian and military governmental regimes that ruled most of the Latin American countries since the mid 1960s until 1990s. The weakness of democracy as an institution in Latin America and the United States' desire to contain the spread of Communism in the Western Hemisphere contributed to decades of human rights violations.¹ The majority of countries had incapable governments with little or no control over the armed forces.²

During this period of time, in many countries of the region the “national security doctrine” has been implemented by the military and their supporters to justify its accumulation of decision-making authority in non-accountable hands. This doctrine was characterized by “*lack of transparency, destruction of institutions of control, and domination of public opinion through the media which led to the commitment of grotesque forms of massive and systematic human rights violations against civil society,*”³ mainly by committing crimes such as forced disappearances, torture, extrajudicial killings, and arbitrary detentions.

After 1980, gradually this situation started to change. Part of the change was seen by the bolder demands of the civil society movements that made the military-dominated regimes increasingly unstable. As a consequence, those governments changed in a relatively short period

¹ LOGAN, Sam; GARRET, Stephen A. *Truth Commissions in Latin America: An analysis of Truth Commissions in Argentina, Brazil, and Chile* (Monterrey Institute of International Studies) on line at: http://sand.miiis.edu/research/documents/logan_truth.pdf [Last viewed 25 June 2010]

² MÉNDEZ, Juan; and MARIEZCURRENA, Javier. *Human Rights in Latin America and the Caribbean: A Regional Perspective*. A paper submitted to the Human Right Development Report 2000 “Human Rights and Human Development.” On line at <http://hdr.undp.org/en/reports/global/hdr2000/papers/mendez2000.pdf> [Last viewed 24 may 2010]

³ *Id*, MÉNDEZ, Juan, *et.al.* pp 2. *See also.* Op.cit. 1. National Security Doctrine consisted that “*Socialist or “pink” executive administrations and mass popular organizations constituted threats to national sovereignty from within.*”

of time to a series of transitions to democracies in almost every country in the region.⁴ Many of the victims and victims' relatives started to search answers to the "why" and "how" and Latino civil society has sought to rectify the past by investigating, reporting the truth,⁵ and to prosecute the responsible for the crimes committed.

The end of dictatorial regimes and State sponsored political repression, involves multilayered mechanisms of transition, which include for example; the implementation of truth commissions, criminal prosecutions against former military governmental officials at local level. However, domestic systems have been limited or unwilling to respond to such situations as international human rights law requires them to do so. This deficit has forced universal and regional systems of human rights protection to deal with increasing numbers of complaints of alleged gross human rights violations occurred in repressive times.⁶

The 1969 American Convention on Human Rights (which came into force in 1978) developed a new important mechanism for the region to address human rights violations; the Inter-American Court of Human Rights, which for the first time has the subsidiary attribution to held States that have ratified the American Convention accountable for their past actions with binding resolutions.⁷

⁴ *Id*, MÉNDEZ, Juan, *et.al.* pp 3.

⁵ Op.cit. I. LOGAN, Sam, *et.al.* pp 3.

⁶ SANDOVAL-VILLALBA, Clara. *The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court on Human Rights: A Commentary on their Implications for Reparations.* In FRESTMAN, Carla; GOETZ, Mariana; and STEPHENS, Alan (eds.), *Reparations for Victims of Genocide, War Crimes, and Crimes Against Humanity: Systems in Place and Systems in the Making.* (ed. Martinus Nijhoff Publishers. Boston, 2009) pp 243.

⁷ FARER, Tom. *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox.* In HARRIS, David; and LIVINGSTONE, Sthepen (eds.), *The Inter-American System of Human Rights* (ed. Clarendon Press: Oxford, 1998) pp 62. *See also.* ORGANIZATION OF AMERICAN STATES. *American Convention on Human Rights.* "Pact of San Jose of Costa Rica." 22 November 1969, Articles 61-65.

Relevance of the topic

The Inter-American system is one of the three existing regional systems of human rights protection (among the European, and African) that coexist with the universal treaty-based and non-treaty based mechanisms in the world. Of these systems, the Inter-American one has played a crucial role in dealing with gross human rights violations and granting advanced reparations.⁸

In this context, it is possible to say that:

“The Inter-American Court has contributed to the development of international law with ground-breaking jurisprudence on the legal treatment of different human rights violations, and has also developed what is considered to be the most coherent and solid approach to reparations for gross, widespread, and systematic human rights violations in international human rights law today.”⁹

One of the most common situations that the Court has to deal with is the crime of “forced disappearance” and it has developed standards for protection and reparations programs that helped to restore peace, and to establish patterns for the protection of human rights in Latin American region.

⁸ Op.cit Note 1. MÉNDEZ, Juan, *et al.* pp 14.

⁹ Op.cit Note 4, SANDOVAL-Villalba, Clara, *et.al.* pp 244.

The crime of forced disappearance has been committed by repressive and authoritarian military regimes as a systematic and widespread phenomenon in many Latin American countries affecting thousands of persons and their families over the time.¹⁰

Thesis statement

In this independent study, it will be observed the evolution that the Inter-American Court has shown on its forced disappearances reparations resolutions during its historical development, and it will be discussed about some Inter-American Court reparations decisions that show critical deficiencies that may affect its development and effectiveness for the future, and it will be argued the necessity of the Court to strengthen its decisions to maintain its high perception of legitimacy and effectiveness.

¹⁰ CEJIL. *Forced Disappearance of Persons in the Inter-American System of Human Rights*. CEJIL Gazette No 32. 2009. [Proper Translation.] On line at: http://cejil.org/sites/default/files/Gaceta_32_sp.pdf [Last viewed 26 June 2010]. *See also*. The crime of forced disappearance is recognized by different international legal instruments such as the: UN. G.A. *Resolution 133*. Session 47. ***Declaration on the Protection of All Persons from Enforced Disappearance***. 18 December 1992. Article 1 “Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field (...) Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, *inter alia*, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.” *See*. UN. G.A. ***International Convention for the Protection of All Persons from Enforced Disappearance***, 20 December 2006. Article 2 For the purposes of this Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.” *See also*, ORGANIZATION OF AMERICAN STATES. General Assembly, ***Inter-American Convention on Forced Disappearance of Persons***, 9 July 1994. Article 2, For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

Fields of study

This paper will be based mainly on the **international human rights law** field, which has been widely accepted as:

“[t]he fundamental norms of human rights that everyone should respect and protect at the universal, regional, and particular laws adopted by States which formally protect human rights. While international treaties and customary law form the backbone of international human rights law and other instruments, such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation and development (...) By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfill human rights.”¹¹

The focus of this study will be based on the right to reparations established in the Article 63(1) of the American Convention.¹² It will be also focused to review how the Inter-American Court has interpreted this article and ordered States to take effective action to remedy victims and relatives that suffered the crime of forced disappearances.

¹¹ OHCHR. *International Human Rights Law*. On line at:

<http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx> [last viewed 26 may 2010]

¹² ORGANIZATION OF AMERICAN STATES. ***American Convention on Human Rights***. “Pact of San Jose of Costa Rica,” 22 November 1969. Article 63(1) “If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”

The second main field of this study will be the field of **transitional justice**,¹³ understood as it follows:

*“Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. It emerged in the late 1980s and early 1990s, mainly in response to political changes in Latin America and Eastern Europe-and to demands in these regions for justice. At the time, human rights activists and others wanted to address the systematic abuses by former regimes but without endangering the political transformations that were underway. Since these changes were popularly called “transitions to democracy,” people began calling this new multidisciplinary field “transitional justice.”*¹⁴

The majority of Latin American countries that have experienced military and authoritarian regimes are facing claims about forced disappearances committed during those times -which does not exclude that this crime could be committed at any time. However, this paper will explore reparations granted by the Inter-American Court on forced disappearances cases occurred during repressive times, and how those reparations play an important role as a mechanism of transitional justice in Latin America trying to address victim’s perspectives of truth and justice of past violations of human rights.

¹³ U.N. SC Report. “*The rule of law and transitional justice in conflict and post-conflict societies*” Report of the Secretary-General. S/2004/616 (23 August 2004,) pp. 4. para 8. The concept of “transitional justice” used in this paper “*comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both, judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.*” See also, International Center for Transitional Justice Center. *What is Transitional Justice?* 2008. On line at: http://www.ictj.org/static/TJApproaches/WhatIsTJ/ICTJ_WhatIsTJ_pa2008_.pdf [last viewed 26 May 2010]

¹⁴ *Id.* International Center for Transitional Justice Center *et.al.*

Methodology

This paper will use the method of comparative analysis in order to observe the evolution of the Inter-American Court reparations decisions over the time. Due to the word limit to do this paper makes it impossible to analyze all reparations resolutions of the Inter-American Court history. Therefore, this paper will use judgments from different periods of time and also from different compositions of the Court members, which will help to analyze the advances and deficiencies and compare them one from another as a sample of the general Inter-American case-law study.

Besides, key actors will be interviewed with the purpose to obtain specific information about the evolution of the Court's decisions on their own words. The chosen persons are those involved on the litigation of cases representing victims behold the Inter-American Court, victim's relatives, and a current judge from the Inter-American Court of Human Rights.

Literature Review

This paper will use historical and theoretical documents and books written by specialists in transitional justice, and also specialists on international human rights law field who had addressed reparations studies. It will also consider official documents such as UN human rights reports and documents to set definitions and standards which will be used throughout the study. Nonetheless, the major part of the independent study is based on the constant jurisprudence elaborated by the Inter-American Court on Human Rights on forced disappearances cases, which will give a broad understanding of the aim of this analysis.

Structure of the Project

First, this paper will provide the reader a broad understanding of the reparations meaning, its historical roots and evolution, its legal framework, and its application by different tribunals and courts addressing transitional justice. Primarily it was important to situate the origins of the reparations concept and its development and evolution on the international human rights law field (Chapter I.)

Secondly, it will be developed the role of the Inter-American Court on human rights awarding reparations, its legal background, and the different modalities of reparations ordered for Latin American countries (Chapter II.)

Thirdly, it will present an important analysis of the Inter-American case-law from different periods of time and its evolution giving a comparative analysis trying to develop and show the main critical aspects of the Inter-American Court on human rights, showing its advances and deficiencies (Chapter III.)

Finally, this paper will analyze how the critical aspects developed on Chapter III could affect litigation and new reparations developments in future from the perspective of persons involved on the field, and it will conclude with the critical analysis of the subject as a whole (Chapter IV.)

Chapter I

Reparation as a Transitional Justice mechanism

The discussion about reparations and its development have arisen in post-conflict situations, mostly after transitions from military dictatorships and other authoritarian regimes, generally toward a more democratic rule. Nowadays, States around the world are facing the enormous challenge of how to repair their past wrongdoings¹⁵ in order to address truth and justice for victims and relatives of human rights violations and also to restore victims' personal dignity. According to this; national and international Courts, and increasingly Truth Commissions play an important role developing the right of truth, and reparations for past human rights violations.

