

Inter-American Court of Human Rights' reparation judgments. Strengths and challenges for a comprehensive approach

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This paper will analyze the comprehensive approach inside the Inter-American Court of Human Rights' (I-ACourtHR) reparation judgments in order to contribute to healing processes of the victims and communities in the countries of the region. The study of the most representative cases of the I-ACourtHR will explore the most remarkable aspects of reparations judgments.

This text proposes that **reparations** should be understood always in an integral perspective, in order to grasp the full complexity of the individual and collective damages produced by violence. In this sense, reparations in this document will be discussed primarily as an issue with ethical, political, and psycho-social dimensions.

As Van Boven affirms,¹ only scarce or marginal attention is given to the issue of redress and compensation of the victims, the perspective of the victim is often overlooked and considered a complication, an inconvenience, and a marginal phenomenon. Undeniably, the rights of victims in reparations and criminal process are a relatively unexplored subject in Latin American countries.

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¹ Van Boven, Theo, "Reparations: a requirement of justice", in: *El sistema interamericano de protección de derechos humanos en el umbral del siglo XXI*. Memoria del Seminario, Tomo I, second edition. Inter-American Court of Human Rights, San José, Costa Rica, 2003.

Finally, this work will provide a holistic look at the evolution of several elements of reparations in the inter-American system and will propose that integral reparations should be intimately linked with the combating of impunity as a final goal and necessarily from the perspective of the victims.

Reparations without justice are not reparatory and the wider social-political struggles for justice and against impunity and specific psychosocial interventions need to be increasingly consonant and integrated in a unified strategy.²

*In spite of the existence of relevant international standards...
the perspective of the victim is often overlooked.*

*It appears that many authorities consider this perspective
a complication, an inconvenience and a marginal phenomenon.*

Theo van Boven

Gross Human Rights violations patterns in Latin America and the role of international tribunals in conflict management and peacebuilding processes

Impunity, an institutionalized process in most countries in Latin America, is a symbolic register of the “perverse”. Tortures, forced disappearances, and the indigenous genocide in the whole America are certainly cruel and well-known pervasive facts. In most of the cases they have been unpunished enforcing the socialized idea that everything is allowed, even the total and absurd reification of the human being.

The conquest and colonization processes on the American continent represent a paradigmatic model of that, gross violations which were never appropriately addressed or repaired and have broken the community’s political spirit, solidarity and mutual reciprocity.³ This impunity has unconsciously legitimized the abuse of the structural and

² Lykes and Mersky, in: De Greiff, P., *The Handbook of Reparations*. The International Center for Transitional Justice, Oxford University Press, US, 2006, p. 616.

³ Donoso, G., “Memoria e identidad. La subjetividad y las leyes de la cultura”, in: *Acheronta Revista de Psicoanálisis y Cultura* (online magazine < <http://www.acheronta.org/>>), No. 18, 2003.

“symbolic violence”.⁴ Aggression, intolerance, ontological insecurity, exacerbated narcissism, corruption, and violence against the “other” have become the most frequent psychological effects, which are discovered and played out on the social stage.

The Latin American genocide’s impunity is a profound part of our history; and the forgetting and injustice have turned us into suspicious people who can not believe in the State because it does not guarantee the rule of law over the search for truth and justice. The current impunity, however, is nothing but an old trauma that has revived and reinforced the last one.⁵

It is possible to inherit the unspeakable and unthinkable. This is a negative transmission, which becomes present and repeats that which was not translated into ideas.

The Law and its organizing, regulating, reparatory and cohesive functions have not given any sense to social catastrophes; has remained in limbo, in the absolute anomy. There are no limits anymore in every human field.

Many regional conflicts are the direct consequence of past struggles and not just of political and recent circumstances. For instance, the Latin American’s re-conciliation problem is not only related to the 70s and 80s military regimens. It is also closely connected with the indigenous people’s long history, which itself needs to be understood and investigated, as was reported by Truth Commissions in Guatemala and Peru.⁶

⁴ The reproduction of structures of domination in society therefore depends on the imposition of cultural values which are presented as universal but whose content and context are politically and historically determined—and therefore arbitrary. The concept of **symbolic violence** has been looked at works like Pierre Bourdieu’s *Reproduction in Education, Society and Culture* (1970), *Distinction: A Social Critique of the Judgement of Taste* (1979), *Homo Academicus* (1984) and *The State Nobility* (1989).

⁵ Aguiar, E., “Efectos psicosociales de la impunidad”, in: CODEPU, *Seminario Internacional sobre la Impunidad y sus efectos en los procesos democráticos*, December 13-15, 1996. Santiago, Chile, 1999, p. 213. (Author’s translation.)

⁶ Berinstain, C., “Reconciliación luego de conflictos violentos: un marco teórico”, in: IIHR and IDEA, *Verdad, justicia y reparación. Desafíos para la democracia y la convivencia social*. IIHR and IDEA, San José, Costa Rica, 2005, p. 20. (Author’s translation.)

The State's failure to punish crime disqualifies it as a guarantor of the symbolic order and peaceful human interchange. It opens the possibility of periodical reactivation of feelings of profound helplessness.⁷

The Latin American history, as many, has been built upon unfair wars, dead people and a lot of pain. It is easy to want to forget it. Human nature needs to defend itself and, in an unconscious way, decides to forget the suffering. However, the historical memory is not totally developed, the conflicts remain unresolved and repressed and the community's feelings are not expressed suitably. The elementary tenants of psychology teach us that the hope to expose the truth and deal with past trauma can be counteracted by internal desires for it to be left untouched. The so-called "need to ignore it".⁸

For example, during the 70s and even the 90s, Latin America suffered violent conflicts, guerrilla wars, cruel dictatorships and internal struggles, among other problems. This political violence in the region marked systematic, continuous, and gross human rights violations that produced severe psychosocial effects on the population in some countries. State violence has recreated structural, political, direct and symbolic violence, which have all affected intra and inter-subjectively the social life. The conflicts all exist in either a manifest or a latent way.

There are high rates of structural and direct violence. For instance, extreme poverty, massive migrations and the "maras" or gangs phenomena in Central and South America. The former political instability in Bolivia and Ecuador, the atrocities of the Guatemalan military in the 1980s, the massacres carried out by Mexican authorities, drug traffickers and Brazilian police, and the manoeuvring of

⁷ Kordon, D., "Incidencia psicosocial de la impunidad", en: *Varios, Seminario Internacional sobre la Impunidad y sus efectos en los procesos democráticos*, 13-15 de diciembre de 1996. CODEPU, Chile, 1999. (Author's translation.)

⁸ DePres, 1976, quoted by Hamber, B., "Do Sleeping Dogs Lie?: The psychological implications of the Truth and Reconciliation Commission in South Africa", Seminar No. 5. Centre for the Study of Violence and Reconciliation, Johannesburg, South Africa, 1995, p. 4.

Colombia's paramilitaries, guerrillas and army, merely represent new moves in an old game.

The UNFPA's 2004 report entitled *Democracy in Latin America, Towards Citizens' Democracy* affirms that 42.8% (218 millions people) of the total population of the region lived below poverty level in 2002. Latin America, with a Gini coefficient of 0.552, is also characterized by its extreme unequal distribution of the income, its unemployment, its lack of education and its social exclusion of indigenous peoples, women and young. Poverty coincides with ethnical division, as well as gender discrimination. Indigenous people and women are the principal victims of violence and marginalization.⁹

Violence in Latin America can be explained by one of Zizek's thoughts. According to him, we can no longer distinguish between "Suspension of Guarantees" and political stability because the suspension of the law in the name of Law is not an exception anymore. The States have become killing machines as an effect of the bio-politics.¹⁰

For instance, forced disappearances became systematic and generalized practices implemented by the States as anti-subversive control mechanisms. They were complex practices which are composed of several phases. Generally, they conclude with the victim's torture and execution and the disappearance of the body, all with the use of State's funds.

According to statistical reports, the sheer scale of disappearances in Latin America has been overwhelming. In Guatemala alone nearly 40,000 people were lost from the late 1960s to the early 1990s. Over 9,000 vanished in Argentina during the military dictatorship, which ruled from 1976 to 1983. Many thousands more disappeared in Chile, Uruguay, El Salvador

...this systematic abuse left many more victims in its wake:
the countless grieving and traumatized family members of the

⁹ IIHR and IDEA, *Verdad, justicia y reparación. Desafíos para la democracia y la convivencia social*. IIHR and IDEA, San José, Costa Rica, 2005, p.11. (Author's translation.)

