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“We’re Out Here Talking About Life and Death”: Reparations for Human Rights Violations in  
Vieques, Puerto Rico

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## ABSTRACT

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From 1941-2003, the U.S. Navy used the island of Vieques, which is inhabited by close to 10,000 U.S. citizens, for war games, bombing exercises, and simulated aquatic landings. During those six decades, the bombardment of Vieques with both conventional and chemical weapons devastated the environment and created a massive health crisis. The health crisis is exacerbated by the extreme poverty on the island, much of which is also traceable to Navy policy there. Since 2003, several petitions and attempts for reparations for Vieques’ residents have been made to the Navy specifically and the US government generally, most notably a class action lawsuit in which more than three-quarters of Viequenses were named plaintiffs. Since that lawsuit’s dismissal in 2013, the question of reparations has again come to the foreground of Viequenses politics. The Navy, while conceding the facts of both the toxicity of their bombing exercises and the heightened health problems faced by Viequenses, consistently denies that there is a connection between the two. This thesis places that denial in the context of the Navy’s long-running obfuscation of its responsibilities to the Viequense people and, drawing on relevant human rights norms as well as other sources of reparation theory, argues that the Navy and US Government have a moral and legal obligation to provide comprehensive reparations to the people of Vieques.

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*“It was an exciting and a joyous moment for the people of Vieques, Puerto Rico, but I think for all the people who struggled, wherever those people may be, to get the U.S. Navy to leave, and for people all over the world to see a victory and to claim that victory...with that celebration, there’s also a caution. And that caution, I think, comes from the transfer of the land to the U.S. Department of Interior as opposed to giving the land back to the people of Vieques and, in essence, giving the people of Vieques their reparations. And those reparations need to come by giving the people back their land and also by the U.S. government doing intensive, massive cleanup of the land, that has depleted uranium, napalm, and God knows what other contaminants that continue to kill the people.”*

-Rosa Clemente<sup>1</sup>

The activist and journalist Rosa Clemente spoke these words amidst the jubilation of May 1, 2003, the day that marked the end of the U.S. Navy’s bombing of the island of Vieques, Puerto Rico. Since 1941, the Navy had used Vieques for live-fire bombing and amphibious landing exercises, war games, munitions storage, and waste disposal. The end of the bombing was a result of four years of continuous local civil disobedience combined with intense political pressure from global protests. Viequense people – the island is home to around 10,000 U.S. citizens – had resisted the Navy’s occupation of their land virtually from the beginning, but the 1999 death of David Sanes Rodríguez, a Viequense civilian contracted as a security guard by the Navy who was killed by an errant bomb during a routine exercise, attracted international attention. Protesters in Vieques constructed camps on the firing range to prevent bombing exercises, and many spent time in federal prison.

Narrowly defined, the end of the bombing in Vieques represented the “success” of the movement. After more than a decade has passed since the bombing of Vieques stopped, though, the caution expressed by Rosa Clemente in 2003 seems prescient. The damage done to the island and its inhabitants during six decades of Navy exercises was immense, and has gone largely unaddressed by the Navy and U.S. Government in the ensuing years. Massive land expropriations in the 1940s served as a prelude to millions of tons of bombs and other weapons being dropped on the island.

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<sup>1</sup> Interview on *Democracy Now!*, May 2, 2003.  
[http://www.democracynow.org/2003/5/2/celebrations\\_continue\\_in\\_vieques\\_following\\_the](http://www.democracynow.org/2003/5/2/celebrations_continue_in_vieques_following_the)

The environmental devastation caused by the military exercises begat a persistent health crisis for the island's residents, one that is exacerbated by the absence of adequate medical facilities there. The Navy, as a matter of policy, actively opposed economic development of Vieques, with predictable consequences: Vieques is the poorest municipality in Puerto Rico, with fully a quarter of Viequense households living on less than \$10,000 a year, and nearly half of the island's residents living under the poverty line.<sup>2</sup> Combined, these crises amount to serious and prolonged violations of Viequense human rights and their consequences continue to weigh heavily on the islanders' lives.

