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Reparations of the Inter-American Human Rights System in Cases of Gross and Systemic Violations of Human Rights: The Colombian Case

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CONFERENCE

REPARATIONS IN THE INTER-AMERICAN SYSTEM: A COMPARATIVE APPROACH

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granted a similar amount to that requested. However, the uncertainty existent in the system has a strong impact on the lawyers who want to work in the inter-American system. If you spend seven or eight years litigating before the Inter-American Commission or the Court, you will have undoubtedly incurred significant expenses, and the Court should carefully analyze each individual case or at least set more clear guidelines when granting costs and expenses.

Case	**Amount Requested**	**Granted by Court**
Blanco Romero	$176,000	$40,000
Masacre of Mapiripan	$180,000	$25,000
Serrano-Cruz	$47,000	$43,000

C. Diego Rodríguez-Pinzón[29]

"Reparations of the Inter-American Human Rights System in Cases of Gross and Systematic Violations of Human Resources: The Colombian Cases"

I want to focus this presentation on one of the main problems that this region has confronted during the last couple of decades: gross and systematic violations of human rights. Throughout its history, Latin America has faced some of the worst violations of human rights. We have transitioned into a new democratic environment in most of the countries of the hemisphere, but unfortunately, there are still states that continue to face these types of violations.

I want to use the case of Colombia, a country with which the inter-American human rights system has dealt with in the last twenty-five years, as an example to try to illustrate how the Inter-American Human Rights Commission and Court have balanced the issue of remedies and reparations with the difficult task of repairing gross and systematic violations, as Professor Dinah Shelton indicated. The case of Colombia provides us with some insight on how international mechanisms are trying to respond in this region and, particularly,

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how some of Colombia's official institutions and non-governmental organizations are trying to engage in a dialogue at the international level in order to find a way to provide relief for the victims of violent groups.

Colombia has been permanently in the agenda and docket of the Inter-American Commission and the Inter-American Court for the last two decades. The Inter-American Commission, for its part, has engaged Colombia in many different ways. The Commission has an ample mandate and the institutional tools that are particularly well-suited to address these types of violations: on-site visits, the possibility of issuing reports of a general or special nature, and diplomatic intervention, among others. The Commission has resorted to all these institutional mechanisms to confront and induce improvement in the current human rights situation in Colombia.

Interestingly enough, the Inter-American Commission's practice in the late 90's provides us with the first examples of the type of reparations that the inter-American system could implement regarding the situation in Colombia, a practice that years later we will crystallize in the jurisprudence of the Inter-American Court in cases against this country. Under the Commission's auspices, several landmark events occurred in the context of several friendly settlement discussions in cases of massacres perpetrated by Colombian state agents. Among the most notable cases, *Massacre "Los Uvos" v. Columbia*,[30] *"Caloto" Massacre v. Colombia*,[31] and *Villatina Massacre v. Colombia*[32] were all being processed in the individual complaint system of the Commission. Surprisingly, in a hearing held in 1995, the government agreed to initiate friendly settlement discussions for those events.[33] The government offered the possibility of adopting several types of reparations to try to remedy the damage done. On July 29, 1998, Colombia's President publicly stated that government forces were internationally responsible under the American Convention on Human Rights for the violations committed in the massacres of Los Uvos, Caloto, and Villatina. This event had structural importance even though it occurred in the context of an

30. Case 11.020, Inter-Am. C.H.R., Report No. 35/00, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 446 (1999).

31. Case 11.101, Inter-Am. C.H.R., Report No. 36/00, OEA/Ser.L/V/II.106, doc. 6 rev. (1999).

32. Case 11.141, Inter-Am. C.H.R., Report No. 105/05, OEA/Ser.L/V/II.124, doc. 5 (2005).

33. The friendly settlement in the *Villatina Massacre* was successful, while it failed in the end in the *Los Uvos Massacre* because of a lack of full compliance with the agreement, mainly on the issues of prosecuting those responsible.

individual case because it had extensive political and social repercussions. The most significant effect, among several important outcomes, was the validation of human rights obligations as a legitimate issue and a positive force within the conflict in Colombia. Until then, human rights were rhetorically perceived as "the rights of the rebels" or "the rights of terrorists." The fact that Colombia's President came out publicly and stated that the actions by the security forces of Colombia were a violation of the human rights of the victims, as recognized in international norms, significantly empowered an important constituency of human rights defenders and victims, among others, that until then had been perversely associated, in most cases, with violent groups and accused of "using" human rights to embarrass the government.