¹⁰ Zizek, S., *Violencia en acto. Conferencias en Buenos Aires*. Paidós, Buenos Aires, Argentina, 2004, p. 130. (Author's translation.)

disappeared. These individuals often did not know the fate of their loved ones, nor were they ever handed over the remains; as a result, they were unable even to properly mourn their tragic losses.¹¹

Nonetheless, the democratic processes in Latin America have been building and strengthening themselves; today our democracies face new challenges to their consolidation and inclusion. Human rights international and non-governmental organizations, as well as international tribunals have taken the obligation to develop broad and integrated jurisprudence according to the specific problems that different regions of the world could face. International and regional organizations like United Nations (UN) and the Organization of American States (OAS) have created and maintained special bodies and institutions in order to contribute to the democratization, development, mediation, peacemaking and peace-building processes in the region.

The Inter-American Commission of Human Rights of the OAS, the Inter-American Court of Human Rights [ICHR], and the Inter-American Institute of Human Rights [IIHR] are institutions in charge of promoting within the States of the region; legislations and policies to guarantee the respect for human rights.¹²

The mandate of the international human rights protection organizations of the inter-American system, which have jurisdictional competences –the Commission and the Court–, is to promote, protect and verify the fulfilment of the American Convention of Human Rights. Both organizations have been created by free and sovereign choice by the member States, in order to combat impunity, re-establish a sense of international justice and formulate reparations for gross human rights violations of the victims, their relatives and communities. The ultimate goal of these organizations should be to recreate new peaceful and respectful bonds between people, that might reconstruct their own societies.

¹¹ Antkowiak, T., “Truth as right and remedy in international human rights experience”, in: *Michigan Journal of International Law*, Vol. 23, No. 4. Michigan, U.S.A., 2002, p. 979.

¹² Valle, V., “Long walk to democracy in Latin America and the Caribbean”, paper prepared for the United Nations University for Peace, presented at the IV International Conference of New or Restored Democracies, celebrated at Cotonou, Republic of Benin, Africa, on December 4 to 6, 2000, p. 23.

Indeed, the responsibility of justice organizations and international tribunals is enormous. The impact and deep repercussions of their actions or decisions will affect the victims permanently. If the judgment has been satisfactory for them, they can finally start to experience the closure for losses and mourning; but if for some reason, this final verdict does not repair their suffering or the whole process has not addressed their older traumas properly, how will they deal with those issues?

International tribunals of human rights represent the ultimate notion of justice. The effects of material and symbolic reparations that these tribunals order are able to restore the existential status of the victims, subscribe them in a new circuit capable of validating their testimony as historical truth.¹³

The Law considered like a **symbolic other** must appear in the figure of the courts conducting public trials and sanctioning the States. The mediation of the I-ACourtHR, as a superior entity, secures hope that the mourning of the victims and relatives will not be unending.

On a collective basis, symbolic measures intended to provide moral reparation, such as formal public recognition by the State of its responsibility, or official declarations aimed at restoring victims' dignity, commemorative ceremonies, naming of public thoroughfares or the erection of monuments, help to discharge the duty of remembrance.¹⁴

The exercise and practice of human rights have the objective of distributing the power accumulated in a single sphere, the State. It reaffirms dignity as a basic quality of the human being. Human rights institutions have been created in order to rationalize the power relationships. This may be one of their most important objectives.

The law has the structuring function of social ordering, as well as a symbolic dimension which let the production of new significances. In this sense, reparatory laws must create the conditions that facilitate

¹³ Bottinelli, C., "La impunidad como tentación del poder absoluto", Psychological Assistance at the inter-American system, IHR Project, San José, Costa Rica, 2005. (Author's translation.)

¹⁴ Joint, L. (Special Rapporteur), "Question of the impunity of perpetrators of human rights violations (civil and political)", Revised final report. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-ninth session, *The administration of justice and the human rights of detainees*, E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.

individual and collective elaboration of the *crimes against humanity* of the state terrorism.¹⁵

International tribunals have political and juridical as well as ethical responsibility to fulfil their goals and missions. Their objective might be to reinstate subjective and cultural order in societies. Internal justice should not, of course, be exempt from those same functions and responsibilities. Indeed, balancing structural conditions inside their own political and symbolic power is the first challenge for achieving successful reparation processes.

Healing and the importance and utility of the interdisciplinary approaches

Healing is an attempt to restore the relationship of the individual with the reality, reviving the capacity to link with other people and the world, as well as their capacity to plan the future using a better self-knowledge and their reality.¹⁶

However, healing rarely goes into legal spaces. Mental health has been relegated by other disciplines and by itself to the specific, clinical and individual treatments. Justice holds the highest mandate out of all the omnipotent and reparative faculties with their representatives. Interdisciplinary communication has not always functioned. At the same time, after historical reconciliation processes, different sciences are not always ready to continue working together with satisfactory results.

Justice reappears in the idea that its aim is to heal victims of violence and to reconcile opposing groups. But at the same time, formal justice sometimes has recurred in the discussion of healing as a potential barrier or provocation for renewed trauma. Still, there have been many detractors of the initiative of including therapeutic aspects in the work of international

¹⁵ Guillis, G., “El concepto de reparación simbólica”. Equipo de Salud Mental del CELS, Psychological Assistance at the inter-American system, IIHR Project, San José, Costa Rica, 2005, p. 18. (Author’s translation.)

¹⁶ Lira E. and E. Weinstein, “Psicoterapia y represión política. Prefacio”, in: Instituto Latinoamericano de Salud Mental y Derechos Humanos, *Reparación, derechos humanos y salud mental*. Ediciones Chile América CESOC, Santiago, Chile, 1996. (Author’s translation.)

tribunals. It has been said that healing is not only non neutral, but also detrimental and risky to the core mission of establishing truth and justice. For example, some sarcastic critics called the Truth and Reconciliation Commission (TRC) in South Africa the “Kleenex Commission”.¹⁷

In our experience, we can assert that healing inside national or international juridical systems socializes the trauma. The victims empower themselves and become social actors and survivors, because they stop being passive entities and change into active protagonists; citizens entitled of their rights.

In this sense,

...etymologically, “to repair” comes from the Latin concept *reparare* which means “to be prepared again”. Symbolic reparation means to get ready for a new existence, without terror, without impunity, through a juridical and symbolic act.¹⁸

In a psychosocial approach, reparations are an attempt to recover the victim’s essential life project and to understand the origins and motivation of a repressive action. Reparations should be understood always in a comprehensive perspective, in order to grasp the full complexity of the individual and collective damages produced by violence. Reparations are more than physical elements, such as money, medical services, monuments, among others. Frequently, the reparation processes by themselves are the most important elements. The victim’s active involvement is a very important component of international justice, because passive victims could feel disrespectfully treated and some behaviour could betray the memory of their loved ones.

One of the most important and significant goals of reparations for victims of political violence, is that it allows them to channel their frustration, aggression and feelings of revenge through language and symbolic acts. Well-processed reparations can bring closure or the beginning of mourning and can serve as symbols of healing.

¹⁷ Minow, M., *Between Vengeance and Forgiveness: Facing history after genocide and mass violence*. Beacon Press, Boston, US, 1998, p. 63.

¹⁸ Guillis, G., “El concepto de reparación simbólica”... , p. 3. (Author’s translation.)

The need to take revenge is a deeply rooted human need that cannot be moralized away. It is an inevitable and indestructible part of the human psyche. At the same time, it is a powerful emotion that can be contained in the appropriate forms.¹⁹

Victims should not be chastised for having those intense and human feelings. This would turn out to be in re-victimization. Victims need to elaborate the violence suffered, and they do not need extra guilty feelings just to fit in to the social image of “goodness”. Their reactions are a normal and desirable reaction to abnormal conditions.

The implementation of an active and integral interdisciplinary work for torture cases and other human rights violations in the inter-American system could mark fundamental guidelines not only in the exercise and legal dispositions of human rights of victims, but also contributing to establish advances in the jurisprudence and respective doctrine. Greater theoretical developments on the part of the psychosocial disciplines will promote the enrichment of other ways of understanding this type of problematic. It is necessary to have a methodological line to set up limits for each discipline (psychological, legal or others). It is essential to try a common language among these knowledges, for the victims’ easy and accessible management; therefore, the simple juxtaposition of disciplines or its coincidental encounter is not interdisciplinary.²⁰

In this intent of articulation from two different discourses, the legal one (discourse of the objective order) and the psychological one (discourse of the subjective order), two languages appear well delimited and defined by their differences, trying to be interrelated, to be melted sometimes in one, and sometimes being separated. We share a time of agreements and tolerant disagreements, discussions and pleasant discoveries, that left us the certainty referring to the human

¹⁹ Godwin, T., *Shattered voices. Language, violence and the work of truth commissions*. University of Pennsylvania Press, Philadelphia, US, 2004, p.6.