To date, in spite of consistent claims for reparations by Viequenses for the various harms perpetrated on them by the Navy's activities on the island, none have been offered or given. In part, this is a result of the Navy's continued denial that its activities on Vieques are responsible for its health and economic crises. That denial is aided by a series of reports from the Agency for Toxic Substances and Disease Registry (ATSDR), a federal agency tasked with studying public health, which "could not identify a relationship between military activities and health problems experienced by the island's residents."<sup>3</sup>

The Navy expropriated about two-thirds of Vieques in 1941, before Pearl Harbor, but nevertheless in anticipation of U.S. entry into the Second World War.<sup>4</sup> A second wave of expropriations, justified as necessary for national interests in the burgeoning Cold War, occurred in 1947-48. By 1948, the Navy controlled a little more than three-quarters of Vieques.<sup>5</sup> The entire Viequense population was forcibly relocated to the remaining land in the center of the island. Today, the federal government (represented by both the Navy itself and the Department of Fish and

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<sup>2</sup> U.S. Census Bureau, 2009-2013 5-Year American Community Survey

<sup>3</sup> ATSDR, "Vieques Overview." <http://www.atsdr.cdc.gov/sites/vieques/overview.html>

<sup>4</sup> Plans for a naval base in Puerto Rico began in earnest in 1939, and construction on Roosevelt Roads – the base in Ceiba, on mainland Puerto Rico, from which Vieques exercises were carried out – began in 1940. The first wave of expropriations in Vieques was part of this larger plan for Puerto Rico. For more, see: Marie Cruz Soto, "Inhabiting Isla Nena, 1514-2003: Island Narrations, Imperial Dramas, and Vieques, Puerto Rico" (PhD dissertation, University of Michigan, 2008): 193-195, and César J. Ayala and José L. Bolívar, *Battleship Vieques: Puerto Rico from World War II to the Korean War* (Princeton, NJ: Markus Wiener Publishers, 2011): Chapters 1 and 3.

<sup>5</sup> 25,353 acres out of a total of 33,649. Cruz Soto, "Inhabiting Isla Nena", 196.

Wildlife) still controls most of the former Navy lands, and fully half of Vieques remains off-limits to Viequense people.

During the 60 years of bombing and exercises in Vieques, the Navy dropped thousands of tons of bombs on the island.<sup>6</sup> In 2009, the environmental scientists James W. Porter, James V. Barton, and Cecilia Torres presented a paper to a meeting of the NATO program Science for Peace and Security, coincidentally held in Vieques. Their paper collects the best estimates for the amount of weaponry dropped on the island, which they call “staggering.”<sup>7</sup> Their research shows that 662 million pounds of bombs were dropped over the course of the Navy’s occupation, of which two million remain as unexploded ordinance underwater.<sup>8</sup> In addition, they calculate that 7000 pounds of rocket fuel and 100,000 gallons of oil leaked onto the island. Besides the mass of conventional weapons, the Navy at different times used napalm, Agent Orange, white phosphorous, and depleted uranium in Vieques. The combined effect of these exercises has been environmental devastation such that nearly the whole of Vieques has, since the end of the bombing, been declared a Superfund site, the largest of its kind.<sup>9</sup> Prior to the listing of Vieques as a Superfund site, a 2000 agreement between the Navy and the government of Puerto Rico had mandated Navy cleanup of 12 contaminated sites on the island.<sup>10</sup> An additional 40 sites were identified by mid-2005.<sup>11</sup> As of 2015, the cleanup of Vieques is ongoing, and perpetually underfunded. According to Robert Rabin, a Viequense resident who was one of the leaders of the movement against the Navy occupation:

While the cleanup is taking—has taken over 10 years so far, they’re only scratching the surface. This is a process that we believe is happening with no real supervision, no genuine community participation. We believe the military is really not interested

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<sup>6</sup> Parts of this paragraph are paraphrased from a term paper I wrote for Professor Jon Bush in Spring 2015.

<sup>7</sup> J.W. Porter, et al., “Ecological, Radiological, and Toxicological Effects of Naval Bombardment on the Coral Reefs of Isla de Vieques, Puerto Rico” in *Warfare Ecology: A New Synthesis for Peace and Security*, edited by Gary E. Machlis, et al. (Dordrecht, Netherlands: Springer, 2009): 65-124.

<sup>8</sup> All figures from *Ibid.*, 68 (table 1).