The aim of this study – the Inter-American reparations- could not be dealt without understanding reparations historical roots and evolution in context, its location on the international human rights law framework, and its appliance on international human rights law field.

Understanding Reparations as a concept

The term “reparation” has been conceptualized as:

“[a] moral imperative that seeks to mend what has been broken. It can contribute to the individual and societal aims of rehabilitation, reconciliation, consolidation

¹⁵ PARMENTIER, Stephan, and DE FEYTER, Koen. *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*. Introduction (eds. BOSSUYT M, and LEMMENS P. Intersentia Antwerpen-Oxford 2005,) pp 1.

*of democracy and restoration of law. It can also help to overcome traditional prejudices that have served to marginalize certain sectors of society and contribute to the crimes perpetrated against them will not be repeated again. It is also a legal right owed to survivors.”*¹⁶

The right to remedy is part of international law body and it is contained in global¹⁷ and regional¹⁸ human rights treaties. Also in humanitarian law instruments,¹⁹ and in international criminal law, even the Statute of the International Criminal Court makes provision for the award of reparations to victims of international crimes.²⁰

The law of state responsibility enshrines the underlying principle that every breach of an international obligation attributable to a state carries with it a “duty” to repair the harm caused.²¹

¹⁶ FRESTMAN, Carla; GOETZ, Mariana; and STEPHENS, Alan. *Reparations for victims of Genocide, War Crimes, and Crimes Against Humanity: Systems in Place and Systems in the Making*. (ed. Martinus Nijhoff Publishers, Leiden. Boston, 2009.) pp 9.

¹⁷ UN G.A. **International Covenant on Civil and Political Rights. (ICCPR.)** 2200 A [XXI] 16 December 1966. Contains separate articles on remedies, addressing the right of access to an authority competent to afford remedies and the right to an effective and enforceable remedy in Art. 2(3), while Arts. 9(5) and 14(6) provide that anyone unlawfully arrested, detained, or convicted shall have an enforceable right to compensation or be compensated according to law. *See*. The **Convention on the Elimination of Racial Discrimination** on its Article 6, and the **Convention on the Elimination of All Forms of Discrimination against Women**, Article 2(c) contain broad language on remedies. The UN **Convention against Torture** refers on its Article 14 to redress and compensation for torture victims. Several treaties refer to the right to legal protection for attacks on privacy, family, home or correspondence, or attacks on honor and reputation. The **ICCPR**, Article 17, **Convention on the Rights of the Child**, Article 16. *See also*, non-treaty texts include **Universal Declaration of Human Rights**, Article 12, and **American Declaration of the Rights and Duties of Man**, Article V. Among treaties adopted by the specialized UN agencies, the International Labor Organization **ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries**, refer to “fair compensation for damages” Article 15(2) “compensation in money” Article 16(4) and fully compensation for “any loss or injury.”

¹⁸ COUNCIL OF EUROPE. **Convention for the Protection of Human Rights and Fundamental Freedoms**. As amended by Protocols No 11 and 14. Rome 4.XI.1950. Articles 13, 41. *See also*, the **American Declaration of the Rights and Duties of Man**, Article XVII. **American Convention on Human Rights**, Art. 1(1), 10, 63(1). **African Charter on Human Rights Peoples’ Rights**, Art. 7, 21, 26.

¹⁹ INTERNATIONAL COMMITTEE OF THE RED CROSS. **Convention (IV) respecting the Laws and Customs of War on Land and its annex**: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Article 3 obliges contracting parties to indemnify for a violation of the regulations. Similarly, Protocol I to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts that any party to a conflict who violates the provisions of the Geneva Conventions or the Protocol “shall...be liable to pay compensation.”

²⁰ INTERNATIONAL CRIMINAL COURT. **Rome Statute of the International Criminal Court**. A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002, Article 75.

²¹ P.C.I.J. *The Factory at Chorzow (Jurisdiction)*, Ser. A, No 9, at 21 (July 26, 1927) “[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.” Reaffirmed in the ICJ. Advisory

In general, reparations aim at “full restitution” (*Restitutio in integrum*) which means restoration of the victim to the condition that was before the violation occurred.²² In cases where this is not possible, such as cases in which the victim has been killed or disappeared without knowing their whereabouts, compensation is required.²³

In addition; declarations, resolutions and other non-treaty texts adopted by the United Nations human rights Charter-Based, and treaty bodies also addresses the right to a remedy.

In 2005, the United Nations Commission on Human Rights adopted the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*,²⁴ marking a landmark in the long process towards the framing of victim-orientated policies and practices coinciding with an increasing awareness of the prevalence of victim’s rights.²⁵ According to this principles and guidelines, the notion of reparation can encompass a vast array of measures such as: restitution,²⁶

Opinion. *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep. 1949. para 184. The ICJ has indicated that “the basic principle of reparation articulated in the *Chorzow Factory case* applies to reparation for injury to individuals, even when a specific jurisdictional provision on reparation is contained in the statute of a tribunal.” See also, United Nations, Economic and Social Council, 45th Session, *Study Concerning the Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*: Final report prepared by Theodor Van Boven, 2 July 1993, U.N. doc. E/CN.4/suh.2/1993/8.

²² I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, paras 26-27. Since its first judgment the Inter-American Court established that: *Reparation of harm brought about by the violation of an international obligation consists in full restitution (restitutio in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm. (...) As to emotional harm, the Court holds that indemnity may be awarded under international law and, in particular, in the case of human rights violations. Indemnification must be based upon the principles of equity.*

²³ I/A Court H.R., *Case of Aloeboetoe et al. v. Suriname*. Reparations and Costs. Judgment of September 10, 1993. Series C No. 15, paras 46-47.

²⁴ 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* : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, available at: <http://www.unhcr.org/refworld/docid/4721cb942.html> [accessed 25 May 2010]

²⁵ VAN BOVEN, Theo. *Victims’ Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines*. In FERSTMAN et al. (eds.) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Martinus Nijhoff Publishers, Leiden Boston 2009,) pp. 19-40.

²⁶ *Id.* Article 19: Restitution

compensation,²⁷ rehabilitation,²⁸ satisfaction,²⁹ and guarantees of non-repetition (See definitions below on Chapter III.)³⁰

Consequently, under international human rights law wherever States have violated duties there is a clear legal obligation to repair.³¹ Failure to provide a remedy constitutes a separate breach of the treaty, additional to the original violation.³² Interpreting this legal development, the right of victims of human rights violations to receive reparations is now widely acknowledged as a general matter and customary international law.³³

In general, reparation is formulated as an individual entitlement, flowing from an individualized conception of harm, and the obligation to repair individuals under international law resides with the state.³⁴

Historical development of reparations

In former international law, States were the only subjects of international law and insofar as wrongful acts were committed and remedies instituted, this was a matter of inter-state

²⁷ *Id.* Article 20: Compensation

²⁸ *Id.* Article 21: Rehabilitation.

²⁹ *Id.* Article 22: Satisfaction.

³⁰ *Id.* Article 23: Guarantees of non repetition.

³¹ Op.cit. Note 21. P.C.I.J. *The Factory at Chorzow (Jurisdiction)*, Ser. A, No 9, at 21 (July 26, 1927). *et.al.*.

³² I/A Court H.R., *Case of Velasquez-Rodríguez v. Honduras*. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para 91.

³³ I/A Court H.R., *Case of Aloboetoe et al. v. Suriname*. Reparations and Costs. Judgment of September 10, 1993. Series C No. 15, para 43.

³⁴ SARIS, Anne, and LOFTS, Katherine. *Reparations Programmes: A Gendered Perspective*. In FRESTMAN, Carla *et al.* (eds) *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*. (Ed. Martinus Nijhoff Publishers: Leiden Boston, 2009,) pp 83.

relations and inter-state responsibility.³⁵ By then, victims of international human rights violations did not had a voice beyond that of a witness, nor the right to demand reparations for what happened to them or to their relatives.³⁶

The progressive recognition of the status of individuals under international law, owed in large part to the developments in international human rights law since the Second World War, has impacted on the concept and progressive application of the principle and right of reparation in a number of fundamental ways.³⁷

Before that happens, the end of World War I raised the question of the meaning of “reparatory justice.” The “Treaty of Versailles” attributed the crime of “aggressive war” and led the peace settlement made Germany responsible for “total war guilt” concluding with Germany’s agreement to pay huge reparations to the Allies. The terms in which reparations was given was not in the Allies “right,” but rather, in terms of Germany “duty.”³⁸

³⁵ Op.cit Note 14. FRESTMAN, Carla, *et al.* Cfr. VAN BOVEN, Theo. *Victims’ Rights to a Remedy and Reparation: The new United Nations Principles and Guidelines*.

³⁶ Judge ODIO-BENITO, Elizabeth. *Foreword*. In FRESTMAN, Carla *et al.* (eds,) *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (ed. Martinus Nijhoff Publishers: Leiden Boston, 2009,) pp 1.

³⁷ CANÇADO TRINIDADE, Antônio A. “El Reglamento de la Corte Interamericana de Derechos Humanos (2000) y su proyección hacia el futuro: La emancipación del ser humano como sujeto del derecho internacional,” [Proper translation] in Cançado, Antonio and Manuel, Ventura (eds.), *El futuro de la Corte Interamericana de Derechos Humanos*, (Corte Interamericana de Derechos Humanos-Alto Comisionado de las Naciones Unidas para los Refugiados: San José, 2004,) pp 64.

³⁸ PEACE TREATY OF VERSAILLES. *Reparations*. Part VII. Arts. 231-247. Section I. Art. 231. On line at: <http://net.lib.byu.edu/~rdh7/wwi/versa/versa7.html> “The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.”

According to the treaty's war-guilt clause, all responsibility for the war was to be shouldered by Germany. Nonetheless, despite the treaty's settlement of total liability conceded the problem of the scarcity of resources.³⁹

After the end of World War II, the Western Allies placed the responsibility for the reparation of the war damages in the hands of the newly constituted German Federal States. Following a few stages, the Federal Republic of Germany enacted the "Final Federal Compensation Law" on 14 September 1965. Thus, indemnification for persecution of persons was differentiated from restitution of lost property.⁴⁰ Under the principle of "Wiedergutmachung" (that means to make something good again,) used to make amends for their suffering during the Nazi regime, reparations were only concerned with monetary matters. However, by this time the designated beneficiaries of the reparations were not a triumphant nation but, instead, the citizens of Israel, represented by the beneficiary nation.⁴¹

The Post World War II payments changed dramatically the concept of reparations. As an example, the Statute of the International Military Tribunal of Nuremberg created enormous developments in international law extending the norms relating the law of war beyond international sphere to apply to States' internal conflicts. At the war's end, the 1949 the Geneva Conventions spurred the development of international humanitarian law, contemplating

³⁹ TEITEL, Ruti G. *Transitional Justice*. Chap 4. Reparatory Justice (ed. Oxford University Press: New York, 2000,) pp 122.