²⁰ Stolkiner, A., “La interdisciplina: entre la epistemología y las prácticas”, in: <http://www.elcampopsi.com.ar>, 1999, p. 1. (Available May 4, 2010. Author’s translation.)

rights, that there is still a long road to travel, and the confidence that it is possible to do it together.²¹

The world of Law is a world dominated by the discourse of legality, by the objective and pragmatic law, whose logic corresponds to an objective discourse that can distinguish what is framed inside the law and what is not, the rights protected, those forced, its repercussions and the recognition of the best possible repair within the established regulation.

In the psychological discipline, it is a matter of understanding the internal world laws in order to undertake its expressions in human behaviors. The legal discourse is processed in a different way, and is offered in a new perspective according to the suffering, the personal history and the circumstances the victims' life. For victims, experiences remain recorded, incorporated in the individual –and collective– unconsciousness. What is forgotten is not lost; it reappears at any moment transformed through different means such as: dreams, nightmares and physical symptomatic and psychological productions (insomnia, pains and illnesses, depressions, etc.). The psychic does not distinguish among rights violated and repairs pertaining to those violations; the pain and the suffering are the living evidence of the violations, and its relief of the repair.²²

In psychology, the logic of discourse is abstract and subjective; therefore, its object of study is not always precise or finished and it is full of its own particularities.

It is a challenge to advance with an interdisciplinary approach that can guide experts to understand new discourses and to contribute with new theorizations.

²¹ Neuberger, A., and V. Rodríguez, V., “Lenguaje interdisciplinario psico-jurídico vinculado con el litigio de casos en el Sistema Interamericano”, Psychological assistance at the inter-American system, IIHR Project, San José, Costa Rica, 2005. (Author's translation.)

²² *Ibidem.* (Author's translation.)

Reparation, International Law and human rights

Ubijus, ibi retnedium: Where there is a right, there is a remedy. This maxim has long been part of Common law legal systems and appears in Civil law. The implication is that courts have the inherent power to devise the appropriate remedy to conclude cases that come within their jurisdiction. Despite this, national and international courts of law often cannot ensure that States provide effective redress of legal wrongs. Most of them, as we will see later, grant economic compensations and palliative measures in place of remedies that would specifically undo the wrong: such as substitute specific conduct by the wrongdoer, sanctions, and punishment that denies impunity.²³

At the universal level, the United Nations Commission on Human Rights (UNCHR) has created various monitoring mechanisms that deal with particular human rights issues and remedies for human rights violations, outside the context of specific human rights treaties.

In this sense, the most valuable efforts to bring together various reparations rights have been the draft *UN Basic Principles and the Guidelines on the Right to Reparation for Victims of Violations of Human Rights and International Humanitarian Law* (1993) and the *Question of the impunity of perpetrators of human rights violations* (1997) by special rapporteurs Theo van Boven and Louis Joinet, respectively.

In the inter-American system the reparation's classification is subdivided in:

- ***Restitutio in integrum***. This is the re-establishment of the situation that existed before the perpetration of the wrongful international act. From a psychosocial point of view, this kind of reparation has been criticized for being utopian and disrespectful to the victims and their families' feelings, because after a gross violation nothing can be brought back to "normal".
- **Pecuniary damages**. These types of reparations include the monetary compensations: lost income and consequential damages.

²³ Shelton, D., *Remedies in International Human Rights Law* Oxford University Press, New York, US, 1999, p. 292.

- **Non-pecuniary damages.** In gross violations non-pecuniary damages compensations are the most justified to be granted and the most difficult also because, as I said before, it is impossible to recover the pre-perpetration conditions. Material damages are possible to reconstruct, but the suffering and pain are always going to affect the victim.

Moral damage may include suffering and affliction, detriment to very significant personal values, and non-pecuniary alterations for the victim's living conditions. Inside this category is included, particularly, the compensation by non-physical damages through different forms of satisfaction.

- **The satisfaction and guarantees of non-repetition.** These kinds of reparations are perhaps the most important, because they re-establish justice in a wide sense. They institute political, judicial and even social processes to combat the ultimate causes of the violations and impunity. However, the States do not fulfil these reparations promptly or completely. For instance, the verification of the facts and the public revelation of the truth, or a declamatory failure in favour of the victim, are actually the ones least fulfilled by the States.

In summary, the role of the inter-American system in the activation of reparation politics has been important. For example, in Argentina the recommendations of the I-A CourtHR had a key role in the adoption of the politics of reparations according to victims' demands, including the emission of certificates of disappeared people. In the same country, NGOs and civil society affirm that the only remedy they had come from the OAS, not from the State.

And finally,

...in Guatemala and Peru the hefty compensations mandated by the Inter-American Court in specific Chilean cases mobilized an active reparation program in the national level.²⁴

²⁴ Lira E. and E. Gómez, "Capítulo VI. Reparación y salud mental: programa PRAIS", en: *Reparación, derechos humanos y salud mental*. Instituto Latinoamericano de Salud Mental y Derechos Humanos, Santiago, Chile, 1996. (Author's translation.)

**Reparation's challenges as an interdisciplinary field.
Comparative remarks inside the I-ACourtHR's reparation
judgments**

The general objective of this section is to visualize, from a completely dissimilar scope, the development and progress, as well as the possible limitations, of the Inter-American Court jurisprudence in matters of reparations.

When comparing the European, African and Inter-American Courts, it is found that the three of them may grant reparations, including non-monetary remedies, even when their systems and mechanisms are different amongst them. The I-ACourtHR has a broad remedial authority, which represents one of its major advances in the international justice of human rights. The European Court, on the other hand, has interpreted its powers narrowly.²⁵

Another advantage of the Inter-American Court's reparation jurisprudence is that its reparations will be effective and independent from the limitations of the national law. In contrast to the practice of the European Court, inter-American institutions have directed States to take specific actions to remedy human rights violations.

The nature of reparations in the inter-American system is wider and more complex than the European one since the reparations are not settle down based on defects, imperfections or insufficiencies of the domestic law, but with independence of it.²⁶

Its first judgements as Carrillo asserts,²⁷ introduced a new legal paradigm of justice for human rights violations presenting the State's duty to judge and punish as part of the reparation actions. At the same time, while other tribunals have privileged pecuniary damages rather than non-monetary relief, the Inter-American Court has been progressive in this

²⁵ Shelton, D., *Remedies in International Human Rights Law...*

²⁶ García Ramírez, S., "Las reparaciones en el sistema interamericano de protección de los derechos humanos", in: *El sistema interamericano de protección de derechos humanos en el umbral del siglo XXI*. Memoria del Seminario, Tomo I, second edition. Inter-American Court of Human Rights, San José, Costa Rica, 2003. (Author's translation.)

²⁷ Carrillo, A., *The Handbook of Reparations*. The International Center for Transitional Justice, Oxford University Press, US, 2006, p. 506.

issue and coherent with the appalling Latin American contexts (where granting monetary reparations in some cases would not have been enough). Nevertheless, this achievement may be considered a challenge for the implementation of new and integral non-monetary reparations, in order to approach to the ideal of the *restitutio in integrum* for victims.

For the purpose of this paper, the following key principles and indicators of the I-ACourtHR's reparation judgements have been selected to develop the subsequent analysis ranks.

Principle of equity

Since it is not possible to assign a precise monetary equivalent to non-pecuniary damages, for purposes of comprehensive reparation to victims, the Inter-American Court has turned to other alternatives. First, payment of an amount of money, delivery of goods or services that can be estimated in monetary terms, which the Court establishes through reasonable application of **judicial discretion and equity**; second, public acts or works that seek, *inter alia*, to commemorate and dignify victims, as well as to avoid the repetition of human rights violations.²⁸

In its first cases in 1987,²⁹ related to disappearances during the armed conflict in Honduras, the Inter-American Court agreed to the existence of moral damage (psychiatric reports were used as evidence), and granted monetary compensation for that damage. In its decision the Court seemed to suggest that monetary compensation for emotional harm is particularly appropriate in cases of human rights violations, based upon the principles of equity. The Inter-American Court has engaged to this conception in different cases in order to determine the “appropriate” and “fair” economical compensation.

International and national tribunals decide about this “equity” issue according to specific and peculiar circumstances for each case. It is true that it is not possible to measure human pain, and certainly it would become perverse; but human rights violations' victims need to feel that

²⁸ I-ACourtHR, *Case of the Moiwana Community v. Suriname*. Judgment of June 15, 2005, p. 74, parr. 191.

²⁹ *Velásquez-Rodríguez v. Honduras*. Judgment of July 29, 1988, and *Godínez-Cruz v. Honduras*. Judgment of January 20, 1989.

justice is unbiased with them. It is necessary to implement in the future, standardized methods to approximate the awards for immaterial damage, case by case. An integrated and multidisciplinary methodology could be a very helpful methodological tool to accomplish this. International tribunals should seriously consider working with interdisciplinary expert evidence and similar instruments to orient judgments in a more integral way. The I-ACourtHR and other similar tribunals might look for more effective and objective methodologies to grant these kinds of remedies in order to avoid misconceptions and possible future re-victimizations. Victims come from impunity contexts, where the “no rule” was their *modus vivendi*. The access to I-ACourtHR’s processes would represent for them the return to Symbolic Law as well as to Formal Law.