<sup>9</sup> The EPA’s “Superfund Site Profile” can be found here: <http://cumulis.epa.gov/supercpad/cursites/csinfo.cfm?id=0204694>

<sup>10</sup> Sherrie L. Bayer, “Environmental Justice and the Cleanup of Vieques.” *CENTRO: The Journal of the Center for Puerto Rican Studies* 18, no. 1 (2006): 100-100.

<sup>11</sup> *Ibid.*, 101

in cleaning up Vieques, and rather interested in continuing to punish Vieques for having thrown the U.S. Navy out in 2003.<sup>12</sup>

The destruction of the Viequense environment is inextricably linked with extraordinary damage to Viequense health.<sup>13</sup> The cancer rate in Vieques was 27% higher than among the overall Puerto Rican population in 2000.<sup>14</sup> Despite the fact that infant mortality rates are on a decline in Puerto Rico, they increased 12% in Vieques in 2007.<sup>15</sup> In addition to the chemicals present in the toxic triad of Agent Orange, napalm, and depleted uranium, the shelling of Vieques has left extraordinary levels of everything from aluminum and arsenic to lead and mercury in the bodies of Viequense people. Besides the cancer and infant mortality rates, this had led to heightened rates of hypertension, lower birth rates, and a host of other health problems. Some of those contaminations are passed from mother to child in utero, so the health crisis in Vieques is an intergenerational one, and it is reasonable to suspect that some of the victims of the Navy bombing are not yet born. For those who are, they are born onto the municipality with the highest rates of teenage pregnancy, prematurity, and infant mortality in Puerto Rico.

Poverty in Vieques exacerbates the health crises – all of the above issues occur on an island without a functioning hospital. The hospital that *had* existed there succumbed to a project of privatization of medical services in Puerto Rico during the mid-1980s, and became nothing more than a “glorified first-aid station.”<sup>16</sup> As a result, residents who are suffering from any of the myriad severe health problems prominent in Vieques (to say nothing of people who have other medical emergencies) have to take a lengthy ferry ride to Fajardo, on the main island of Puerto Rico, to receive proper treatment. Further complicating access to health care for Viequenses is the fact that,

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<sup>12</sup> Robert Rabin, Interview on *Democracy Now!*, May 2, 2013.

<sup>13</sup> Parts of this paragraph are paraphrased from a term paper I wrote for Professor David Scott in Fall 2014.

<sup>14</sup> José Javier Colón Morera and José E. Rivera Santana, “New Dimensions in Civil Society Mobilization: The Struggle for Peace in Vieques” in *Puerto Rico under Colonial Rule: Political Persecution and the Quest for Human Rights* edited by Ramón Bosque-Pérez and José Javier Colón Morera. (Albany, NY: State University of New York Press, 2006): 214.

<sup>15</sup> Victor Torres-Vélez, “The Hidden Wounds of Vieques: A Political Ecology of Disease and Collective Actions in a Militarized Landscape” (PhD dissertation, Michigan State University, 2007): 3.

<sup>16</sup> Katherine T. McCaffrey, *Military Power and Popular Protest: The U.S. Navy in Vieques, Puerto Rico* (New Brunswick, NJ: Rutgers Univ. Press, 2002): 120.



as of 2011, only 61% of them had health insurance, and more than 60% of those who did were on either Medicare or Medicaid.<sup>17</sup>

The issue of Viequense poverty is further linked to the Viequense health crisis because they spring from the same source – the Navy’s occupation. The Navy actively opposed economic development for the civilian sector during their years of possession.<sup>18</sup> In addition, contamination of the water devastated the livelihood of Viequense fishermen, who were deeply involved in movements against the Navy presence from the late 1970s on.<sup>19</sup> These things, of course, only followed the initial expropriations, which denied Viequense people access to some of the most fertile and choicest grazing lands on the island. In the years since the end of the bombing, multinational corporations have begun developing Vieques for tourism and speculators have begun purchasing land that local people, as a result of the decades of enforced economic stagnation, cannot afford. Among the chief concerns for Viequenses at the present time is the possibility that outside investment that is sold to them as “development” will in fact be poorly disguised gentrification – improved services in Vieques do not serve the victims of the bombing if they get priced off of the island.