It is worth mentioning that the government, in the context of the mentioned massacre cases, also agreed to several other types of reparatory measures. These included, among others, compensating the victims, establishing symbolic reparations, such as monuments and plaques in public places in remembrance of the massacres, as well as "formulating or implementing, as appropriate, the pending social compensation projects for attending to the displaced families and individuals, health, education, electric power, the Piedrasentada—Los Uvos road, and job creation."[34] All these "enhanced" reparatory measures were developed in the context of international and national negotiations in cases pending before the Commission.

I believe there is a symbiotic relationship between these first Colombian cases in the Commission's proceedings and what is happening now with the decisions of the Inter-American Court regarding Colombia. In the latest case docket of the Inter-American Court, there are several very important cases recently decided on gross and systematic violations. *"Mapiripan Massacre" v. Colombia*,[35] *19 Tradesmen v. Colombia*,[36] *Pueblo Bello Massacre v. Colombia*,[37] and *Ituango Massacres v. Colombia*[38] are all cases against Colombia and are dramatic examples of cases where the Court has been required to provide redress for massive violations of the most basic rights. The

34. *Massacre "Los Uvos"*, Case 11.020, Inter-Am. C.H.R., Report No. 35/00, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 446 (1999) (quoting the Report of the Coordinating Committee for following up on the recommendations of the Comite de Impulso for the incidents of Los Uvos, Caloto, and Villatina).

35. Inter-Am. Ct. H.R. (ser. C) No. 122 (Mar. 7, 2005).

36. Inter-Am. Ct. H.R. (ser. C) No. 109 (July 5, 2004).

37. Inter-Am. Ct. H.R. (ser. C) No. 159 (Nov. 25, 2006).

38. Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006).

reparations afforded in those cases appear to reflect the earlier work of the Commission in the other Colombian massacres. This suggests that there is a relationship between the initial steps taken by the Commission in the 90's and the latest cases of the Court. The Commission explored the extent to which the Colombian institutions were able or willing to do regarding potential reparations in these types of cases. In the "voluntary" space of a friendly settlement procedure, the state is able to negotiate with the petitioners regarding the possibility of agreeing to provide extensive reparations, under the auspices of the Commission. Consequently, the State was able to accept appropriate and progressive reparations, which would later be used and expanded by the Court in its own judicial decisions.

When we refer to the notion of reparations for gross and systematic violations of human rights, one of the most important aspects that must be taken into account is the duty to investigate, prosecute, and punish. The inter-American system is especially oriented to confront impunity. Compensation for certain kinds of human rights violations is not enough. The inter-American system has consistently ordered states to prosecute and punish those responsible for massacres and other crimes against humanity and/or war crimes. In this regard, these organs have stated that amnesties for these crimes are incompatible with the American Convention. The Commission has decided several cases in which it has declared the amnesty laws of several states incompatible with the state's human rights obligations. Similarly, the Court in *Barrios Altos v. Peru*[39] declared that the Peruvian amnesty violated the American Convention. Additionally, the Court has recently stated that domestic legislation, such as amnesties or a statute of limitations, cannot be an obstacle for prosecution of the perpetrators of serious human rights violations.

Another important notion that has significant implications regarding reparations in certain cases is the "right to truth." The duty to investigate serious violations necessarily implies the right of the victims and their relatives to "know" what happened. The right to truth can be adequately addressed in different ways: the criminal investigation in a case can shed light about what really occurred; the state can establish *ad hoc* truth commissions with a mandate to find the truth in specific cases or specific periods of time in the history of a country; other judicial mechanisms could play such a role, as may happen with civil liability remedies; or the state can acknowledge the

39. Case of Barrios Altos v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

truth publicly through official statements, monuments, or plaques. Additionally, the decisions of both the Court and the Commission can, by themselves, play such a role by officially recognizing the violations.

Regarding the right to truth, it's important to recall *"Mapiripan Massacre" v. Colombia*.[40] This case addressed the forced disappearance of persons in the framework of these horrible massacres. In the reparations judgment, the Court ordered the state of Colombia to publish extensively, on television, in newspapers, and on radio, information about the case and the need to find other persons that were affected so that they could benefit from the reparations ordered. This is significant because, even though the Court focused the decision on forty-nine victims that were identified then, it left the door open to subsequently identify additional victims. The Court specifically ordered the State to take certain measures to find the whereabouts of the disappeared persons, including the identification of victims by using DNA testing.