In fact, if a complex analysis about the compensations granted by the I-ACourtHR for immaterial damage in cases with similar contexts would be prepared, we might probably find asymmetries in the pecuniary compensations granted, and probably in other measures that were ordered. It cannot be overseen that the Court, as a legal tribunal, does not necessarily invoke the law in which the compensation to immaterial damage is based. On the contrary, it determines that this comes from the subjective and slippery notion of the **equitable assessment**, which can change according to the Court’s spirit and composition.³⁰

Also Shelton³¹ affirms that these injuries constitute recognized elements of damages and they are particularly personal and therefore difficult to measure. There is no objective test to measure the severity of a victim’s pain; however, common human experience recognizes the reality of physical and emotional suffering. The inherently subjective reaction to pain and suffering claims can lead judges to gift widely varying amounts for similar injuries.

³⁰ Faúndez, H., *El sistema interamericano de protección de los derechos humanos. Aspectos institucionales y procesales*, reviewed third edition. IIHR, San José, Costa Rica, 2004, p. 818. (Author’s translation.)

³¹ Shelton, D., *Remedies in International Human Rights Law...*

Restitutio in integrum

In the initial Honduran Cases, the victims claimed more than monetary compensation, but no requests for non-monetary reparations were granted. However, in these cases the Court also stated the *restitutio in integrum*. It looks like that this type of reparation had a declarative sense at the beginning. However the Court has achieved an extended history where reparations have a more real sense in most of its cases. This has been a great advantage for combating impunity.

As René Kaes indicates, it is not enough to recognize the nature and the origin of horror. It is necessary to recognize the possibility of subjective elaboration for recognition and collective elaboration. Society needs to integrate its own history and memory; and for these reasons, it is so important that the States fulfill the Court's recommendations about making public the judgment through the official and extensive circulation newspapers in the countries.³²

Presumption of damage

Recent decisions of the Inter-American Court show that the right to receive reparations for moral damages is only granted to whom is declared a victim of a human rights' violation. It seems that the Court does not assume more than, in some cases, the damages can be presumed. This could be understood as a jurisprudential advantage, because it gives clarity and certainty.

Juridical insecurity could put the objectivity of the process and the rights of the parties in predicament.³³

However, from a psychosocial standpoint, the Court's lack of presumptions increases the victims' level of anguish. In fact, this criterion is more restrictive than before, and if there is any failure committed by the petitioners or the Inter-American Commission of Human Rights during the procedure before the Court, some victims could be particularly unprotected.

³² Guillis, G., "El concepto de reparación simbólica"... (Author's translation.)

³³ I-ACourtHR, *Case of the Ituango Massacres v. Colombia*. Judgment of July 1st, 2006. Separate opinion of Judge García-Ramírez.

The Court jurisprudence in immaterial damages has not been uniform. Sometimes it has presumed damage³⁴ and in others it has required evidence of it.³⁵ On this issue I agree with the Secretary of the Court, who affirms that the damage might be presumed because every violation to the right to life causes a deep prejudice in the victim's family nucleus.³⁶

In addition, it is beneficial to keep in mind similar experiences, like the South African Truth and Reconciliation Commission, in order to avoid the same mistakes. In this case, any survivor had to justify their trauma to "qualify" for any type of compensation. This can be demeaning and lead survivors to feel that their experiences are treated with suspicion and scepticism. Moreover, "proving" that the damage was done or that "scars" are permanent runs counter to psychological healing and mastering the traumatic incident.³⁷

Ethnic and cultural diversity approach

The Inter-American Court has been very sensitive about the cultural matters of its judgments. Several cases³⁸ have received very positive benefits

³⁴ I-ACourtHR, *Case of the Caracazo v. Venezuela. Reparations*. Judgment of August 29, 2002; *Trujillo-Oroza v. Bolivia. Reparations*. Judgment of February 27, 2002; *Bámaca-Velásquez v. Guatemala. Reparations*. Judgment of February 22, 2002; *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Reparations*. Judgment of May 26, 2001.

³⁵ I-ACourtHR, *Garrido and Baigorria v. Argentina. Reparations*. Judgment of August 27, 1998; *Case of Las Palmeras v. Colombia. Reparations*. Judgment of November 26, 2002.

³⁶ Saavedra Alessandri, Pablo, "La Corte Interamericana de Derechos Humanos. Las reparaciones ordenadas y el acatamiento de los Estados", en: *Memorias del Seminario Los instrumentos de protección regional e internacional de los derechos humanos*. México, D.F., Secretaría de Relaciones Exteriores; Programa de Cooperación sobre Derechos Humanos México – Unión Europea, 2004, p. 197. See: <http://portal.sre.gob.mx/pcdh/libreria/libro1/Cap%2006.PDF> (available May 4, 2010). (Author's translation.)

³⁷ Hamber, B., *Do Sleeping Dogs Lie?...*

³⁸ I-ACourtHR, *Bámaca-Velásquez v. Guatemala. Reparations*. Judgment of February 22, 2002; *Aloeboetoe et al. v. Suriname. Reparations*. Judgment of September 10, 1993; *Case of the Plan de Sánchez Massacre v. Guatemala. Reparations*. Judgment of November 19, 2004; *Case of the Indigenous Community Yakye Axa v. Paraguay*. Judgment of June 17, 2005; *Case of Yatama v. Nicaragua*. Judgment of June 23, 2005; *Case of the Moiwana Community v. Suriname*. Judgment of June 15, 2005; *López-Álvarez v. Honduras*. Judgment of February 1, 2006.

as reparations, which have contemplated respect and value of their cultural practices in mourning processes, right to political participation, right to fair land distribution, publication and dissemination of the judgements in their own mother tongue, i.e. maya achí, enxent, among others.

The incorporation of an anthropological expertise to orient the complexity of these kinds of facts makes it easier to understand beyond the borders of the law. If the conception of justice is being reparative to people, it is time for the international tribunal to make a qualitative jump and look forward to the specialized and effective glance of other sciences and disciplines.

In 1993, the victims in the *Case of Aloeboetoe et al. v. Suriname* asked for measures other than monetary compensations. The Court specifically ordered that the government should reopen the school and health center in the area where the victims' families lived. However, the Court did not discuss other requests, except to briefly note the continuing obligation of Suriname in informing families of their victims' bodies' location. The decision was considerably less than the Commission and victims requested.³⁹ However, in this case the Court also awarded moral damages due to pain and suffering of the victims' parents, presuming emotional injury from the violation, and concluded that:

It is essentially human for all people to feel pain at the torment of their children.⁴⁰

There is an intense debate about whether the international and national systems of justice should incorporate the diverse juridical practices depending on the cultural manifestations of ethnic groups. From psychosocial and anthropological scopes, the answer could be that there is an urgency to create some parameters to incorporate them. The complement on the diverse visions could grant to these historically discriminated groups a more protective and integral spectrum. Their

³⁹ Shelton, D., *Remedies in International Human Rights Law...*, p. 298.

⁴⁰ I-ACourtHR, *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Reparations*. Judgment of May 26, 2001. Separate Opinion Judge Cançado Trindade.

basic needs, such as their identity and spiritual dimension, would not be threatened anymore. The Court has been continuously developing repairs with an increasing comprehension of the traditional ethnical **cosmovision**, and the psychosocial elements inside traditional justice and reparatory processes were just superficially inserted.

If we analyze this first *Case of Aloeboetoe v. Suriname*, the Saramaca's heritage system was applied to order reparations only accepting and respecting polygyny (the recognition of all the spouses of a man; accordingly, the children that she had with each one of them had to be recognized as legitimate successors). The true Saramaca heritage system was partially ignored.⁴¹

On the other hand, the massacre of Plan de Sánchez, a northern native village of Guatemala, was one of the 626 that occurred in the country. It was perpetrated on July 18, 1982 during the facto government of Efraín Ríos Montt. The army murdered 268 men and women, including children of all ages. According to the psychological expert evidence, the massacre of Plan de Sánchez had terrible consequences in many aspects of the life of its population, such as the breach of family roles, the damage to the cultural identity, the breaking of its ancient relationship with the land and the traditional style of conflict resolution. The community sorrow was altered; therefore, they could not carry out its rituals and the Mayan traditional burials until 1994, twelve years later, when the exhumations took place.⁴²

The psychosocial expert evidence presented in this case analyzed these issues⁴³ and deeply recommended to carry out consultations with the communities to decide what they want as remedy, as well as more adequate

⁴¹ Molestina, M., "La sentencia de reparaciones del caso Aloeboetoe y otros: un punto de vista antropológico", in: *Revista IIDH*, No. 25. Inter-American Institute for Human Rights, San José, Costa Rica, January-June 1997, pp. 109-123. (Author's translation.)