Almost immediately after the cessation of bombing, discussion of reparations for the Vieques’ inhabitants began.<sup>20</sup> Victor Torres-Vélez, who has done extensive work on the environmental and health catastrophes on the island, reported on that discussion in his PhD dissertation:

There are no doubts that Viequenses need both access to health services and reparation for the Navy’s misdeeds. However, there are differences of opinion on exactly what is the most appropriate way of attaining these common goals. These

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<sup>17</sup> U.S. Department of Health and Human Services, “Vieques, Puerto Rico: A Health Care Needs Assessment for the President’s Task Force on Puerto Rico’s Status.” February, 2013. See chart on Page 30.

[http://www.noticel.com/uploads/gallery/documents/Vieques\\_PR\\_A\\_Health\\_Care\\_Services\\_Needs\\_Assessment\\_-\\_February\\_2013.pdf](http://www.noticel.com/uploads/gallery/documents/Vieques_PR_A_Health_Care_Services_Needs_Assessment_-_February_2013.pdf)

<sup>18</sup> McCaffrey, *Military Power and Popular Protest*: 3-5.

<sup>19</sup> *Ibid.*, Chapter 3.

<sup>20</sup> Some of the next four paragraphs are paraphrased from a paper I wrote for Professor Jon Bush in Spring 2015.

tensions are best exemplified in the discussions between civil action lawyers and activists from different groups. From these debates, it becomes evident that while a civil action suit might provide some alternatives, these might fall short of Viequenses' needs. This contention comes from the clash between the inherent limitations of a socially atomizing legal system and activists' holistic understanding of Vieques' situation.<sup>21</sup>

In the end, Viequenses formed a consensus around the decision to file a series of civil suits against the Navy. The largest of those suits, *Sanchez v. United States*, was filed on behalf of 7,125 Viequenses, representing more than 75% of Vieques' population. In February 2012, it was rejected by the First Circuit Court of Appeals in a 2-1 decision.<sup>22</sup> The Supreme Court rejected a petition to hear the plaintiffs' appeal in 2013.

While *Sanchez* is so far the most substantial attempt to secure reparations for the harms of the Navy's occupation of Vieques, other legal challenges have gone forward since its dismissal. Of particular note is a September 2013 petition filed before the Inter-American Commission on Human Rights. While the United States has shown historical reluctance to abide by the rulings and recommendations of the Inter-American Commission, the petition is a powerful tool to put pressure on the government to provide reparation to Viequenses. The petition, by relying on the moral authority and relative political weight of customary international law, could give the United States a political incentive to fulfill its obligations of redress.

Residents of Vieques have remained active in their demands for redress, even and especially in the wake of the *Sanchez* setback. A brochure released in March 2015 by Vieques Vive, La Lucha Continua, a local activist group founded in 2013 to commemorate the tenth anniversary of the closing of the Navy base and the cessation of bombing, enumerates contemporary demands for

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<sup>21</sup> Victor Torres-Vélez, "The Hidden Wounds of Vieques: A Political Ecology of Disease and Collective Actions in a Militarized Landscape" (PhD dissertation, Michigan State University, 2007): 153.

<sup>22</sup> *Sanchez* was filed under the Federal Tort Claims Act, which provides exceptions to the doctrine of sovereign immunity. Specifically, the First Circuit ruled that the claim made by the Viequense plaintiffs did not mean the criteria to be considered one such exception. This is discussed at greater length below.

justice based around the “four D’s” of demilitarization, decontamination, devolution (return of the lands), and development.<sup>23</sup>

This thesis discusses the possibilities for and barriers to achieving a comprehensive reparations package for the people of Vieques for the harms suffered during the Navy occupation of the island. In doing so, it draws on reparations theory and practice from a diverse set of sources, including cases for reparations for new world slavery, transitional justice conceptions of reparations, and international human rights. It is divided into three parts. In part one, I examine domestic and international norms relevant to the Viequense reparation cause, and provide a defense for the use of these tools in building the case for reparations.