⁴⁰ DANIELI, Yael. *Massive Trauma and the Healing Role of Reparative Justice*. In FRESTMAN, Carla *et al* (eds,) *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*. (ed. Martinus Nijhoff Publishers: Leiden Boston, 2009,) pp 57.

⁴¹ Op.cit. Note 39. TEITEL, Ruti G. *et.al.* pp 123.

reparations for violations of civilian's rights in all sorts of armed conflicts. The newly developed obligations led to the national obligations to compensate citizens for human rights violations.⁴²

Following that, the Statutes of the two *ad hoc* international criminal tribunals for Yugoslavia (ICTY) and for Rwanda (ICTR) went a step further, by providing explicit possibility for the judges to order restitution. Article 23(3) of the ICTY Statutes provide that “(in) addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.”⁴³ An identical provision is contained in the rules of procedures of the ICTR.⁴⁴ This provisions mark the first inclusion of a component of reparatory justice in the context of international criminal justice giving the victim importance in the international criminal justice and their role is no longer secondary.⁴⁵

Progressively, the Rome Statute on the International Criminal Court marked a further step towards the consolidation of international economic reparations for individuals.⁴⁶

⁴² *Id.* TEITEL, Ruti G, pp. 123.

⁴³ U.N. ICTY-TPIY. *Rules of Procedure and Evidence*, IT/32/Rev.44 10. The Hague, December 2009. Rule 105 (Restitution of Property) and Rule 106 (Compensation to Victims). “*The judgment of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.*”

⁴⁴ U.N. ICTR-TPIR. *Rules of Procedure and Evidence*. February 9, 2010. Rule 105(Restitution of Property) and Rule 106 (Compensation to Victims). *See also*. ICTR-TPIR. *Statute of the International Criminal Tribunal for Rwanda*. 2007, Article 23(3) “*In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.*”

⁴⁵ ROMBOUTS, Heidy; SARDARO, Pietro; VANDEGINSTE, Steff. *The Right to Reparation for Victims of Gross and Systematic Violation of Human Rights*. In PARMENTIER, Stephan, and DE FEYTER, Koen (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*. (ed. BOSSUYT M, and LEMMENS P. Intersentia Antwerpen-Oxford 2005,) pp 419.

⁴⁶ INTERNATIONAL CRIMINAL COURT. *Rome Statute of the International Criminal Court*. A/CONF.183/9 of 17 July 1998. *Op.cit.* Article 75, which establishes that: “*make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.*”

Also important and relevant are the steps taken United Nations human rights treaty bodies, and by regional human rights courts such as the European Court on Human Rights, and in particular the Inter-American Court on Human Rights which sought to develop adequate responses and addressed reparation in the context of mass victimization.

According to the Inter-American Human Rights Commissioner; Dinah Shelton:

“[t]he Inter-American Court made broad use of its jurisdiction. It has awarded pecuniary and non-pecuniary damages reparations, granting both monetary and non-monetary remedies. Unlike the European Court, the Inter-American has ordered a state to take specific action to remedy a breach in the Convention (...) The Court has been innovative in controlling all aspects of the awards, including setting up trust funds, and maintaining cases open until the awarded remedies have been fully carried out, and awarding pay, at least in part, attorneys fees and costs.”⁴⁷

It is also important to mention the work of certain national post-conflict truth and reconciliation commissions.⁴⁸ For example, the United Nations sponsored Salvadorian truth commission to investigate serious acts of violence that have occurred since 1980.⁴⁹

⁴⁷ SHELTON, Dinah. *Regional Protection of Human Rights* (ed. Oxford University Press: Oxford, 2009) pp 818.

⁴⁸ OETTE, Lutz. *Bringing Justice to Victims? Responses for Regional and International Human Rights Courts and Treaty Bodies to Mass Violations*. In FRESTMAN, Carla et al. (eds,) *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (ed. Martinus Nijhoff Publishers: Leiden Boston, 2009,) pp 218.

⁴⁹ U.N. S.C. *Report of the UN Truth Commission on El Salvador*. S/25500. 1 April 2003.

Reparations on practice

Very often, countries that have emerged from conflict-period and have experienced gross human rights violations suffer “*weak or non-existent rule of law, inadequate law enforcement and insufficient capacity in the administration of justice. This situation is often exacerbated by a lack of public confidence in state authorities and a shortage of resources.*”⁵⁰

Additionally, a variety of measures have been developed in many countries where violations of human rights took place, particularly during conflicts or under authoritarian regimes. They include: criminal prosecutions, truth-telling strategies,⁵¹ various forms of institutional reform, vetting strategies,⁵² local justice, reconciliation initiatives, and reparations for victims. All of these are equally relevant both, for corrective and for preventive reasons; and for each there are successes and failures.⁵³

The challenges that governments and societies face in transition are complex and intractable. Transitional justice has two inter-related goals. The first of these is to respond to past

⁵⁰ Op.cit. Note 2 MENDEZ, Juan, *et al.*

⁵¹ FULLARD, Madelleine; ROUSSEAU, Nicky. *Truth-Telling, Identities, and Power in South Africa and Guatemala*. (International Center for Transitional Justice) On line at: <http://www.ictj.org/en/research/projects/research6/thematic-studies/2538.html> [Last viewed 26 june 2010] Truth telling is understood as the recounting of verbally discursive personal memories of violence, abuse, and torture—was promoted as the only path to reconciliation, healing, and peace “*truth-telling initiatives are vehicles through which "acts of citizenship" may be performed, especially by those historically marginalized.*” For example; The Truth and Reconciliation Commission in South Africa, had dramatically moved much of its work into the public domain, holding public hearings for both victims and amnesty applicants. In Guatemala the Commission for Historical Clarification CEH is one of the first national documents in which indigenous people form an integral part of an account of Guatemalan history.

⁵² ANDREU-GUZMAN, Federico. *Due Process and Vetting*. (International Center for Transitional Justice) On line at: <http://www.ictj.org/en/research/projects/vetting/thematic-studies/2146.html> [Last viewed 26 june 2010] “*Vetting aims to ensure a norm-abiding performance of public service by removing persons who have committed crimes or gross human rights violations or by preventing their access. Vetting covers both recruitment or appointment and dismissal or removal of public employees (...) they can be implemented according to four schematic cases: first, the case of reconstruction of state forces after dissolution by provision of law or physical disappearance; second, if there is construction of a new state entity; third, in the case of a restructuring of state forces following return to institutional or democratic normalcy; and, fourth, if there is regular vetting of public administrative institutions while normal operations of the institution continue.*”

⁵³ OHCHR. *rule-of-law tools for post-conflict States: on truth commissions, prosecution initiatives and vetting*. HR/PUB/06/1. New York and Geneva, 2006

abuses; the second is to prevent similar abuses from occurring in the future. Transitional justice must thus be both backward and forward looking. For example, while the first duty to protect is prospective and forward looking, the other duties, of investigation and compensation are retrospective and backward looking. And very often these goals can be difficult to reconcile.⁵⁴

In the wake of conflict or authoritarian rule in Latin America, reparations programs are essential in the delivery of truth and justice for victims and relatives of human rights abuses.

⁵⁴ SARIS, Anne, and LOFTS, Katherine. *Reparations Programmes: A Gendered Perspective*. In FRESTMAN, Carla *et al.* (eds) *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*. (Ed. Martinus Nijhoff Publishers: Leiden Boston, 2009,) pp 83.

Chapter II

The Inter-American Court scope awarding reparations

After having described the importance of reparations in transitional justice, its context and historical evolution, and also its legal framework applied on international human rights field, it is important now to analyze the specific role of the Inter-American Court granting reparations, and the diversity of measures that could adopt to protect human rights violations focused on forced disappearances cases.

The Inter-American Court of Human Rights background

The Inter-American Court of Human Rights came into existence in 1979, following the entry into force of the American Convention on Human Rights. The Court is composed by seven independent judges nominated by the Convention States parties and elected by the same group of States in the Organization of American States General Assembly.⁵⁵

The Court is exclusively a judicial body. It has both, a) advisory and b) contentious jurisdiction; a) the Court could render advisory opinions on the interpretation of the American Convention or of other treaties concerning the protection of human rights in American States at the request of the Inter-American Commission on Human Rights, or any other OAS member State, whether a Convention party or not, or certain OAS organs.⁵⁶ Advisory opinions are not, as such, legally binding; b) Contentious cases should be referred by the Inter-American

⁵⁵ ORGANIZATION OF AMERICAN STATES. *American Convention on Human Rights*: "Pact of San Jose of Costa Rica." 22 November 1969. Article 52.

⁵⁶ I/A Court H.R., *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*. Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para 43.

Commission on Human Rights or by a state party to the American Convention; thus individuals may not do so; generally only against or by another state party that has made an optional declaration accepting the Court's jurisdiction.⁵⁷ This resort can be used only after the domestic system has failed to provide the victim with an effective remedy.⁵⁸

The Court is an autonomous judicial institution with jurisdiction to decide any contentious case concerning the interpretation and application of the American Convention and other relevant Inter-American treaties signed and ratified by member States, as well as to ensure to the victim or victims of a violation of the rights or freedoms guaranteed by the Convention and the protection of those rights. Because the binding character of its decisions in contentious cases, the Court also is the Convention organ having the broadest enforcement powers designed to ensure the effective application of the Convention.⁵⁹

The American Convention on Human Rights gives the Inter-American Court a broad remedial jurisdiction on its Article 63(1) which states that:

“If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if

⁵⁷ SHELTON, Dinah L. *Regional Protection of Human Rights*. Chap IV. The Regional Institutions and Their Powers (ed. Oxford University Press; Oxford 2008,) pp 527. Cfr. ORGANIZATION OF AMERICAN STATES. *American Convention on Human Rights*: “Pact of San Jose of Costa Rica.” 22 November 1969. “Declarations accepting the Court’s jurisdiction have been made by Argentina, Barbados, Bolivia, Brazil, Colombia, Chile, Costa Rica, Ecuador, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Peru, Panama, Paraguay, Suriname, Uruguay, and Venezuela. According to the Article 62. Cfr. Article 61(1), and Article 64.

⁵⁸ ORGANIZATION OF AMERICAN STATES. *American Convention on Human Rights*: “Pact of San Jose of Costa Rica.” 22 November 1969, Article 46 a)

⁵⁹ Op.cit. Note 58. SHELTON, Dinah L. *et.al*, pp 532. Cfr. Article 62, 63, 1, and article 68 of the American Convention on Human Rights.

*appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”*⁶⁰

The mentioned article codified a canon of customary international law and a fundamental principle of international law, that “*every violation of an international obligation which results in harm creates a duty to make adequate reparation.*”⁶¹ Making use of this, the Court established that reparations for human rights violations are regulated by the American Convention and customary international law, and not by domestic law.⁶²

Since its first decision on reparations, *the Velasquez Rodriguez v. Honduras case*, the Inter-American Court established the nature of reparations under article 63(1) and has been interpreted them as compensatory and not punitive.⁶³ Besides, the Court said that without distinction any human rights violations requires *restitutio in integrum* which includes different elements such as restoration of the *status quo ante* if possible, material damages, moral damages and non-satisfaction measures.⁶⁴

⁶⁰ Op.cit. Note 59. *American Convention on Human Rights. et.al.* The article 63(1) provides the IACHR less restrictive rules than the European Court on Human Rights. It gives a primary and not a subsidiary role in the award of reparations and recognizes different types of reparations measures. On contrast, the content of Article 41 of the ECHR provides that: “*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*”

⁶¹ I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para 25. *Cfr. (Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21 and *Factory at Chorzów*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184).

⁶² Op.cit. Note 22. *Case of Velásquez-Rodríguez v. Honduras*. 1989. Series C No. 7, paras 30-31

⁶³ *Id. Case of Velásquez-Rodríguez v. Honduras*. 1989. Series C No. 7, para 38.

⁶⁴ SANDOVAL-VILLALBA, Clara. *The Concepts of ‘Injured Party’ and ‘Victim’* in FRESTMAN, Carla. *et al. Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making.* (ed. Martinus Nijhoff Publishers: Boston 2009) pp. 246.

The Court established that:

*“Whenever possible, reparation of the damage caused by the violation of an international obligation requires full restitution (restitutio in integrum), which consists in the re-establishment of the previous situation. If this is not possible, as in the instant case, the international Court must determine a series of measures to ensure that, in addition to guaranteeing respect for the violated rights, the consequences of the violations are remedied and compensation paid for the damage caused. It is also necessary to add any positive measures the State must adopt to ensure that the harmful acts, such as those that occurred in this case, are not repeated. The responsible State may not invoke provisions of domestic law to modify or fail to comply with its obligation to provide reparation, all aspects of which (scope, nature, methods and determination of the beneficiaries) are regulated by international law.”*⁶⁵

Beneficiaries of reparations

Article 63(1) provides who should be regarded as the “injured party” who shall be granted with reparations. The term “injured party” could be synonymous to “victim,” meaning the person or persons affected by the violation. For certain types of violations, especially forced

⁶⁵ Op.cit. Note 22. *Case of Velásquez-Rodríguez v. Honduras*. 1989. Series C No. 7, para 26. I/A Court H.R., *Case of Cesti-Hurtado v. Peru*. Reparations and Costs. Judgment of May 31, 2001. Series C No. 78, para 33. I/A Court H.R., *Case of Serrano-Cruz Sisters v. El Salvador*. Merits, Reparations and Costs. Judgment of March 1, 2005. Series C No. 120, para 135.

disappearances, in practice the Court consider that the injured party is not only to the disappeared person, but also that person next of kin who suffered as a result of losing their relatives.⁶⁶

The Inter-American Court reparations on practice

According to article 63(1) the Court is expressly authorized to ensure enjoyment of the rights or freedoms recognized on the American Convention on Human Rights and other relevant treaties ratified by member States, and to remedy the consequences of human rights violations. Reparations granted by the Court include similar measures adopted by the *UN Basic Principles and Guidelines* such as; compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition, costs and litigation fees.

It is important now to clarify that the Court is not limited with these definition for granting reparations, and it could broad its spectrum granting reparations as much as it believes is convenient and useful to repair human rights violations. According to this, case by case the Court has implemented as many reparations as it has seen viable and necessary to remedy the violation found in particular cases.

Compensation

Compensation is defined as a type of reparation that should be provided for any economically assessable damage, appropriate and proportional to the gravity of the violation and

⁶⁶ I/A Court H.R., *Case of Trujillo-Oroza v. Bolivia*. Reparations and Costs. Judgment of February 27, 2002. Series C No. 92, para 54.

the circumstances of each case resulting from gross human rights violations 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 potential earnings, (d) moral damage, (e) costs required for legal or expert assistance, medicine and medical services, and f) psychological and social services.⁶⁷

Since the Court started to function has granted monetary compensation for damages to survivors, heirs, and victim's family members, both for material and moral damages for loss and pain suffered under the term of "fair compensation."⁶⁸

Material damages

The Court generally awards compensation for material damages. This field may include loss of earnings, medical expenses, the costs incurred in searching for the victim when state authorities engage in a cover-up and fail to investigate, and other expenses of a pecuniary character that are caused by the violation.⁶⁹

Loss of earnings

The Court has granted compensation for the injury suffered by the victim during the period where he or she was unable to work due to the human rights violation. This measure is

⁶⁷ Op.cit. 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* : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147.

⁶⁸ Op.cit. Note 22. *Case of Velásquez-Rodríguez v. Honduras*. 1989. Series C No. 7, paras 38 and 39.

⁶⁹ Op.cit. *Case of Trujillo-Oroza v. Bolivia*. 2002. Series C No. 92, para 74.

also applied for victim's relatives. For example, when in family someone has left his or her job to find the remains of their loved ones.⁷⁰

The principal element that the Court uses to calculate the loss of earnings of disappeared persons that are not found is based mainly in present value of income of the victim's life expectancy minus the projected expenses which the victim might have lived.⁷¹

Consequential damage

This measure includes the value of destroyed property, the expenses incurred to obtain information about the whereabouts of the victims, including the recovery of the body, and the additional cost that this violation may have caused to the victim.⁷²

The Court has also included the cost of medical treatment, including psychological treatment received by the victim's family that results from the human rights violation.⁷³

Future damages

Where there is a certainty that the facts that caused human rights violations in the past will cause continuing expenses in the future, the Court could also award "future" damages. For

⁷⁰ Op.cit. *Case of Bámaca-Velásquez v. Guatemala*. 2002. Series C No. 91, paras 54 and 55.

⁷¹ I/A Court H.R., *Case of El Amparo v. Venezuela*. Reparations and Costs. Judgment of September 14, 1996. Series C No. 28, para 28.

⁷² I/A Court H.R., *Case of Heliodoro-Portugal v. Panama*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186, para 233.

⁷³ FAUNDEZ LEDEZMA, Hector. *The Inter-American System of Human Rights protection*. 3rd Ed. (ed. Inter-American Institute of Human Rights, 2004,) pp 830.

example, future expenses of monitoring compliance with the Inter-American judgment or psychological treatment.⁷⁴

Non-Pecuniary compensation or Moral damages

This compensation is granted by the Court taking into consideration the suffering and afflictions caused to the victims, and also for the emotional distress of the victim's relatives. This is relevant on forced disappearances cases.⁷⁵

The Court explained that those who have a close emotional relationship with the victim and when the violation is sufficiently serious, the moral suffering of the victims and their families must be compensated.⁷⁶ The amount of moral damages is calculated based on "principles of equity."⁷⁷

Restitution and rehabilitation

Restitution is understood as those measures to restore the victim -whenever possible- to the original situation before the human rights violations took place. Includes as appropriate, the restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to

⁷⁴ Op.cit. *Case of Heliodoro-Portugal v. Panama*. 2008. Series C No. 186, para 267. *See also*. I/A Court H.R., *Case of Myrna Mack-Chang v. Guatemala*. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101, para 266.

⁷⁵ Op.cit. *Case of Velásquez-Rodríguez v. Honduras*. 1989. Series C No. 7, para 54, 55.

⁷⁶ I/A Court H.R., *Case of El Amparo v. Venezuela*. Reparations and Costs. Judgment of September 14, 1996. Series C No. 28, para 35

⁷⁷ Op.cit. *Case of Velásquez-Rodríguez v. Honduras*. 1989. Series C No. 7, para 25.

one's place of residence, restoration of employment and return of property,⁷⁸ and should include medical and psychological care as well as legal and social services.⁷⁹

Since the victims in the majority of forced disappearances cases were killed or they are still disappeared, the Court has had relatively few occasions to consider this measure.

Life Plan

The so called “*proyecto de vida*” or life time project, serves to award victims for lost opportunities and the lost enjoyment of achieving goals, taking into consideration the vocation, potential, circumstances, and skills of the individual victim. Unlike the concept of consequential damages, the life plan is designed to compensate the victim for the personal fulfillment and liberty interest in planning his or her life.⁸⁰

In cases of forced disappearance, the Court has not ordered compensation for the destruction of the disappeared life plan nor the effect of the disappearance on the life plan of family members.⁸¹

⁷⁸ Op.cit. 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 : resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147

⁷⁹ Op.cit. UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation. et.al.* See also. I/A Court H.R., *Case of Molina-Theissen v. Guatemala*. Reparations and Costs. Judgment of July 3, 2004. Series C No. 108, para 61.

⁸⁰ I/A Court H.R., *Case of Loayza-Tamayo v. Peru*. Reparations and Costs. Judgment of November 27, 1998. Series C No. 42, 147.