⁴² I-ACourtHR, *Case of the Plan de Sánchez Massacre v. Guatemala. Reparations*. Judgment of November 19, 2004.

⁴³ Nieves, G., "Informe sobre el daño a la salud mental derivado de la masacre de Plan de Sánchez para la Corte Interamericana de Derechos Humanos Centro América". Equipo de Estudios Comunitarios y Acción Psicosocial, Guatemala, 2005. (Author's translation.)

forms to achieve it, because as many researches conclude, the reparation complies with its function when it is determined by its own victims.⁴⁴

In addition, it was recommended for a consultation to be carried out with the surviving women to develop measures of repair and programs of medical and psychological attention that contemplate a differentiated vision of the impact according to the kind of victims.

The I-ACourTHR has made diverse considerations and allusions in respect to emotional damage, the permanent breaking of the cultural identity, their customs and traditions, and the psychosocial suffering of the inhabitants of Plan de Sánchez and other communities. We can highlight that the reparations judgment in this case is very extensive and integral, as much in the recognition of immaterial damage as in other forms of repair. Other great advances in this reparation process are the measures of implementation, monitoring and the medical and psychological services offered for the victims, with the intention of guaranteeing quality and efficacy.

On the other hand, the sensitization has been necessary in the fact that many of the victims or their relatives have had roles of leadership in their communities. It can be observed, for many indigenous communities, that the breaking of the bows with ancestors, the fragmentation of the relation with the natural Earth and its resources, and the forced abandonment of their cultural practices, produce severe suffering to them that undoubtedly affect their right to psychic and moral integrity. In this sense, a specific demand of the indigenous people has been free determination to repair them from the standpoint of their own world-view, and respect their rights as minorities.

One of the most recent cases in this area is *Community Moiwana Case vs. Suriname* in 2005 regarding the murder of 39 members of the Moiwana Community in a military operation, in 1986. According to the community traditions, if one of their members is offended, their relatives are obliged to seek justice for the committed offense. If the offended person has died,

⁴⁴ Berinstain, C., "Procesos de duelo en las comunidades mayas afectadas por la violencia política". Ph D. Thesis, País Vasco University, 2005. (Author's translation.)

his spirit will not be able to rest until justice is done.⁴⁵ Similarly, due to the case facts, the Moiwana Community could not honour appropriately its dead. That is considered a “morally deep transgression”, which offends the ancestors and causes “illnesses of spiritual origin”.⁴⁶

The I-ACourtHR took into account these facts and considered them to be a violation of the right to personal integrity of the members of the Community by the

...indignation and shame of having been abandoned by the system of penal justice of Suriname. They must have felt the pain of the hanging of their relatives that died unjustly during the attack.⁴⁷

These have been cases with a dense cultural content, and the solutions arrived at by the Court have left the impression that there is a fertile ground to further advance.⁴⁸

On the other hand, when we have a discussion about reparations, it is necessary to stress that individuals from ethnic-cultural groups⁴⁹ have the right to conserve, use and protect their own traditional health and medicine practices, and demand that the remedies ordered have to be adequate from a cultural perspective, which means free of external imposition unless they consent to it.

In Latin America this debate is still pending. Guatemala and Peru are the countries that have developed these dimension of healing and reparations more appropriately. However, indigenous populations continue to live in discriminatory contexts; so the categories of justice, healing and medicine are frequently western and imposed to them. Healing rituals or traditional mediums and monks are mostly undervalued and rejected, confined to resolve only minor problems. There is no consistency yet to act in these cases, neither from a juridical parameter nor through healing organizations.

⁴⁵ I-ACourtHR, *Case of the Moiwana Community v. Suriname*. Judgment of June 15, 2005, parr. 95.

⁴⁶ *Ibidem*, parr. 99.

⁴⁷ *Ibidem*, parr. 96.

⁴⁸ *Ibidem*, separate Opinion Judge Cançado-Trindade.

⁴⁹ The I-ACourtHR does not establish human rights violations against communities, just individuals. This would be another element to analyze in further documents.

We learned that interventions that complement the traditional systems of healing were not easy to develop. The assumption in successful complementation is that the other party needs additions. The Cambodian villagers did not automatically see this need.⁵⁰

It is worthy to underline the insightful approximation made by Judge Cançado-Trindade in his Separate Opinion in the Case of the *Moiwana Community v. Suriname* about the closeness between Law, ethnic sensitiveness of indigenous peoples and other ancient cultures. He proposes a new category of damage, not covered by the existing categories: the **right to the project of after-life**, that takes into account the living in the relations with their dead, altogether. International Law in general and the International Law of Human Rights in particular, cannot remain indifferent to the spiritual manifestations of human beings, such as the ones expressed in the proceedings before the Court in the Case of the *Moiwana Community*. Also he dears to conceptualize it as a **spiritual damage**, an aggravated form of moral damage which has a direct bearing on what is most intimate to the human person, namely, her inner self, her beliefs in human destiny, her relations with their dead. This spiritual damage would of course not give rise to pecuniary reparations, but rather to other forms of reparation (Separate Opinion Judge Cançado-Trindade. *Case of the Moiwana Community v. Suriname*. Judgment of June 15, 2005, parr. 95).

Right to adequate living conditions

In the *Villagrán Morales vs. Guatemala* case the Inter-American Commission denounced that State agents in Guatemala had executed five children. The Court considered that there were several violations of human rights and gave an important resolution: ordering the designation of an educational center, which has to be named in behalf of the young victims of this case, as reparation. The I-ACourtHR also ordered the State to place, in this centre, a plate with the names of the children and stated that

It would contribute to stirring the conscience in order to avoid the repetition occurred in the present case and to conserve the memory of the victims alive.⁵¹

⁵⁰ International IDEA (Institute for Democracy and Electoral Assistance), *Reconciliation after violent conflict. A handbook, International Institute for Democracy and Electoral Assistance*. Sweden. 2003, p. 157.

⁵¹ *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Reparations*. Judgment of May 26, 2001.

The final judgment of this case finally contemplated integral reparations where moral or immaterial damage were awarded not just in an economical way.

The victims of this case were poor young boys whose mothers had suffered for so many years trying to get justice. The psychological expert evidence in this case was very consistent and defended the idea that the boys were certainly the economical support of the families, and that they were of special value for their mothers. Poverty did not let them appropriate anything else except their own maternity. Material reparations could not substitute this loss; only the symbolic one given by the public **suffering recognition**.

The concept of “Life Plan” or “*Proyecto de vida*”

In *Loayza Tamayo v. Peru*, the inter-American system has made one major and creative innovation in matter of reparations: the so called ***Proyecto de vida***. This concept is associated with the notion of personal transcendence, and at the same time it is about all the options (not just the economic ones) that victims have in their lives to reach their full potentials. It is as an expectation that is both reasonable and attainable in practice. The damage to this **life plan** implies the loss or severe diminution, in a manner that is irreparable or reparable only with great difficulty, of a person’s prospects for self-development.⁵²

The Inter-American Court of Human Rights took a step in the evolution of the law of remedies in this reparations judgment, when it recognized and accepted the concept of project of life, lost opportunities and enjoyment of life, as an element of damages independent of lost future earnings. The Court described ***proyecto de vida*** as the applicant’s reasonable expectations for the future. While accepting the claim in principle and finding that the applicant had suffered harm to his/her *proyecto de vida*, the Court failed to make recognition under this heading. No other applicants have presented a methodology for calculating such damages.⁵³

⁵² Faúndez, H., *El sistema interamericano de protección de los derechos humanos...*, p. 841. (Author’s translation.)

⁵³ Shelton, D., *Remedies in International Human Rights Law...*, p. 229.

The Court found it could not translate the injury into economic terms and therefore it abstained from awarding compensation for the loss nor the access of the victim to the international tribunal, and the decision itself could be seen as a form of satisfaction.

Nowadays, the Inter-American Court judgments do not mention the life project anymore. Nonetheless, the juridical considerations of this concept are analyzed and taken into account in other chapters of the decision. This new criteria of the Court could nullify one of its greatest achievements in reparations. Psychologists, mental health organizations and others might get into the debate proposing new and creative forms to repair the *proyecto de vida*. It is probably one of the most promising and successful sceneries where social sciences could contribute from their own epistemological knowledge to refresh juridical limitations. This is an important jurisprudential element, which might continue being a source to repair future immaterial damages.