In part two, I trace the history of the Navy’s denial of its responsibilities for the crises in Vieques through key moments during and after the bombing, showing a concerted pattern of obfuscation and willful denial. This is followed, in part three, by an analysis of the post-2003 attempts to achieve reparations, particularly the *Sanchez* case and the Inter-American Commission petition. Part three also includes discussion about the strengths and weaknesses in different approaches to reparations post-*Sanchez*: legal v. political, collective v. individual, and forward-looking v. backward-looking reparations. Using the “four D’s” as a basis, the third section also identifies necessary elements for a successful reparations policy for Vieques.

Because of its focus on the period of 1941-2003, this thesis is necessarily limited in how it identifies the harms perpetrated against the people of Vieques. I will be discussing the harms perpetrated by the Navy occupation alone, but the harms in Vieques run much deeper and begin much earlier than that. There is no separating the harms of the bombing from the general context of the colonial relationship between the United States and Puerto Rico.<sup>24</sup> The Navy presence in

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<sup>23</sup> Vieques Vive, La Lucha Continua Brochure. “The Struggle Continues in Vieques.” Copy in possession of the author. In English, their name means Vieques Lives, The Struggle Continues.

Vieques has been only one manifestation of that colonial relationship; Vieques' history is one of colonial domination with corresponding violations of human rights beginning well before 1941, and continuing after the bombs stopped falling.

Like the rest of Puerto Rico, Vieques has been a colony of either Spain or the United States since the late 15<sup>th</sup> Century. Even an extensive reparations programs that addressed all of the ills directly associated with Navy bombing would not begin to address the underlying conditions that made Navy expropriation without appropriate compensation or consent possible.<sup>25</sup>

Beyond the larger theoretical and practical issues related to the very idea of human rights in a colonial territory, the role of Vieques is particular in Puerto Rican history – it has spent centuries as a “colony of a colony” under both Spanish and American rule.<sup>26</sup> The role of Vieques' double colonial status in its devastation at the hands of the U.S. Navy is immense. Even at a time when Puerto Rican officials from across the political spectrum were demanding the Navy's departure from Vieques, and a non-binding referendum showed nearly 70% local support for the immediate cessation of bombing, the ultimate decision rested in the hands of a Congress and President that Viequenses and Puerto Ricans had no hand in electing.

In sum, the roughly 10,000 residents of Vieques are, politically and socially, hugely marginalized within the U.S. body politic, and while a reparations program for the harms suffered under Navy occupation would do something to assuage that, it would not and could not solve these larger problems.

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<sup>24</sup> Legally, Puerto Rico is a “Commonwealth” and “unincorporated territory” of the United States. This was decided and codified by the so-called insular cases in the early part of the 20<sup>th</sup> century, during the first decades of U.S. occupation of Puerto Rico. Puerto Ricans were granted U.S. citizenship by the Jones Act of 1917. It is widely understood to exist nevertheless as a colonial territory whose people possess “colonial citizenship” by scholars of Puerto Rican Studies. See, for example, the special section in the Spring 2013 issue of *CENTRO: The Journal of the Center for Puerto Rican Studies* on the topic of “Puerto Rico, the United States and the Making of a Bounded Citizenship.” (Vol. XXV, no. 1.)

<sup>25</sup> A variation of this sentence first appeared in a term paper I wrote for Prof. David Scott in Fall 2014.

<sup>26</sup> McCaffrey, *Military Power and Popular Protest*, 10.

This is not to say that the insufficiency of reparations for the Navy exercises and bombing makes them meaningless. It would be callous to imagine that Viequenses should wait for redress for centuries of colonial rule before remedy could be applied to the urgent environmental, economic, and health problems facing the community. In short, reparations for the ill effects of the Navy presence in Vieques are necessary but insufficient. It would be unhelpful to focus on the insufficiency at the expense of the necessity.

It is also worth addressing one other potential objection to a focus on Vieques: the placement of Vieques and Viequenses among the many groups to whom reparations are due from the United States government.<sup>27</sup> J. Angelo Corlett claims that “so long as cases for oppression and reparations are made on reasonably clear evidence, then those groups that were oppressed first and worst should be at the top of the list to receive reparations.”<sup>28</sup> By this he means that it would be “unfair for those who were oppressed subsequent to and less than” African Americans and Native Americans to receive reparations before those groups.<sup>29</sup> In the first place, both the temporal question and the question of who was oppressed the “worst” are deeply complicated in the case of Vieques, which came under US rule in 1898 along with the rest of Puerto Rico, but counts native genocide and slavery as part of its history the same as the mainland United States. Beyond that, though, I am not convinced it is useful. Making the case for reparations for Viequenses in no way trivializes the same claims for other groups, and I would argue that it would be, to use Corlett’s word, “unfair” to Viequenses to ignore their rightful claims to reparation until the reparation claims Corlett considers “more” right are satisfied. To that end, I am making the case for Viequense reparations on its own merit, independently of its relationship to other cases against the United States.