⁸¹ HAGLER, Megan, RIVERA, Francisco. *Bamaca Velasquez v. Guatemala: An Expansion of the Inter-American System's Jurisprudence on Reparations*. Vol. 9. Issue 3. (American University-Washington College of Law: Washington, 2002) On line at: <http://www.wcl.american.edu/hrbrief/09/3bamaca.cfm> [Last viewed 25 June 2010]

Litigation costs and attorney fees

After the revision of the rules of procedure of the Inter-American Court on 2001 where the new Court's regulations allowed victims to have *locus standi* (direct representation) before the Court, the representatives and attorneys started to claim the reimbursement of their fees for the representation of the victims on the international forum.⁸²

Other forms of reparations (measures of satisfaction and guarantees of non-repetition)

According to the *UN Basic Principles and Guidelines* Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention of human rights violations,⁸³ such as measures to know the truth of the past, to know the whereabouts of the disappeared, the recovery of their bodies, and all of those measures related to satisfy victims and victims' relatives.⁸⁴

⁸² OAS. *Rules of Procedure of the Inter American Court on Human Rights*. Approved by the Court during its XLIX Ordinary Period of Sessions, held from November 16 to 25, 2000,1 and partially amended by the Court during its LXXXII Ordinary Period of Sessions, held from January 19 to 31, 2009 , art 24. Available on Internet at:

<http://www.cidh.org/basicos/english/basic20.RulesCourt.pdf> [last viewed April 24, 2010]

⁸³ Op.cit. UN General Assembly, *Basic Principles and Guidelines et.al*. Article 23 (Guarantees of non-repetition) (a) Ensuring effective civilian control of military and security forces; (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (c) Strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

⁸⁴ *Id.* Op.cit. UN General Assembly, *Basic Principles and Guidelines et.al*. Article 22 (Satisfaction). Should include, where applicable, any or all of the following: (a) Effective measures aimed at the cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; (f) Judicial and administrative sanctions against persons liable for the violations; (g) Commemorations and tributes to the victims; (h) Inclusion

The obligation to Prosecute, Investigate, and punish

In the majority of the cases the Inter-American Court has ordered States to prosecute, investigate and to punish the persons responsible for the violation as a form of reparation.⁸⁵

Progressively the Court specifies that victims must be granted to participate in the investigation proceedings, “in accordance with domestic laws” and Convention rights. The Court also ordered to publish the results of the respective investigations.⁸⁶

Granting legislative, Administrative and Policy reform measures

The Court has ordered States to enact legislative reforms either to remove *de jure* violations or to facilitate prevention, prosecution or remedies for violations.⁸⁷ For example, on forced disappearances the Court ordered to adapt domestic laws to conform to the Convention and to make reparation, and thereby guarantee all the rights and freedoms therein upheld.⁸⁸ In another case, the Court ordered the implementation of a national exhumation program if one did not yet exist.⁸⁹

of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

⁸⁵ I/A Court H.R., *Case of Caballero-Delgado and Santana v. Colombia*. Reparations and Costs. Judgment of January 29, 1997. Series C No. 31, para 65(4)

⁸⁶ Op.cit. *Case of Bámaca-Velásquez v. Guatemala*. 2002. Series C No. 91, para 106.2

⁸⁷ CASSEL, Doulgas, *The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights*. In: K. De Feyter, S. Parmentier, M. Bossuyt, and P. Lemmens (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*. (ed. Intersentia; Oxford, 2005,) pp. 205.

⁸⁸ I/A Court H.R., *Case of Garrido and Baigorria v. Argentina*. Reparations and Costs. Judgment of August 27, 1998. Series C No. 39, para 71.

⁸⁹ Op.cit. *Case of Bámaca-Velásquez v. Guatemala*. 2002. Series C No. 91, para 83.

In some cases the Court has progressively used its attribution to order this measure by ordering the creation of a genetic data bank, and to establish an expedite procedure to regulate the absence and presumption of death due to forced disappearance.⁹⁰

The Court also ordered to train military, police and judicial personnel in matters of human rights and humanitarian law.⁹¹ The Court also ordered Bolivian State to pass legislation that was pending in the Congress to make forced disappearance a crime.⁹²

The Court has also ordered to establish a national commission to trace the young people who disappeared when they were children during an armed conflict, with the participation of civil society,⁹³ and the creation of a web search web page in order to trace disappeared children, which includes a data base with specific information of disappeared persons, creating a link to coordinate national links with the different governmental and non-governmental authorities and institutions.⁹⁴

Remains and burial

The Court has ordered to locate the remains of victims of forced disappearances, and also has taken into consideration their proper burial which is important to preserve the dignity of victims and their families. In that sense, the Court has ordered States to take serious efforts to locate remains of victims, turning back to their families to a proper burial, and transferring and

⁹⁰ Op.cit. *Case of Molina-Theissen v. Guatemala*. 2004. Series C No. 108, para 91 a) and b). See also. I/A Court H.R., *Case of Serrano-Cruz Sisters v. El Salvador*. Merits, Reparations and Costs. Judgment of March 1, 2005. Series C No. 120, para 193

⁹¹ *Id.* *Case of Bámaca-Velásquez v. Guatemala*. 2002. Series C No. 91, para 86, 106.4.

⁹² Op.cit. *Case of Trujillo-Oroza v. Bolivia*. 2002. Series C No. 92, para 98(2).

⁹³ Op.cit., *Case of Serrano-Cruz Sisters v. El Salvador*. 2005. Series C No. 120, para 183-188.

⁹⁴ Op.cit., *Case of Serrano-Cruz Sisters v. El Salvador*. 2005. Series C No. 120, paras 189-191.

burying them at State expenses. For example, the Court ordered Guatemala to establish the whereabouts of the remains of the victim and to deliver them to his family, and to bury those remains.⁹⁵

Symbolic measures

Symbolic measures should be understood as important measures of moral reparations, and may serve to deter further human rights violations. In this sense, the Court has ordered to name a street, school or plaza for a victim's memory, usually with a commemorative plaque. It has also ordered to conduct public ceremonies, where victims officially receive public acknowledgment of state responsibility for its wrongdoings.⁹⁶

In some cases the Court has ordered that high state officials should conduct and participate in public ceremonies.⁹⁷

Judgments publications

The Inter-American Court has considered that its judgments constitute *per se* measures of moral reparations.⁹⁸ In different cases of forced disappearances the Court has ordered to publish its judgments in widespread national circulation newspapers, official websites, among others such as official gazettes.⁹⁹

⁹⁵ I/A Court H.R., *Case of Molina-Theissen v. Guatemala*. Reparations and Costs. Judgment of July 3, 2004. Series C No. 108, para 85. Op.cit. *Case of Bámaca-Velásquez v. Guatemala*. 2002. Series C No. 91, para 81, *See also*, Separate Opinion of the Judge Cançado Trindade Antônio, at 9.

⁹⁶ Op.cit. *Case of Molina-Theissen v. Guatemala*. 2004. Series C No. 108, para 87 (public act of acknowledgment of international responsibility and amends to Marco Antonio Molina next of kin), 88 (naming a school).

⁹⁷ Op.cit. *Case of Heliodoro-Portugal v. Panama*. 2008. Series C No. 186, para 247, 249, 253.

⁹⁸ Op.cit., *Case of Velásquez-Rodríguez v. Honduras*. 1989. Series C No. 7, para 36.

⁹⁹ Op.cit. *Case of Heliodoro-Portugal v. Panama*. 2008. Series C No. 186, para 248. Op.cit. *Case of Molina-Theissen v. Guatemala*. 2004. Series C No. 108, para 86.

The judgments ruled by the Court are binding according to the Article 68.1 of the American Convention; States has assumed the binding nature of its resolutions by ratifying the American Convention and by accepting the compulsory jurisdiction of the Court. The Court has ordered States to inform periodically about the judgment's compliance.¹⁰⁰

In addition to article 68.1 the duty of States to comply with the Courts decisions are based on the principle of international law (*pacta sunt servanda*) according to the Article 26 of the Vienna Convention on the Law of Treaties,¹⁰¹ that guarantees the effective protection of human rights and the purpose of the American Convention. However, in cases of not compliance the Court has the attribution to send the case to the OAS General Assembly which politically could exhort the state to comply with the Court's resolutions.¹⁰²

¹⁰⁰ Op.cit. 74. FAUNDEZ LEDEZMA, Hector, *et.al.* pp 908.

¹⁰¹ U.N. *Vienna Convention on the Law of Treaties* (1969). Treaty Series, Vol. 1155, p. 331. Entered into force on 27 January 1980. Vienna 23 May 1969. On Line at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [Last viewed 25 June 2010] Article 26. *Pacta sunt servanda* "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

¹⁰² *Id.* FAUNDEZ LEDEZMA, Hector, *et.al.* pp 926.

Chapter III

A Comparative Overview of Inter-American Court reparations on Forced disappearances cases

The dramatic expansion of reparations granted by the Inter-American Court can be compared and illustrated from its first judgments on reparations until its recent decisions that now typically are more comprehensive dealing with forced disappearances cases.

In this case-law study it will be seen an overview of various reparations decisions made by the Court in different periods of time, and also by different compositions of the Court as a sample of its obtained results to review its similarities and differences.

Velasquez Rodríguez v. Honduras (1989)

Facts

The young Angel Manfredo Velasquez Rodríguez was a student at the National Autonomous University of Honduras, he was accused of alleged political crimes, and on the afternoon of 12 September, 1981 he has been violently detained without a warrant for his arrest by members of the National Office of Investigations of the Armed Forces of Honduras.¹⁰³ The facts happen during the period of 1981 to 1984 where at least 100 to 150 persons disappeared in a systematic pattern when Honduras was facing a civil armed conflict.¹⁰⁴ The victims were usually persons whom Honduran officials considered dangerous to the state security. The whereabouts of Mr. Velasquez are still unknown.

¹⁰³ I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, para 3.

¹⁰⁴ *Id. Case of Velásquez-Rodríguez, et.al.* para, 147 *in fine*, and 148.

Reparations

The reparations granted in this case were:

- To pay compensation the sum of 750.000.00 (*Lempiras*) free from taxes to be paid to the family (Wife and Children) of Angel Manfredo Velasquez as compensatory damages.¹⁰⁵

Additionally the Court said that the judgment on the merits of July 29, 1988 is in itself a type of reparation and moral satisfaction of significance and importance for the families of the victims.¹⁰⁶

Analysis

This initial reparation resulted being inadequate. The main reason for this was because the State of Honduras delayed to pay what it was ordered on this resolution until Honduran currency was devaluated. Additionally, the Court did not order the payment of delay interest. The Court later reminded these differences on its interpretative judgment.¹⁰⁷ In later cases and by now, the Court orders payments of compensation in United States Dollars or their local currency equivalent, and also imposes bank interests on payments delays.¹⁰⁸

¹⁰⁵ I/A Court H.R., *Case of Velasquez-Rodríguez v. Honduras*. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para 60

¹⁰⁶ *Id.* Para 36.

¹⁰⁷ I/A Court H.R., *Case of Velasquez-Rodríguez v. Honduras*. Interpretation of the Judgment of Reparations and Costs. Judgment of August 17, 1990. Series C No. 9

¹⁰⁸ I/A Court H.R., *Case of Radilla-Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209, paras 389 and 382.

What is interesting of this case is that the Court did not considered by this time the request of the widow of Angel Manfredo Velasquez and the Inter-American Commission on Human Rights which claimed a series of remedial measures.¹⁰⁹ In the reparations decision the Court did not explain the reasons of not granting those reparations.