On the other hand, in this case also the victim affirmed that she was severely tortured and raped in prison. The Court stated it to be a violation of the right to personal integrity (Art. 5 of the American Convention), because the victim suffered cruel, inhuman and degrading treatment. Although, the I-ACourtHR did not find enough evidence to declare the violation of Article 5 for the alleged rape, the Court ordered Peru to release her and pay fair compensation to her and her family, and reimburse to them the expenses they incurred in during the legal process. In its reparations judgment in the case of *Loayza Tamayo* the Court focused on rehabilitation and reintegration of the victim. I will develop more on this specific aspect in the following section.

Inclusion of gender approach

In the case *Loayza Tamayo v. Peru*⁵⁴ the Court failed to award symbolic reparations, rejected the victim's petition of public apologies and did not recognize the systematic sexual violation, because "due to the nature of the facts" they could not prove the validity of the rape allegations. Another severe legal repercussion of this was that it was not considered as a torture case, but just as a cruel and inhuman treatment case.

⁵⁴ Reparations Judgment of November 27, 1998.

The revision of this case from a psychosocial approach revealed that the fundamentally legal vision could not reach the dimension of the victims' suffering and the necessity to repair it. The validity of some tests would be reinforced with a psychological consultant, and thus would facilitate the legal work. The inter-disciplinary work, for its characteristics of amplitude, interchanges and diverse ideas, has been adapted to continue producing advances in the treatment of cases before the Court, and in the doctrine and jurisprudence of human rights.⁵⁵

On the other hand, in the massacre of Plan de Sánchez, several women between the ages of 12 and 18 were sexually abused. The same occurred in other massacres of the country in the same period. The memory and dignity of women as transmitters and support groups remained culturally, and socially familiar, and individually damaged. Women were consumed by an intense fear that has paralyzed and prevented them from participating in the processes of justice because of their fear to speak.

During the public hearing the Court showed sensitivity to the women's affectation due to the sexual violations. Nevertheless, the Court's decision does not allude specifically to the surviving women who suffered rape.

The gender approach is essential in this area because it implies and recognizes that violent conflicts affect men and women differently. A differential perspective is necessary in order to analyze the impact that affects women generally. Throughout the armed dictatorships or conflicts, sexual violence, especially against women, has been frequent and systematic. The nullity and the associated stigma complicate the reintegration of women, as well as the access to justice or repair; given the impact that the revelations can have in social or family lives.

For example, the Report of the Truth Commission of South Africa indicated that the number of women who went to testify during this process was extremely high regarding the number of men. In addition, it was demonstrated that women, who got to testify, did not speak about

⁵⁵ Neuburger, A., "Análisis del caso María Elena Loayza Tamayo contra Perú", Psychological Assistance at Inter-American System, IIHR Project, San José, 2005.

their own experiences as victims, but of their spouses, children or other men in their lives.⁵⁶

In this sense, in the *Case of the Miguel Castro-Castro Prison v. Perú*, the I-ACourtHR took foremost progress in the protection of women's rights. The Court stated the applicability of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (CEDAW). As the judges García Ramírez and CanVado Trindade assert, respectively, in their separate opinions:⁵⁷

This road was pendent of statement, analysis and solution. It has been until today, an unexplored issue, without definition.

In this *Case of the Miguel Castro-Castro Prison* there have been acts of extreme violence and cruelty against the interns –women and men– as it is pronounced in the file of the case, which, however, requires a gender analysis in reason of the nature of determinate human rights violations that the women suffered particularly.

Separate opinions

The case *Tibi vs. Ecuador*⁵⁸ has had great relevance for the legal doctrinal development since it denotes an integral view when incorporating clearly important psychosocial elements in its content. Judge Cançado Trindade's separate opinion stated that the incorporation of psychosocial arguments and a wider scope of the victim's realities from traditional juridical spaces is indubitably an example that the interdisciplinary methodology has positive incidence in the development of the new juridical criteria, and certainly establishes a higher level of sensitivity to look at the victims, not just in legal frameworks but with their own complexity in a real and hard world.⁵⁹

On the other hand, in the *Case La Cantuta v. Perú*⁶⁰ Judge García Ramírez offers several queries about the forgiveness, reconciliation,

⁵⁶ Minow, M., *Between Vengeance and Forgiveness...*, p. 84.

⁵⁷ I-ACourtHR, *Case of the Miguel Castro-Castro Prison v. Perú*. Judgment of November 25, 2006.

⁵⁸ I-ACourtHR, Judgment of September 7, 2004.

⁵⁹ I-ACourtHR, *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Separate opinion, Judge Cançado Trindade, parr. 33

⁶⁰ I-ACourtHR, Judgment of November 29, 2006.

victim's rights, and their efficacy inside the international tribunal. These are very interesting and polemic issues, and they show a deep concern about the social and ethic spheres that involves the juridical issues and the aperture for an open and inclusive debate.

Moreover, a lucid and articulate elucidation about the encounter between mental health and human rights was exposed in the separate opinion of Judge García Ramírez in the case *Ximenes Lopes v. Brasil*.⁶¹

Adequate treatment to the victims' relatives

In the case *Mapiripán Massacre v. Colombia*⁶² one of the most relevant aspects of this judgment is found in the section "Other forms of repair". This element shows the extensive and well-achieved characterization that this judgment offers to the conditions that should meet the services of psychological and medical attention for victims, to grant mainly: specialization, without charge and voluntarily⁶³.

As in other cases⁶⁴ the reparations have included medical and psychological attention. It is relevant to mention that in this case the Court maintained that the State has the obligation to provide medical and psychological attention to all the executed or disappeared victims'

⁶¹ I-ACourtHR, Judgment of July 4, 2006.

⁶² I-ACourtHR, Judgment of September 15, 2005.

⁶³ Adequate treatment to the victims' relatives. The Court considers that is precise to have a measurement repair that looks for a reduction of the psychological sufferings of all the executed or disappeared victims' relatives. With the purpose of contributing to the repair of these damages, the Court arranges the obligation in charge of the State to offer gratuitously, without any charge using the national services of health, the appropriate treatments required for these people, previous manifestation of their consent to these effects, from the notification of the present judgment to those who already are identified and at the moment of the identification, in the case of those who are not identified at the moment, and by the time that is necessary, including the provision of medicine. When providing psychological treatment, it has to be considered the circumstances and particular necessities of each person to offer them collective, familiar and individual treatments, according to everyone and after an individual evaluation.

⁶⁴ I-ACourtHR, *Godínez-Cruz v. Honduras*. Judgment of August 17, 1990; *Juan Humberto Sánchez v. Honduras*. Judgment of June 7, 2003; *Case of the Caracazo v. Venezuela*. Judgment of November 11, 1999; *Cantoral-Benavides v. Perú. Reparations*. Judgment of December 3, 2001.

relatives, as well as other possible and future victims who are identified during the process. Besides the characteristics mentioned above, there were also special conditions determined on the provision of services (previous manifestation of their consent, during the time that the treatment is necessary, without any charge and using the national health services, –including mental health– a suitable treatment and the provision of medicine). All these measures mark very positive parameters of evolution of the reparations in an integral way.⁶⁵

The methodology of attention to victims is another strength that was implemented in this case. There was a close coordination between the legal organization or applicants: Colectivo de Abogados “José Alvear Restrepo”, the Center for Justice and International Law (CEJIL) and the mental health group, which also incorporated one of the modalities of assistance with diverse functions. In this case, a psychiatrist and a psychologist participated in the elaboration of the psychological expert evidence, and the psychological accompaniment to the victims was in charge of an organization of psychosocial support to victims.

When this team concluded its experience of psychological assistance in this case, it reported that the interdisciplinary work contributed in a fundamental way to the affected people in order to adopt a very positive attitude and confidence, to the legal declarations, the psycho-judicial evaluation and the individual search of repair as a contribution to the defense of human rights and the overcoming of impunity.

Conclusions

The Inter-American Court of Human Right’s jurisprudence has had an extensive history of several challenges and achievements. As van Boven affirms⁶⁶, the Inter-American Court’s legal case on reparations has acquired great sophistication in the development of criteria and judicious practice of awarding pecuniary reparations. However, the Court has not

⁶⁵ I-ACourHR, *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of January 31, 2006, parr. 274; *Vargas-Areco v. Paraguay*. Judgment of September 26, 2006, parrs. 159-160; *Gutiérrez-Soler v. Colombia*. Judgment of September 12, 2005, and others.

⁶⁶ Van Boven, Theo, “Reparations: a requirement of justice”...

shown great willingness to order other non-pecuniary reparations and to give substance to the wording of Article 63. Among some strengths are:

Strengthens

- The reparations, which are actually autonomous from national limitations, have shown a positive development and evolution. They have been very creative and culturally sensitive, for example, the obligation to publish the judgement in an official newspaper serves not only as recognition of the State's responsibility and the clarification of the facts, but also contributes to the elaboration of the processes of sorrow and emotional marks for the victims and their relatives, as well as the rescue of collective memory and the creation of social conscience. The value of symbolic reparations is that they extend beyond the victim and their families. They have an effect in the collective. They represent a demand of dignity, the fight against social violence and impunity.

