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Reparations: A Comparative Perspective

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CONFERENCE

REPARATIONS IN THE INTER-AMERICAN SYSTEM: A COMPARATIVE APPROACH

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rights of individuals. The nature of the issues before the Court requires consideration in its decision making of the need to ensure and guarantee compliance with the rule of law. In fact, what we are witnessing is a collapse of the distinction between subjective and objective rights, considering the fact that through its decision the Court does justice not only in a concrete case but promotes and restores the validity of the rule of law as a whole.

The decisions by the system's supervisory organs confirm time and again the importance of the qualities and backgrounds of the seven commissioners and seven judges. Their independence and knowledge have been fundamental in the development of the law of reparations. The quality of the legal argumentation presented by states, non-governmental organizations ("NGOs"), and private lawyers has also been crucial. Lawyering becomes an important narrative through which national and comparative jurisprudence strengthens hemispheric norms.

The *Washington College of Law* hopes to contribute to the quality of lawyering through many of our activities: the Academy on Human Rights, the moot court competition, and conferences like this one. The quality of the speakers, the organization of the themes, as well as the enthusiasm shown by our own students, makes me optimistic of the contribution this conference will have. The transcript that follows is concrete proof of the level and importance of this type of event. The *Washington College of Law* will continue, as an academic institution, to contribute to the system, creating an important domain for the exchange of views at the highest level. We see this as part of our strategic vision of addressing issues of our time in a diverse environment, drawing speakers from different cultures and legal traditions, united by the motivation of promoting the rule of law in the hemisphere.

The following are edited versions of speeches delivered at the conference.

II. REPARATIONS: A COMPARATIVE PERSPECTIVE

A. *Fernanda Nicola*⁴

My aim here is to narrow our focus on two detailed issues. First, I would like to look at reparations through a metaphor between the jurisprudence of the European Court of Human Rights on the one

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hand and the European Court of Justice on the other. Second, I would like to address a particular aspect of reparations in the current European regional system, namely assessing reparations by going beyond monetary damages and by casting light on the restoration of rights. In other words, how the European regional jurisprudence has brought member states into compliance with their obligations towards individuals, while at the same time shaping the domestic legal regimes.

I will start with a well-known story, the story of Cain and Abel from the Book of Genesis. You can imagine the two European courts as the two biblical brothers. Like Cain, or the bad brother, the European Court of Justice is the brother who was a farmer, who was into trade, and had fewer competences to deal with human rights issues. Like Abel, the European Court of Human Rights since 1950 was the court representing the good brother. In fact, this Court has exclusive and original jurisdiction on human rights, and thus it is considered the primary forum for human rights violations in Europe. By the end of my talk, I would like you to think about this story and consider whether this metaphor on the different roles of these two courts is still plausible.

My presentation on reparations in the European regional system focuses on four cases. Two of these cases were decided between 2004 and 2007 before the European Court of Justice, or the bad brother, and the other two were decided in 2004 before the European Court of Human Rights, or the good brother.

The two cases decided before the good brother, the European Court of Human Rights, are cases that many scholars have largely commented on because the Court showed for the first time an innovative approach towards reparations. The so-called "prisoner cases" are *Assanidze v. Georgia*⁵ and *Ilascu and Others v. Moldova and Russia*.⁶ In both cases the European Court of Human Rights moved beyond an old fashioned and limited approach to reparations. The Court had clarified on many occasions that when *restitutio in integrum* was possible, it was ultimately for the states to carry it out. In the words of the Court, "If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself."⁷ The Court had also clarified that in the cases in which *restitutio in integrum* cannot be attained, the state has the option to choose

5. App. No. 71503/01 (Eur. Ct. H.R. Apr. 8, 2004).

6. App. No. 48787/99 (Eur. Ct. H.R. July 8, 2004).

7. *Iatridis v. Greece*, App No. 31107/96, ¶ 33 (Eur. Ct. H.R. Mar. 25, 1999).

measures to abide by the judgment, provided they are compatible with the conclusions set out in the Court's judgment.

In light of the prisoner cases, in 2004 the European Court of Human Rights took a more active role with regards to *restitutio in integrum*. In short, Abel is not only the good brother, but he is also showing his muscles. Mr. Tengiz Assanidze was the former mayor of Batumi, the capital of the Ajarian Autonomous Republic of Georgia. In October of 1993 he was arrested for illegal dealings with the Batumi Tobacco Manufacturing Company and unlawful possession of firearms. He continually argued that his detention was invalid and represented a gross violation. In 2000, he finally filed an application before the European Court of Human Rights. The Court found that there was a violation of Article 5 of the Convention,⁸ that everybody has a right to liberty and security of person. But the Court went further, holding that by its nature, the violation found in the case did not leave any choice as to the measure required to remedy. Thus, the Court ordered the Georgian Republic to secure the applicant's immediate release.