In this case the Court also declined to order as a measure of reparation the legal obligation that Honduran state had to investigate, prosecute, and punish the responsible for the disappearance reasoning that the judgment on the merits has already pointed out the state's continuing duty to investigate, and to prevent involuntary disappearances and to punish those directly responsible.¹¹⁰

Finally, the Court said that the judgment on the merits is for itself a type of reparation and moral satisfaction of significance for the family of the victim.¹¹¹

¹⁰⁹ Op.cit. *Case of Velasquez-Rodriguez v. Honduras*. 1989. Series C No. 7, para 7. Mrs. Emma Guzmán de Velásquez, the widow of Angel Manfredo Velásquez Rodríguez, asked the Court to order the Government to comply with the following points: 1) An end to forced disappearances in Honduras. 2) An investigation of each of the 150 cases. 3) A complete and truthful public report on what happened to the disappeared persons. 4) The trial and punishment of those responsible for this practice. 5) A public undertaking to respect human rights, especially the rights to life, liberty, and integrity of the person. 6) A public act to honor and dignify the memory of the disappeared. A Street, park, elementary school, high school, or hospital could be named for the victims of disappearances. 7) The demobilization and disbanding of the repressive bodies especially created to kidnap, torture, make disappear and assassinate. 8) Guarantees to respect the work of humanitarian and family organizations and public recognition of their social function. 9) An end to all forms of overt or indirect aggression or pressure against the families of the disappeared and public recognition of their honor. 10) The establishment of a fund for the primary, secondary, and university education of the children of the disappeared. 11) Guaranteed employment for the children of the disappeared *that* are of working age. 12) The establishment of a retirement fund for the parents of the disappeared. See also. para 8, and 9 with the request of the Inter-American Commission on Human Rights

¹¹⁰ *Id. Case of Velasquez Rodriguez, et.al.* para 34.

¹¹¹ *Id.* para 38.

Caballero Delgado and Santana v. Colombia (1997)

Facts

On February 7, 1989 Isidro Caballero Delgado, a leader of the Santander Teachers' Union, and Maria del Carmen Santana who worked with Isidro Caballero were detained by persons who belonged to the Colombian Army and several civilians who collaborated with them, in the Municipality of San Alberto; which at that time was a zone of intense army, paramilitary and guerrilla activity.¹¹² The whereabouts of those persons are still unknown and the Court presumed they are death.¹¹³

Reparations

The reparations granted in this case were:

- 1) US\$ 89,500.00 or its equivalent in the national currency to the relatives of the Isidro Caballero-Delgado and Maria Del Carmen Santana for material and moral damages.
- 2) US\$ 2,000.00 to pay directly to Mrs. Maria Nodelia Parra-Rodríguez as reimbursement for procedural expenses incurred in her representations before the Colombian authorities.
- 3) The Colombian State is obliged to continue its efforts to locate and identify the remains of the victims and deliver them to their next of kin.¹¹⁴

¹¹² I/A Court H.R., *Case of Caballero-Delgado and Santana v. Colombia*. Merits. Judgment of December 8, 1995. Series C No. 22, para 3, and 53.

¹¹³ *Id.* para 63.

¹¹⁴ I/A Court H.R., *Case of Caballero-Delgado and Santana v. Colombia*. Reparations and Costs. Judgment of January 29, 1997. Series C No. 31, para 66 *in fine*.

Analysis

In this case the Court did not consider the Commission's requests to amend Colombia's laws governing the remedy of *habeas corpus*, and the lack of codification of the crime of forced disappearance of persons in the country's domestic law that have facilitated the commission of the crime of forced disappearance of Isidro Caballero-Delgado and Maria del Carmen Santana.¹¹⁵

The Court established that the codification of the crime of forced disappearance of persons into law in the terms of the 1994 Inter-American Convention to be desirable, but was of the opinion that its non-codification did not prevent the Colombian authorities from pursuing its efforts to investigate and punish the crimes committed to the detriment of the persons referred to in the instant case.¹¹⁶ These reasoning could difficult the investigation of these crimes in future and the Court did not consider that this measure could be preventive for similar events do not happen again.

The Court considered that the question of the competence of military tribunals and their compatibility with international human rights instruments calls for a review of Colombian legislation, because it would have been inappropriate to undertake in an incidental manner and at the reparations phase.¹¹⁷

The Court also rejected these claims: a) State public acknowledgment of responsibility, because the Court considered that in the public hearing of the case the Agent of the Government

¹¹⁵ *Id.* Para 18

¹¹⁶ *Id.*, para 56.

¹¹⁷ *Id.*, para 57.

declared its responsibility, b) the claim to apologize to the victims' relatives and to society, c) to settle special attention and economic support to the College that bears Caballero-Delgado's name, and c) to conduct a program for the promotion and dissemination of human rights.¹¹⁸ In all of these claims, the Court did not discuss in detail its reasons for those reparations have not been granted.

Trujillo Oroza v. Bolivia (2002)

Facts

Jose Carlos Trujillo Oroza was illegally detained on December 23, 1971, and he has been seen for the last time on February 2, 1972 in Santa Cruz City. He was approximately 22 years old; and he was a student of philosophy at the *Universidad Mayor de San Andrés*. His whereabouts are still unknown. The facts happened in a situation of political instability where fragile democratic periods were interrupted by frequent “*coups d'état*.”¹¹⁹

Reparations

1. The State must take all necessary measures to locate the mortal remains of the victim and deliver them to his next of kin, so that they can bury him appropriately.
2. The State must define the forced disappearance of persons as an offense in its domestic legislation.
3. The State must investigate, identify and punish those responsible for the harmful facts that are the subject of the instant case.

¹¹⁸ *Id.* para 23, and 58.

¹¹⁹ I/A Court H.R., *Case of Trujillo-Oroza v. Bolivia*. Reparations and Costs. Judgment of February 27, 2002. Series C No. 92, para 53.

4. The State must publish the judgment on merits.
5. The State must adopt those measures for the protection of human rights that ensure the free and full exercise of the rights to life, freedom and humane treatment, and to a fair trial and judicial protection, in order to avoid future harmful acts such as those of this case.
6. The State must officially assign the name of José Carlos Trujillo Oroza to an educational establishment in Santa Cruz City.
7. That, for non-pecuniary damage, the State must pay the total sum of: US\$ 245,000.00
8. For pecuniary damage, the State must pay the total sum of: US\$153,000.00
9. For costs and expenses, the State must pay the amount of US\$ 9,400.00.
10. The definition of the forced disappearance of persons as an offense must be made within a reasonable period.
11. The payments ordered in this judgment shall be exempt of any existing or future charge or tax.¹²⁰

Analysis

This case shows a great improvement of the reparations decisions, different from its precedents cases, which rejected the analysis of codifying forced disappearance on internal law. Contrary to *Caballero Santana and Delgado case*, in this decision the Court established that is important to record that the failure to define the forced disappearance of persons as an offence in the internal law has prevented the criminal prosecution to investigate and punish crimes committed against the victim from being detained and disappeared, and allowed impunity to

¹²⁰ I/A Court H.R., *Case of Trujillo-Oroza v. Bolivia*. Reparations and Costs. Judgment of February 27, 2002. Series C No. 92, para 141.

continue in this case. That is the reason why the Court has ordered the state to define forced disappearance as an offense in its domestic legislation and that this only could be considered as reparation complete when it becomes a law of the Republic and enters into force.¹²¹

The Court has ordered the state to take all necessary measures to investigate the facts and identify those responsible and punish them, and to adopt provisions under domestic law that may be necessary to ensure compliance of this obligation.¹²² Besides, the Court takes a step further establishing that the State shall take all necessary steps to ensure that these grave violations are not repeated as an obligation whose fulfillment benefits “society as a whole.”¹²³ In this issue, the Court expanded its decision contrary to its previous *Castillo Páez v. Peru* case, where the Court discussed how the right to reparations is not expansive to society as a whole.¹²⁴

In this case the Court has linked as a measure of reparations the “right to truth,” which relies in the duty of the State to investigate the human rights violations, to avoid impunity, to punish those responsible and also to know what happened to the victim, regardless of the whereabouts of the mortal remains,¹²⁵ which in previous cases such as *Castillo Páez* did not addressed this issue by saying that this argument refers to the formulation of a right that does not

¹²¹ *Id.* para 97 and 98.

¹²² *Id.* para 102.

¹²³ *Id.* para 110. See also, I/A Court H.R., *Case of Bámaca-Velásquez v. Guatemala*. Reparations and Costs. Judgment of February 22, 2002. Series C No. 91, para 76.

¹²⁴ I/A Court H.R., *Case of Castillo-Páez v. Peru*. Reparations and Costs. Judgment of November 27, 1998. Series C No. 43, para 93 “this Court has not held that the moral damages caused by an individual’s death extend to such communities, **and even less** to the nation as a whole. If in some exceptional case such compensation has ever been granted, it would have been to specific communities that have suffered proven moral damages.” Cfr. *Aloeboetoe et al.* Case, Reparations, para 83.

¹²⁵ Op.cit. *Case of Trujillo-Oroza v. Bolivia*. Reparations and Costs. Judgment of February 27, 2002. Series C No. 92, para 114. “the right of the victim’s next of kin to know what has happened to the him and, when appropriate, where the mortal remains are, constitute a measure of reparation and, therefore, an expectation that the State should satisfy for the next of kin and society as a whole”

exist in the American Convention on Human Rights, although it “may correspond to” a concept of the already established obligation to investigate.¹²⁶

Contrastingly, the Court ordered to name a school with the name of Jose Carlos Trujillo Oroza as a way to preserve his memory and it should be inaugurated in a public ceremony in the presence of the victim’s next of kin. This reparation differs greatly from its previous *Caballero Santana and Delgado* case where all of satisfaction and non-repetition measures have been rejected.

Additionally, the Court goes beyond and ordered Bolivian State to execute symbolic acts ensuring that the reparation has a “national impact,” concept that it has not dealt in previous cases. The Court considered that the acknowledgment of responsibility is a positive contribution to the development of the principles that inspire the American Convention, and also ordered to publish the judgment on merits on the official gazette.¹²⁷

Progressively the Court calls the Inter-American Convention on the Forced Disappearance of Persons to ensure the measure to train public law-enforcement personnel, or officials’ education on forced disappearance of persons.¹²⁸

The Court reasoned in this issue different from its previous cases analyzed on this study, where it established that this measure would contribute to raising public awareness about the

¹²⁶ I/A Court H.R., *Case of Castillo-Páez v. Peru*. Merits. Judgment of November 3, 1997. Series C No. 34, paras 85 and 86.

¹²⁷ *Id.* paras, 118 to 119.

¹²⁸ *Id.* paras, 120 to 121.

forced disappearances crimes and the need to avoid the repetition of harmful acts, giving reparations a broad aspect to remedy past wrongdoings of the States.¹²⁹

Heliodoro Portugal v. Panama (2008)

Facts

On May 14, 1970 Heliodoro Portugal has been illegally detained by individuals in civilian clothing who obliged him to get into a vehicle, which drove off to an with unknown destination. At that time, Panama was governed by a military regime. In this case, the whereabouts and fate of Mr. Portugal became known when his remains were identified in August 2000.¹³⁰

Reparations

1. The Court considered the present judgment constitutes as form of reparation
2. The State shall pay the sum of US\$20,000.00 as compensation for pecuniary damage to the victims' relatives.
3. The State shall pay the sum of US\$ 166.000.00 as compensation for non-pecuniary damage to the victims' relatives.
4. The State shall investigate the facts that gave rise to the violations in the instant case, and identify, prosecute and, if applicable, punish those responsible.
5. The State shall publish parts of the judgments, once, in the official gazette and in another newspaper with widespread circulation.
6. The State shall carry out a public act acknowledging its international responsibility in

¹²⁹ *Id.* paras, 122.