The guarantee of non-repetition does not only contribute to commemorate the name of the victims, but it also allows analyzing the causes and consequences of facts, and it contributes to the prevention of those facts repetition. In addition, the recognition of cultural aspects of victims and their private needs are contemplated in I-ACourtHR reparations as seen before. One cannot deny the close link between reparations and combating impunity, as well as ensuring non-recidivism of the injurious acts, always and necessarily from the perspective of the victims. True *reparatio*, linked to realization of justice, requires overcoming obstructions of the duty to investigate and to punish those responsible, and putting an end to impunity. In other words, contrary to what the Inter-American Court maintained in the past,⁶⁷ reparations can perfectly well be both compensatory and punitive, with the aim of putting an end to impunity and ensuring realization of justice – which is perfectly in accordance with the current stage of development of international law.⁶⁸

⁶⁷ In the judgments on “compensatory indemnification” (1989) in *Velásquez Rodríguez* and *Godínez Cruz* Cases.

⁶⁸ I-ACourtHR, *Myrna Mack-Chang v. Guatemala*. Judgment of November 25, 2003, Separate opinion Judge Cançado Trindade, parr. 46.

- The creation of the *proyecto de vida* and the psychological support as part of medical treatments are reparations that might continue under permanent re-examination for their future evolution.
- Reparations stated by the Inter-American Court have had positive repercussions. Thus, they might develop integral and interdisciplinary measures to cover the extensive needs of the victims. As Desmond Tutu expresses,⁶⁹ there might have to be differentiation between the form and quality of reparations made by two people who have suffered exactly the same damage in consequence of the same illegal act.
- The effective fulfillment by States is a common element of reparations, which is mandatory for its real objective. In this sense, according to the Inter-American Court, the high degree of fulfillment of the Court's judgments is one of the greatest profits of the inter-American system.⁷⁰

Of the total controversial cases that the Inter-American Court of Human Rights has under its jurisdiction, 13.33% are filed, 30.66% are in proceeding before the Court and 56% are in the stage of supervision of sentence fulfillment.⁷¹

These are official statistics and pronouncements from the Court about the percentage of the compliance of fulfillment, and they show one of the most positive aspects of the inter-American system's functioning together with all the work of observation and monitoring developed by the victim's representatives organizations, who are in charge of caring for the quality of the reparation for the integral satisfaction of victims.

Regarding the material damage compensations' degree of compliance by States, from the diverse compliance resolutions emitted by the Court it is possible to conclude that, in general, the monetary remedies are fulfilled. On the other hand, regarding the States' duty to sanction the perpetrators, there

⁶⁹ Tutu, D., *No future without forgiveness*. Doubleday, U.S.A., 2000.

⁷⁰ García Ramírez, S., "Las reparaciones en el sistema interamericano de protección de los derechos humanos"..., pp. 126-130 and 557; Saavedra, P., "La Corte Interamericana de Derechos Humanos, las reparaciones ordenadas y el acatamiento de los Estados"..., pp. 185-220. (Author's translation.)

⁷¹ I-ACourtHR, *Caesar v. Trinidad and Tobago*. Judgment of March 11, 2005. Separate opinion, Judge Manuel E. Ventura Robles.

is a lack of effective compliance of the Court's judgments. Furthermore, until now, there is no case where the disappeared victim's remains have been returned to their families.⁷²

After a revision and analysis of the compliance resolutions, it is possible to conclude that the effectiveness and compliance are not the same in all kinds of reparations. For instance, the most successful are the monetary, press publications and symbolic reparations. On the other hand, the less successful are perpetrator's investigations and sanctions and the location of disappeared people or their remains.

Reparations, as restitution, compensation and rehabilitation, may be more easily accepted by the State, but not without its problems. Restitution may not only be feasible in situations of epidemic violence. Rehabilitation is probably the most acceptable aspect of reparations, medical and psychosocial rehabilitation is probably within the financial and moral compass of most countries and could probably be done.⁷³

Liliana Ortega, Executive Director of COFAVIC (Venezuela), declared that

97% of investigations to identify, judge and sanction in the perpetrators of the *Caracazo Case vs. Venezuela* are in their preliminary phase; for that reason, nobody has been condemned... there are no measures no guarantee the repetition of the facts... the impunity is evident [and she insisted in] the necessity of an official politics of human rights.⁷⁴

An investigation made by Paz Rojas⁷⁵ in Latin America and South Africa shows that all the people interviewed agreed in saying that most of the reparatory measures did not take place and when the violation happened, it was only in the economic scope and social welfare. Both of

⁷² Saavedra, P., "La Corte Interamericana de Derechos Humanos, las reparaciones ordenadas y el acatamiento de los Estados"... (Author's translation.)

⁷³ Hamber, B., and Richard Wilson, "Symbolic closure through memory, reparation and revenge in post-conflict societies", Traumatic Stress in South Africa conference hosted by the Centre for the Study of Violence and Reconciliation in association with the African Society for Traumatic Stress Studies at the Parktonian Hotel, Johannesburg, South Africa, 1999.

⁷⁴ March 2006, from <<http://www.eluniversal.com>>.

⁷⁵ Rojas, P., "La reparación y sus efectos", in: ECAP, *Psicología social y violencia política*. Siglo XXI, Guatemala, 2003.

them are absolutely insufficient. In that investigation, the victims agreed that the States did not fulfil the reparations in an integral sense. According to Rojas, it is unacceptable for victims that the official list with the names of the perpetrators of human rights violations would not become public. Victims and society need to know the names in order to individualize the responsibility, and this does not become an abstract concept dissolved in any institution: the State, the Army, etc.

Limitations

- As analyzed during the previous sections, the Inter-American Court's judgments compliance is a clear limitation on its reparations jurisprudence, which should be faced in order to continue its progress and look for the protection and welfare of human rights violations' victims. The I-A CourtHR is able to apply international laws, but it does not have any specific juridical method to make States fulfil its orders, just political ones. It is indispensable to fortify the real impact of the role of this international tribunal and the supervision mechanisms of the OAS, just like the European system has done.

If we analyze the 2005 Annual Report on the Work of the Inter-American Court of Human Rights we can see that the quantity of cases has increasing. The "old" cases are still under supervision of compliance (so they could not have been closed yet), and new cases continue to be presented. The Court shall implement new forms to increase its capacity in making a difference in national, community or individual peacebuilding processes.

- On the other hand, reparations are intimately related to the correlation of political forces. It means that we cannot talk about reparation if it is not linked with power and political will. It has been concluded that in those countries where political forces are favourable to reparations, the reparations processes move forward. This usually happens just in a few occasions. For that reason, reparations issues can be disappointing. In summary, the successful percentage in reparations experiences is 1 to 10. Furthermore, international community does not usually finance the reparations projects, basically for three reasons: reparation is a State's act; it is politically delicate because it could represent political struggles

with national actors, and there are some restrictions in domestic legislations.⁷⁶

- Additionally, the Court could review standards that require the declaration of the violation of the right to personal integrity, in order to declare someone a victim and access to immaterial reparations carefully. These procedures, in a certain level, could, as we analyzed before, unprotect a victim.

We need to emphasize that during the last year, the Inter-American Court has also shaped a new politic: to not hold public hearings in every case. The Court is resolving certain cases internally. This means many victims did not have the opportunity to tell their story, to generate a narrative framework in order to be assimilated into individual and collective memory.

This could mean the bridging of “fundamental discontinuities of life”... It gives visible and tangible shape to the past, providing shall we say, a ritual context within which the past can be examined and placed on record – at least in part.⁷⁷

The subjective and broad vision at the same time, given mainly by a psychological-juridical work, would avoid that those reparation judgments become in new stressing and re-victimizing factors for victims and relatives. Lawsuit process has specific juridical connotations, which could be frustrating for many victims.

For example, in the case *Genie Lacayo vs. Nicaragua*⁷⁸ the parents of the victim rejected the \$20.000 granted as economical compensation by the Court. They sent a letter to the Inter-American Commission, the Court and others affirming that they wanted justice, punishment and sanction for perpetrators. The State deposited the money in a notary lawyer's

⁷⁶ Segovia, A., International IDEA and IIDH, “Desafios para la democracia y la convivencia social”, San Jose, Costa Rica, July 27, 2005.

⁷⁷ Hamber, B., “Dealing with the past and the present. Psychology of Reconciliation”. Public address presented at the 4th International Symposium on the Contributions of Psychology to Peace, Cape Town, p. 65.