The other prisoner case, *Ilascu v. Moldova*, is a similar judgment of the Europe Court of Human Rights with similar facts. Four Moldovan nationals were convicted by the Supreme Court of the Moldavian Republic of Transdnistria, a region of Moldova which proclaimed its independence in 1991 but has not been recognized by the international community. The applicants contended that their detention was not lawful because it was ordered by an entity not recognized under international law. The European Court of Human Rights did it again! Namely, it held that any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolonging of the violation of Article 5 of the European Convention. As a result, the Court requested that the States take every measure to put an end to the arbitrary detention of the applicants. As of today, while the Georgian Republic has fulfilled the recommendations of the Court immediately after the *Assanidze* judgment, only one of the three applicants in the *Ilascu* case has been released.

Now, let me reason by analogy to address the other brother, Cain, or the bad one. The bad brother is the European Court of Justice, which has no explicit mandate to deal with human rights. But of course, the Court has clearly stated in its jurisprudence, and it was

8. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222.

later affirmed in the Treaty of Maastricht⁹ in 1992, that the Treaty on European Union includes the protection of fundamental rights as guaranteed by the European Convention on Human Rights and resulting from the constitutional traditions of the member states. Thus the European Court of Justice is competent to decide human rights issues, and it has actively addressed questions on fundamental rights in its jurisprudence. The bad brother is definitely becoming milder.

Let us look, for example, at immigration law in the European Union. The question is whether the member states on the one hand, or the European level on the other, is competent to deal with immigration law in Europe. Even though immigration law should fall under the competence of the member states as a typical police power, under the Justice and Home Affairs pillar of the European Union, the EU is also competent on immigration issues. Thus, two major cases were recently decided by the European Court of Justice in very interesting ways.

The first judgment is *Catherine Zhu*,¹⁰ and as you can tell, the last name Zhu is not a European name like Catherine, but rather it is a Chinese name. Mrs. Zhu was a pregnant Chinese woman who moved to Northern Ireland to deliver her baby. Under the Irish naturalization law, her baby, Catherine, became an Irish citizen and consequently, a European citizen. In taking residence in Northern Ireland, Mrs. Zhu's purpose was to obtain a long term permit to reside in the UK. However, under UK immigration laws, Mrs. Zhu did not get the permit to reside and was to be deported very soon. The UK court referred Mrs. Zhu's case to the European Court of Justice. The Court held that minors, like Mrs. Zhu's daughter, should benefit fully from the right of free movement granted to European citizens. Thus, Catherine had the right to reside not only in Ireland, but she could move freely to the UK. Moreover, the Court held that Catherine's mother was serving as a caretaker to a dependant family member; thus, she would provide sufficient resources for her baby, so as to not to become a burden to the public finances of the state. Therefore, Mrs. Zhu had the right of residence with her daughter, and, as Advocate General Tizzano claimed, the denial of such a right would have contravened the principle of unity of family life, as laid down by Article 8 of the European Convention

9. Treaty on European Union art. F, Feb. 7, 1992, 31 I.L.M. 253, O.J. C191 1992, at 1.

10. Case C-200/02, Kunqian Catherine Zhu v. Sec'y of State for the Home Dep't, 2004 E.C.R. I-9925.

of Human Rights,¹¹ to which the Court expressly attributed fundamental importance.

The second immigration law judgment of the European Court of Justice is *Jia*.¹² Again, the name is a Chinese one, and *Jia* is a case in which the Court decided whether a retired Chinese national, Mrs. Jia, could be granted a permit to reside in Sweden as a family member of a European community national who had exercised her right of free movement. Mrs. Jia was the mother of a Chinese national who was married to a German woman, who was a European citizen. Mrs. Jia's German daughter-in-law had gone to Sweden to work. Mrs. Jia planned to reunite with her daughter-in-law and her son in Sweden. However, the Swedish immigration board did not allow Mrs. Jia to live with her son, and she was going to be deported by the immigration authorities. Again, the European Court of Justice not only granted the right of Mrs. Jia to stay in Sweden, but it held that a dependant family member without the means to survive in China with her own salary had the right to stay and to move with her family to Europe.

Both sets of cases present a powerful analogy between the two European regional courts. In both cases these courts have addressed the issue of reparations in light of the restoration of rights by bringing the states into compliance with their treaty obligations. Both courts have clearly demonstrated their willingness to move beyond mere monetary damages when dealing with reparations for the violation of fundamental rights. Rather than pecuniary damages, these courts have directly addressed the States in order to force them to take action to stop the human right violation, or they have indirectly modified domestic immigration law regimes. The European Court of Human Rights, the good brother, has openly asked the States to immediately release the prisoners. The European Court of Justice, the bad brother, has held that third country nationals have the right to stay in a member state of the European Union. Perhaps the path of the two brothers is coming closer together than what we could have expected a few years ago as they are both showing their good will and their muscles.

11. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222.

12. Case C-1/05, Yunying Jia v. Migrationsverket, O.J. C42, 3 (2007) (quoting the operative parts of the judgment).