¹³⁰ I/A Court H.R., *Case of Heliodoro-Portugal v. Panama*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186, para 2.

relation to the violations declared in the judgment.

7. The State shall provide the medical and psychological care required by Graciela De León de Rodríguez, Patria Portugal and Franklin Portugal, free of charge and immediately, through its specialized health care institutions.
8. The State shall define the offenses of forced disappearance of persons and torture within a reasonable time.
9. The State shall make the payment for reimbursement of costs and expenses.¹³¹

Analysis

In this case the Court did not address the claim made by the representatives to pay the sum of that the family failed to receive as a result of the destruction by fire of their farm in the Province of Veraguas,¹³² because the alleged date on which these facts occurred preceded the presentation of the application, and therefore cannot be considered supervening facts.¹³³

In this case, the Court has been progressive and strong by awarding reparations related to an effective investigation and made progress when the Court order the state to consider even those proceedings yet to be initiated in order to determine those responsible for the facts of this case and to apply the consequence provided for by law.¹³⁴ The Court ordered the state to exhaust all investigative leads regarding what happened to Heliodoro Portugal to ascertain the truth about the facts, and also the Court ordered that the state cannot use any law or domestic legal provision

¹³¹ *Id.*, para, 275.

¹³² *Id.*, para, 223.

¹³³ *Id.*, para, 230.

¹³⁴ *Id.*, para, 245.

to waive its obligation to investigate, and ensured the participation of the next of kin in all of the stages of the investigation.¹³⁵

However, the Court rejected the victims claims of; a) produce a video on the context of the military dictatorship and the case of Heliodoro Portugal, b) to include the Report of the Truth Commission in the required school curriculum in Panama, c) to designate June 9 as the day of the disappeared, d) to name a public square in memory of those who disappeared during the military dictatorship, e) to create a Special Prosecutor of Human Rights, f) to adopt a national program of compensation for families of the victims of forced disappearances and extrajudicial execution, and for the victims of torture, g) to create a genetic information database to determine the identity of the remains of those who disappeared during the military dictatorship.¹³⁶

The reason why the Court did not address those claims was because those reparations would not constitute a direct damage to Heliodoro Portugal's family. Anyway, the Court is not clear while rejecting those measures, and said that the reparations already ordered go long way towards achieving the goal of "awareness" about forced disappearances, and therefore it is not necessary to order additional measures.¹³⁷

It is important to clarify that some of the asked reparations measures made by the representatives does not have the only intention to create "awareness" about the forced disappearances occurred in Panama, contrary, they have the intention to get through this case to a broader reparation that could help other victims that could not get their cases to the Inter-

¹³⁵ *Id*, para, 246, 247.

¹³⁶ *Id*, para 260.

¹³⁷ *Id*, para 262.

American Court, and most of the reparations measures asked by the representatives had a valid purpose to know the truth directly to Helidoro Portugal case, for example; the creation of a Special Prosecutor of Human Rights or the creation of the video on the context of military dictatorship in Panama.

Besides, the Court has ordered in previous cases the adoption of similar measures asked in this case, for example; the creation of a genetic data base to determine the identity of disappeared persons even when this reparation was not directed only to the victim of the alleged case,¹³⁸ by so, in this case the Court misses the opportunity to strengthen its jurisprudence and to also misses the chance to open collective reparations and preventive programs such as the inclusion of the Report of the Truth Commission in the required school curriculum in Panama.

Radilla Pacheco v. Mexico (2009)

Facts

Mr. Rosendo Radilla-Pacheco disappeared since August 25, 1974 on the context denominated “Dirty war of the seventies” where a systematic pattern of disappearances has been documented. Until now, the whereabouts of Mr. Radilla is unknown.¹³⁹

¹³⁸ I/A Court H.R., *Case of Molina-Theissen v. Guatemala*. Reparations and Costs. Judgment of July 3, 2004. Series C No. 108, para 88, when the Court established that “*is extremely important to have a genetic data bank to enable identification of the missing persons or their remains.*” It should be noticed that this reparation was not directed to the specific victim of the case, but the “*missing persons or their remaining.*” In this case to enable establishment and clarification of parentage of missing children and their identification which was not direct reparation for the damage caused to Marco Antonio Molina’s family. *See also*, e.g. I/A Court H.R., *Case of Serrano-Cruz Sisters v. El Salvador*. Merits, Reparations and Costs. Judgment of March 1, 2005. Series C No. 120, para, 188. the Creation of a national tracing commission to find disappeared children. “*the Court considers that the national tracing commission must include State institutions that have demonstrated some interest in resolving this problem and others who should be members because of their functions, and also that civil society should participate through non-governmental organizations that have been engaged in this search or that are specialized in working with young disappeared persons, such as the Asociación Pro-Búsqueda.* And also the creation of a Web Searching Page, and a Genetic Data base for a generality of victims and not only for the alleged victims of the case, paras, 191 and 193.

¹³⁹ I/A Court H.R., *Case of Radilla-Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209, para 132.

Reparations

1. The judgment constitutes *per se* a form of reparation.
2. The State shall effectively carry out, with the due diligence and within a reasonable period of time, the investigation and, if it were the case, the criminal proceedings established with regard to the arrest and subsequent forced disappearance of Mr. Rosendo Radilla-Pacheco, in order to determine the corresponding criminal responsibilities and effectively apply the punishments and consequences established by law.
3. The State shall continue with the effective search for and the immediate location of Mr. Rosendo Radilla-Pacheco or, in its case, of his remains.
4. The State shall adopt, within a reasonable period of time, the appropriate legislative reforms in order to make Article 57 of the Code of Military Justice compatible with the international standards in this subject and the American Convention on Human Rights.
5. The State shall adopt, within a reasonable period of time, the appropriate legislative reforms in order to make Article 215 A of the Federal Criminal Code compatible with the international standards in this subject and the Inter-American Convention on Forced Disappearance of Persons.
6. The State shall implement, within a reasonable period of time and with the corresponding budgetary disposition, programs or permanent courses regarding the analysis of the jurisprudence of the Inter-American Human Rights Protection System in reference to the limits of military criminal jurisdiction, as well as a training program on the correct investigation and prosecution of facts that constitute the forced disappearance of persons.

7. The State shall publish in the Official Gazette of the Federation and in another newspaper of ample national circulation, for a single time, parts of the Court's Judgment and publish it in its totality on the official website of the Attorney General of the Republic.
8. The State shall hold a public act of acknowledgment of responsibility with regard to the facts of the present case and in order to preserve the memory of Mr. Rosendo Radilla-Pacheco.
9. The State shall prepare a bibliographical sketch of the life of Mr. Rosendo Radilla-Pacheco.
10. The State shall provide free psychological and/or psychiatric attention immediately, adequately, and effectively, through its specialized public health institutions, to the victims declared in the present Judgment and that so request it.
11. The State shall pay the amounts in the concept of compensation for pecuniary and non-pecuniary damages and the reimbursement of costs and expenses, as corresponds.¹⁴⁰

Analysis

In this judgment the Court has been more progressively ordered that the state shall guarantee through its competent institutions, that the ongoing preliminary inquiry on the facts that constitute the forced disappearance of Mr. Rosendo Radilla is kept before the ordinary jurisdiction and not by military jurisdiction.

The Court went forward by ordering whenever new criminal cases are opened against alleged responsible parties who are or have been military officers, the authorities in charge shall

¹⁴⁰ *Id.* Operative Paragraphs 7-18.

guarantee that they will be brought before the common or ordinary jurisdiction and, under no circumstance, in the military or war courts.¹⁴¹ This order differs greatly from the *Caballero Santana and Delgado* case where the Court considered inappropriate to undertake in an incidental manner and at the reparations phase the consideration of the question of military tribunals and their compatibility with international human rights instruments, because the Commission proposed this issue belatedly.¹⁴²

The Court advanced and ordered the state to regulate military jurisdiction when it ordered the state that the Political Constitution of Mexico shall be coherent with the conventional and constitutional principles of the due process of law and the right to a fair trial, included in Article 8(1) of the American Convention and the relevant regulations of the Mexican Constitution.¹⁴³ The Court has also ordered the Mexican state to modify its internal law which punishes the crime of forced disappearance, ordering to adopt all measures to make legal classification compatible with the international standards.¹⁴⁴

Additionally in this case, contrary to its decision on *Heliodoro Portugal* case, the Court according to the claim made by the petitioners to distribute the bibliographical book written by Andrea Radilla Martínez on her father. Likewise the video made on the period of the dirty war on official spaces and on prime time on the memory of the victim. The Court ordered the state to prepare a (sic) bibliographical¹⁴⁵ sketch of the life of Mr. Radilla-Pacheco, through a publication,

¹⁴¹ *Id.*, para 332.

¹⁴² Op.cit. *Caballero Delgado and Santana v. Colombia*. 1997. Series C No. 31, para 57.

¹⁴³ *Id.*, para, 338.

¹⁴⁴ *Id.*, para, 344.

¹⁴⁵ (sic) The meaning is biographical not bibliographical.

as of the investigation *in situ* and of the reproduction of the corresponding official sources, considering the historical vindication and the dignity of the victim.¹⁴⁶

¹⁴⁶ *Id.*, para, 356.

Chapter IV

Views and opinions of those involved

It is important for the purpose of this study to have the appreciation of people who is involved in the Inter-American system of human rights, for this, it has been considered very useful to obtain the opinion of some of the victim's relatives of the cases mentioned in this study. Besides, it was also important to obtain the opinion and perspective of litigants lawyers who work representing victims behold the system, and finally it was very important to obtain the point of view of the issues discussed on this paper from a former Judge of the Inter-American Court which will enrich the discussion of this study which we will see it on this chapter.

Victim's relatives perspective

Patria Portugal

Mrs. Patria Portugal, daughter of the disappeared victim Heliodoro Portugal, expressed on an interview that the Court decision was very important and helped very much to create awareness about the forced disappearances crimes committed during the dictatorship regime in Panama. However, she felt that after such a long process litigating behold the Inter-American system she has not gotten adequate justice that she expected from this decision.

Mrs. Portugal said that the monetary and non-monetary compensation was lower than she and her representatives has claimed, and that the Court did not considered to order reparation regarding the family destroyed farm which for them represented one of the most valuable

reparation claimed and that the Court did not take into account the victims perspective on this issue.¹⁴⁷ On this issue, the Court considered that this fact preceded the presentation of the application and that that the Court will not examine the alleged claim.¹⁴⁸

However, the victims' relatives expected that the Court could order the State to restore the lost property because it was a historical and also valuable for the family.