⁷⁸ I-ACourtHR, Judgment of January 29, 1997 and Order of the Court of September 13, 1997.

office. The Court never mentioned the letter, decided that Nicaragua had had compliance with the judgment and filed the case.⁷⁹

- Finally, the inter-American system together with all non-governmental organizations, which have incidence on the system, must find forms and mechanisms to individualize and to personalize the approaches to face the pain and the adversities of the past. The legal-psychological strategy is an experience that approximates us towards this level.

The complex dynamics and the brutal reality of this type of violence demonstrate that an interdisciplinary approach is a very useful and valuable tool to understand the dimension of the suffering of the victims, and their necessity of repair, and in this way, get the basis for a real culture of peace and human rights in the region.

Recommendations

It is extremely difficult to prescribe a particular model of reparations. Nevertheless, this section tries to offer some general guidelines in order to face the difficulties and challenges of the Inter-American Court and similar international tribunals of justice, that are found in this work; to become real social actors in the world peacebuilding processes.

As far as possible, recommendations are formulated to help in responding to these complexities. However, they should be considered as proposals which main objective is re-opening the international debate and to be discussed and adapted to the particular circumstances.

The experience of those who exert activism has shown experts that certainly this sector is specially exposed to very difficult to assume realities, without an adequate preparation. Crossing violence and pain as part of the quotidian of people causes the development of defences and symptomatic situations, as ways of internal alarms that try to redirect that addition of violence as an escape or defence. Among the most frequent situations that legal teams confront are: nightmares or extreme fatigue post-interview or hearing; depressions or excitation; lack of motivation for work; maniac states of work, and stress. There

⁷⁹ Faúndez, H., *El sistema interamericano de protección de los derechos humanos...*, p. 803.

are activists who have enormous empathy with the victims and suffer with them, others who overturn their empathy in a quiet way in their work for the victim, and others that put enormous distance between the reality and the suffering of the victim and their own feelings. Exhaustion levels exist as well as emotional contamination. Many times the presence of a psychologist who indicates these defences and relations that could affect their work mark some kind of resistance. Furthermore, conceptual differences establish ruptures in the ideologies and forms to touch very intimate narcissist's threads. They mark divisions, alliances, rivalries, etc., and many interfere in the good performance of all and in the resolution of the same case.

Interdisciplinary knowledges and practices are forms of power and, therefore, questions of power will appear necessarily. In this sense, when working for the struggle of human rights, having close the pain and suffering of people, being witnesses of vulnerability and impunity, experts feel immune to cruelty, they believe they are able to escape from temptations that power offers. Nevertheless, often, those actions that are born from life desire, from human altruism, are carrying simultaneously enormous doses of destructiveness, commotion and are poison for the own ideal of freedom.⁸⁰ The psychologists have also lived these experiences in daily practices, they have often chosen the ways of treatment. The important thing is to be able to reveal the power, to put it in words, to elaborate it. Learning to deal with these issues is still a challenge of interdisciplinary work. Psychological treatment or case management have indeed to be services for other people, not only a mask or disguise of own internal conflicts. Nobody would benefit from that equation; the re-traumatization of the victims is imminent.

⁸⁰ Forster, R., *Clínica psicoanalítica ante las catástrofes sociales*. Paidós, Buenos Aires, Argentina, 2003, p. 144.

I-ACourtHR and other international organisms

- Mr. van Boven⁸¹ developed in his report some relevant propositions about reparations challenges that are necessary to face. He affirmed that the question of reparation for victims of gross violations of human rights and fundamental freedoms should be addressed more consistently and more thoroughly both in the United Nations and other international organizations, as well as at the national levels. Furthermore, he asserted that all agencies and mechanisms dealing with human rights and humanitarian issues at national and international levels should be mindful of the perspective of the victims, and of the fact that victims often suffer long-term consequences of the wrongs inflicted upon them.
- It is imperative to create and sensitize about the importance of the interdisciplinary work between juridical and social sciences, mainly the psychological and anthropological ones. The Inter-American Court of Human Rights or similar ones, might implement permanent mechanisms of integral attention to victims in order to be coherent with their own purposes and produce reparatory and integral processes for their central characters: the victims.

Human rights organizations, NGOs and other sectors of civil society

- Some measures ordered by the I-ACourtHR and similar organisms have been proved psychosocially reconstructive; they might be permanently strengthened by civil society and human rights organizations. Some of them can be mentioned: to recognize victim's truth and suffering; promote the investigation of some facts of the past; dignify victims and their families; recognition and apologies for the facts; public commemorations – give public voice to the victims' testimony;

⁸¹ Van Boven, Theo (Special Rapporteur), "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms", Final report, *Review of further developments in fields with which the sub-commission has been concerned*, E/CN.4/Sub.2/1993/8. Commission on Human Rights, Sub-Commission on Prevention of, Discrimination and Protection of Minorities, Forty-fifth session, Item 4 of the provisional agenda, 1993.

economical support; policies of social development; prevent the causes to avoid their repetition; public recognition of the unjust suffering, and others.

- On the other hand, it would be important to remember that reparations' success is not about judgment compliance; it is essentially about the quality of them. Human rights organizations have to inform, assess, supervise, monitor and evaluate the State reports about their compliance in an interdisciplinary way in order to inform to the Court or denounce the facts. A program of reparations generates expectations in the victims. If this is not fulfilled, it will produce very negative and opposite effects to the aim of the reparation. And from the psychological point of view, frustration and people's double victimization take place. In this sense, there is a consensus that justice is the most important right and reparation for victims. Punishment for perpetrators and the truth of the facts are essential to the psychosocial restoration of the victims, families and communities.
- Interesting experiences from the South African TRC and similar initiatives could be applied and developed in our region. For instance, its recommendations included that the companies contributed to the constitution fund of reparations, indicating their possible numerous modalities. It also asked for a restructuring of the debt in which the apartheid regime had incurred to maintain the State police. It was reconstructed to release money in the short term destined to the development plans and redistribution so necessary. Besides, the Commission recommended the obtaining of a tax of patrimony – by a single time of the old beneficiaries.
- Also, the Khulumani group (KSG) produced a set of proposals of repair policy as the bases of the work of incidence and lobbying with the oriented government to obtain that the individual and communitarian reparations are sufficient; activities of pursuit and processing were made. Trained personnel took care of the victims and relatives with appeals of reparations' requests. The KSG has installed a Telephone Line of Aid on Reparations.⁸²

⁸² From <<http://www.khulumani.net>>.

- About symbolic reparations, as Hamber and Wilson commented,⁸³ genuine reparations, and the process of healing, does not occur **through** the delivery of an object (e.g. a pension, a monument, etc.), but through the process that takes place around the object.

It is important for the victims to take part in projects, like monuments, which are aimed directly at their interests.

States

- In a psychosocial way, it is necessary that the States implement free, specialized, effective and adequate psychosocial and medical attention programs to victims, families and communities. Ideally, some combination of individual and collective dimension should be achieved by providing better and easier access to health services to previously oppressed minorities in remote areas. However, in order to be psychologically restorative at the individual level, it may need to personalize, for instance; specific and free counseling services may also be organized. It would be also necessary to research the potential possibilities and limitations of every healing orientation and level in order to establish more successful strategies of victim's attention. Moreover, these kinds of programs might not be confused with public policies.
- These kinds of programs might incorporate the gender and cultural characteristics of people in which they are working. In addition, it is indispensable to work with local resources, traditional medicine and healing methods. Still, as Wessells affirms,⁸⁴ there are so many different initiatives under way on these issue, which are signals that it's time to provide some systematic guidance. I am hopeful that in a small way the UN Task Force⁸⁵ will contribute to that. States, international

⁸³ Hamber, B., and Richard Wilson, "Symbolic closure through memory, reparation and revenge in post-conflict societies"...

⁸⁴ Michael Wessells, personal communication, 14-03-2006.

⁸⁵ UN Task Force on Mental Health and Psychosocial Support in Emergency was created by the Interagency Standing Committee which consists of all the UN agencies and also a large consortia of NGOs. It was started to construct practical guidance on first response in emergencies regarding mental health and psychosocial supports. Michael Wessells, personal communication, 03-03-2006.

organizations, human rights organizations, mental health institutions and local communities will have substantial contributions in these measures too.

- Finally, as Žižek asserts,⁸⁶ the “postmodern” ethics of compassion to victims legitimize the evasion, the interminable deferment of the act. All “humanitarian” activity to aid victims, all food, clothes and medicines for the Bosnians (for example), is there for hiding the urgency of the **act**. The multitude of ethical individuals that are multiplied of particular ethics today (ecological ethics, medical ethics, etc.) must be conceived indeed like an effort to avoid the true ethics, the ethics of the **ACT** as it.

⁸⁶ Žižek, S., *Violencia en acto. Conferencias en Buenos Aires...*