The Court in *Mapiripan* also made a brief reference to amnesties. The representatives of the victims called the Court to address the "justice and the peace law" that Colombia adopted in the framework of the demobilization process of self-defense groups. The Court refused to make a direct statement or a determination of the compatibility of this law with the American Convention. However, the Court stated once again that amnesties or any other obstacle to investigate and prosecute this type of serious human rights violations would be incompatible with the Convention. Any future determination by the Court in a case about the compatibility of this law with the Convention would have serious legal implications, not only in the international level but also in Colombia's constitutional framework, considering the doctrine established by the Constitutional Court of this country regarding the relevance of international human rights law in Colombia's legal order.

Another aspect that is worth noting regarding reparations is the notion of compensation. This is, according to the International Law Commission's ("ILC") "Articles on Responsibility of States for International Wrongful Acts,"[41] a reparation in international law that mainly seeks restitution, compensation, and satisfaction. The notion of proportionality of the reparations required from a state is essential.

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40. Inter-Am. Ct. H.R. (ser. C) No. 122 (Mar. 7, 2005).

41. Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, U.N. Doc. A/56/10 (Dec. 12, 2001), *available at* http://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/9_6_2001.pdf.

The ILC rejected the idea of non-proportional reparations even though its draft articles considered the possibility that so-called "international crimes" of states could give rise to non-proportional reparations and that compensation issues could be the equivalent of "punitive" damages. The Inter-American Court has not explicitly recognized "punitive" damages.[42] However, the Court's assessment of compensation in the Colombian cases appears to have taken into account the grave and systematic nature of these violations and imposes particularly cumbersome payment amounts in favor of the victims. It is, of course, difficult to determine what would be proportional compensation in cases of massacres and massive forced disappearances, and when such compensation should amount to being punitive. But when confronting gross and systematic violations, I believe that the power of reason and justice will leave no alternative for the international community and international human rights bodies but to increasingly recognize the need for appropriate "enhanced" compensation in these types of cases.

There have also been some important measures related to social and institutional reparations in the framework of these cases. For example, forced displacement of persons is one of the most dramatic human rights situations in Colombia. In this regard, the Court has ordered that for the families displaced by the massacres (entire villages were emptied), the State will have to implement special measures to secure an adequate housing program and to ensure the safe and dignified return of these persons. Another measure ordered by the Court is the human rights education of the armed forces.

Finally, it is important to mention that Colombia has developed some unique domestic mechanisms that allow national authorities to compensate victims and re-open criminal cases where there was impunity, if the State has been declared internationally responsible for a human rights violation. Therefore, if the Inter-American Court or Commission finds that Colombia violated the Convention by adopting a judicial decision that unfairly exonerates a perpetrator of serious human rights violations, that decision can be re-opened. This is a very important development that will hopefully allow victims and their relatives to finally seek justice in Colombia's national courts based on a decision of an international human rights body. This is of utmost importance due to the fact that reparations are only as

42. *See* "Mapiripan Massacre" v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 122 (Mar. 7, 2005) (Trindade, A., concurring) (asserting the need to examine this notion in the jurisprudence of the Court).

effective as the national mechanisms that are in place to receive these international decisions.

D. Dinah Shelton[43]

I'm going to talk about the United Nations principles and guidelines on reparations, but I thought it might be appropriate to start with three brief anecdotes about how reparations have been a part of my work for the last twenty-five years.

It started—this is something all the professors will probably understand—by a question from a student in class. We had been discussing the various petition procedures in human rights law, and one of the students raised her hand and asked, "What do the victims get out of these procedures at the end?" I said, "Good question, why don't you write your paper on that topic." She decided to study the European system and came to me after a few weeks and said, "I cannot make any sense of what the European Court of Human Rights is doing on reparations." Her completed paper said that there is no coherence in the jurisprudence. I became intrigued by the matter and after looking into it much further wrote the book on reparations.

Along the way in writing that book, I had an occasion to speak with Zenaida Velasquez, the sister of Manfredo Velasquez-Rodriguez, the young man who disappeared in Honduras, and was the subject of the first case in the Inter-American system to address reparations. I asked her how she felt about the outcome of the case because the Court awarded substantial monetary damages. She said, "Well, we got money, but I still don't know where my brother is." That lack of knowledge was something extremely important to the family. A year ago I ran into her again, and I said, "Have you gotten any further news?" She said, "No, we keep hearing that he might be paved over by a roadway somewhere." She still doesn't know after all this time what happened to her brother, and that was the reparation she most wanted.

The third incident happened last Thursday when the Japanese Prime Minister announced that there is no proof that there was any misconduct by the Japanese military in forcible sexual bondage of women throughout Asia during World War II. One of the reasons that there is not much evidence publicly available is because there was no Nuremburg-like international trial for war crimes in Asia after

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