Mrs. Portugal said that the compensation awarded by the Court did not solve any of the economical problems of the family had, and it does not represent what the family has spent for more than twenty years searching the whereabouts of her father and the suffering caused. According to her opinion a monetary and non-monetary compensation should restore de damage caused by the human rights violation and should mend the life of the victims' relatives which in this case did not happened. However Mrs. Portugal quoted that "*the struggle is not for money, is to find the truth.*"¹⁴⁹

Mrs. Portugal considered her conformity with all other measures ordered by the Court such as the publicity of the judgment, the public act of acknowledgment of international responsibility, and to define the offense of forced disappearance of persons and torture on internal law.

¹⁴⁷ PORTUGAL, Patria. *Daughter of Mr. Heliodoro Portugal*. Interview realized in San Jose by Ramiro Barriga. 23 March 2010, San Jose, Costa Rica. *See also*. Op.cit. **Case of Heliodoro-Portugal v. Panama.**, 2008. Series C No. 186, para 223.

¹⁴⁸ Op.cit. **Case of Heliodoro-Portugal v. Panama.**, 2008. Series C No. 186, para 230.

¹⁴⁹ *Id.*

Nevertheless, she also stressed her frustration because she felt that reparations measures are shouldered on the victims because they have to still struggling against the state to force it to comply with the Inter-American Court's resolutions and she felt great passivity of the Inter-American Court and she considers that the Court should play a more belligerent role requiring compliance with its resolutions. However, it is important to clarify that this is not possible within the legal framework of the Inter-American Court.

Finally, Mrs. Portugal showed its unconformity with the Court's rejection of the measures such as the video of the military dictatorship and the case of Heliodoro Portugal, and other collective reparations which would have help to a broad amount of victims' families on forced disappearances.¹⁵⁰

Ana Lucrecia Molina

Ana Lucrecia Molina is the sister of the child Marco Antonio Molina Theissen who disappeared in 1981. Its case has been resolved by the Court on 2004. Ana Lucrecia said that the judgment made by the Court is positive because it established the gravity of the crime of forced disappearances against children in the civil armed conflict occurred in Guatemala and she felt that the Court's decision gives a great perception of justice with its own limitations.¹⁵¹ For example, the Court did not award the reparation to ensure legal, political, and material support for the *Comisión Nacional de Búsqueda de la Niñez Desaparecida*;¹⁵² and the Court did not explain the reason of rejecting this claim, which in her words was "valid" and it could help to

¹⁵⁰ *Id.*

¹⁵¹ MOLINA THEISSEN, Ana Lucrecia. *Sister of the disappeared Marco Antonio Molina Theissen*. Interview realized on May 2010. San Jose, Costa Rica.

¹⁵² I/A Court H.R., *Case of Molina-Theissen v. Guatemala*. Reparations and Costs. Judgment of July 3, 2004. Series C No. 108, para 75 i), k)

repair a collective group of victims. According to this, Mrs. Ana Lucrecia believes that the Court did not analyze the proper context of the country in which it ruled and how this measure could help to improve to know the truth and to establish mechanisms of compliance.¹⁵³

Another problem that she felt is that the compliance has been very difficult and also a heavy task for the victim's family, which in time is a slow and frustrating process because the Court does not have coercive force.¹⁵⁴

Finally she perceives that the Court gives a perception of a moral justice which is important by awarding the satisfaction and non-repetition measures and barely with the compensation measures. But for her the real justice could only be addressed when they find the truth of the facts and when the responsible would be prosecuted and punished for the crimes that have committed and when the impunity of the case ends.¹⁵⁵

Representative's perspective

Gisela De León, Center for Justice and International Law (CEJIL)

Gisela De León is the former legal director in the Center for Justice and International Law CEJIL, which is an specialized non-governmental organization directed to represent victims of human rights violations behold the Inter-American system of human rights.¹⁵⁶

¹⁵³ Op.cit. Note 146 MOLINA THEISSEN, *et.al.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ DE LEON, Gisela. *Former Legal Director of the Center for Justice and International Law on its office in Central-America.* Interview made by Ramiro Barriga on May2010 in San Jose, Costa Rica.

According to her experience and the aim of the organization, the litigation of strategic cases is aimed to obtain reparations for the victims and victims' relatives, and also for collective reparations for society. She considers that the Inter-American Court has been rich on its reparations judgments and has developed great standards for human rights protection across Latin American region.

However, Mrs. De Leon thinks that, depending of the composition of the Court, they could feel that the Court is in sometimes restricts the application of reparations in a consistent and coherent development. In that sense, she expressed that the Court needs to have defined criteria to award reparations and strengthen its past decisions regardless the composition of the Court to be a mechanism that answers direct and indirect victims that suffered human rights violations.

De Leon expressed also that the Court should have a broader vision of the strategic litigation of cases and the effect that reparations could have. Sometimes the Court orders reparations measures difficult to address and politically inconvenient for the victims and civil society organizations, and that could cause different problems of reparations implementation.

Inter-American Judge Perspective

Judge Manuel E. Ventura Robles

Manuel E. Ventura Robles who is currently Judge of the Inter-American Court of Human Rights recalls that the Inter-American has a progressive jurisprudence and it is evolving permanently case by case and sometimes its resolutions depends also from the composition of

the Court and probably there could be clashes between them but he considers that as a living instrument the jurisprudence evolved greatly and consistently.¹⁵⁷

Judge Ventura also referred to the rules of procedure of the Court of 2001, in which the Court adopted the practice to unify the procedure of preliminary objections, merits, and reparations (the Court could use this procedure as discretionary, and whenever it is necessary the Court could change this procedure and to make a special hearing on reparations. For example, the case of *Salvador-Chiriboga v. Ecuador*, from 2008) However, because the increasing amount of cases pending, and for the celerity of the Court's decisions the Court unified this processes and the Judge felt that this practice could limit and weakened the proper defense of the State and the opportunity of victims of being heard about the reparations claims. In his opinion before this change there were more elements to evaluate appropriate reparations measures.

Judge Ventura believes that the Court's reparations are more progressive and satisfactory for victims and also for societies that are emerging from difficult situations such as military regimes or civil armed conflicts, and points out one of the main challenge that the Court face awarding reparations is referred to its limitation to make proper studies on the field regarding a case (which for him is an ideal to be accomplished) and this is because the low financial budget which the Court has, that made impossible to study the country and the context before to award an specific reparations on its different cases.

¹⁵⁷ VENTURA ROBLES, Manuel E. *Current Judge of the Inter-American Court by Ramiro Barriga*; Interview realized on San Jose on June 2010.

Conclusions

Given the analysis of the present study paper, it is interesting to see that the reparations decisions of the Inter-American Court have evolved dramatically since its first judgment in the *Velasquez Rodriguez* case until the last one, *Radilla Pacheco* case on forced disappearances. The Court has awarded progressively broader reparations under the concept of satisfaction and non-repetition.

Some of the reparations measures ordered by the Court are the most important reparations awarded among any other human rights entities in the world. The Inter-American Court stressed the necessity to repair past wrongdoings by Latin American governments. Those wrongdoings had risen from military conflicts and authoritarian regimes and the reparations measures include giving civil society, non-governmental organizations, and new governmental authorities different tools to address past human rights violations, to ensure future protection of human rights, also to find accountability of past wrongdoings, and to prevent that human rights violations, such as forced disappearances, will happen again.

Nonetheless, this study has identified some deficiencies in the decisions of the Court, such as those mentioned on the *Caballero Santana and Delgado* case where the Court did not want to order the Colombian state to amend its national laws and procedures. However, the Court made steps forward in future judgments, for example with the *Trujillo Oroza* case, through which the Court broadly expanded its resolution, ordering the State of Bolivia to define the forced disappearance of persons as an offence against the law. Until then, Bolivia suffered an

impunity that made the prosecution of past crimes committed against human rights practically impossible.

Correspondingly, this study has shown that the evolution of reparations ensuring the prevention of violations benefits the “society as a whole,” contrary to previous cases, such as the *Castillo Páez* case, in which the Court rejected to conceptualize this issue and that the “right to truth” is also a measure of reparation.

Finally, we have seen the decision in the *Radilla* case, through which the Court ordered the Mexican state to elaborate measures to preserve the memory and biographical sketch of the life of the victim, contrary to its decision on *Heliodoro Portugal* case in which the Court rejected such a demand.

All of the described cases are examples of the variability of decisions that the Court can go through. Also, it was possible to recognize that in different stages of the evolving jurisprudence, the Court did not follow the same patterns of discussion on issues that deserved equal treatment.

Sometimes, depending on the composition of the Court, there may be different decisions, some of them may move forward with remedial measures, and others tend to draw back or fail to grant a relief that can be considered valid and important for victims and petitioners, in a region that still faces the recovery and transition to democratic rule establishments.

It has been argued that some mechanisms and techniques used by the Court are not understood, mostly when the Court rejects award reparations claimed by the representatives or by the Inter-American Commission on Human Rights without reasoning about its rejections. That situation has the potential, in perception of relatives of victims, of damaging their goal to obtain true justice by making use of the Inter-American system.

It is also argued that the change in the procedures of the Court affected the way to address reparations and, according to Judge Ventura, this affected the quality of reparations resolutions because victims' representatives and States do not have the opportunity to discuss broadly the reparations measures away from the exceptions and merits.

The representatives of victims have felt that these practices could affect the strategic litigation in the future. They also believe that sometimes the Court did not consider that its reparations decisions could be used as a great tool by the civil society to help restore tensions that are emerging from conflicts, as well as to protect and prevent future human rights violations. Therefore, the potential that the reparations decisions shows could affect the representation of victims before the Inter-American Court, and its lack of efficiency, even in a single case, could jeopardize the deeper effect that leads to a mend of victims of human rights violations.

Conversely, it is important to recognize that the developments made by the Court on its forced disappearances decisions has played a crucial role to create awareness about the mentioned crime that occurred in different countries in Latin America. That development played

an outstanding role in dealing with democratic governments that were meant to face and to restore victims of human rights violations that happened in the past repressive periods.

The Inter-American Court conserves a high standard of legitimacy among the countries that have ratified the American Convention and accepted the compulsory jurisdiction of the Court. It also has a great standard of credibility among the victims, their relatives, the civil society, and non-governmental organizations that make use of this system.

This independent study paper has identified some of the advances and deficiencies of the Inter-American Court on its practice awarding reparations on forced disappearances cases as an example of the broad reparations on other similar cases in its vast jurisprudence. There are good reasons to believe that for the future a comprehensive and coherent practice of the Court awarding reparations is needed, without affecting its attribution to award broad reparations and to advance on its decisions.

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