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<sup>27</sup> Much of the following paragraph is paraphrased from the same term paper mentioned in footnote 26.

<sup>28</sup> J. Angelo Corlett, *Heirs of Oppression* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2010): 16-17.

<sup>29</sup> *Ibid.*, 17.

## **Part One: The Right to Redress for Destruction of Environment and Health**

Practitioners and scholars of human rights have recognized a universal right to redress for human rights violations since the publication of the field's foundational documents. Article 8 of the Universal Declaration of Human Rights establishes that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

In more recent times, the UN General Assembly passed a resolution enumerating the "basic guidelines and principles on the right to remedy and redress" for gross violations of human rights, international law, and international humanitarian law.<sup>30</sup> The continued codification of the right to reparation, as evidenced by that resolution, has also been upheld in numerous domestic and international legal cases, and is a primary feature of the Rome Statute of the International Criminal Court.<sup>31</sup> Further, reparations are a one of the four key pieces of "comprehensive transitional justice policy."<sup>32</sup> The rise of transitional justice as a field has been hugely influential on the development of international norms, and it has further solidified the normative value of reparations that they are incorporated into transitional justice mechanisms. The International Center for Transitional Justice (ICTJ), an NGO founded under UN auspices in 2001, summarizes the justification and necessity of reparations as follows:

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<sup>30</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

<sup>31</sup> In addition to establishing the ICC's ability to enforce the payment of reparations during trials in Article 75 (2), the Rome Statute established a Trust Fund for Victims in Article 79 that allows reparations payment to come from the international community through the Court itself.

<sup>32</sup> The other three are criminal prosecutions, institutional reforms, and truth-telling mechanisms. International Center for Transitional Justice, "What is Transitional Justice?" <https://www.ictj.org/about/transitional-justice>

States have a legal duty to acknowledge and address widespread or systematic human rights violations, in cases where the state caused the violations or did not seriously try to prevent them.

Reparations initiatives seek to address the harms caused by these violations. They can take the form of compensating for the losses suffered, which helps overcome some of the consequences of abuse. They can also be future oriented—providing rehabilitation and a better life to victims—and help to change the underlying causes of abuse.

Reparations publicly affirm that victims are rights-holders entitled to redress.<sup>33</sup>

Much of the ICTJ’s conceptual framework applies to Vieques. The violations to Viequense human rights represented by the military exercises were unquestionably widespread and systematic. Much of the prescriptive framework is useful, too, in the Vieques case. Compensation and rehabilitation are both entirely worthy aims for Viequense reparations. In addition, because of their citizenship status as residents of Puerto Rico and their relative invisibility within the U.S. body politic, there is undoubtedly a great need for and a great value to be gained from public affirmation that the people of Vieques are “rights-holders entitled to redress.” Most of that value is forward-looking, based on the hope that the recognition of Viequenses as such would provide for them more recourse in the future than they have had to this point *within* the American body politic. That affirmation is important, but insufficient. Reparation in Vieques must transcend the merely symbolic – damage must be undone, and it must be undone urgently.

There is also precedent for practitioners of international law, as well as diplomatic, political, and legal bodies, to accept claims for reparations for environmental damages and violations of the right to health. The right to health is established in a substantial number of human rights treaties, declarations and norms, beginning with Article 25 of the UDHR:

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<sup>33</sup> International Center for Transitional Justice, “Reparations”. <https://www.ictj.org/our-work/transitional-justice-issues/reparations>

- (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
- (2) Motherhood and childhood are entitled to special care and assistance<sup>34</sup>

It seems unthinkable - and certainly incompatible with the United States' responsibilities under Article 25 - that U.S. citizens would live in such extraordinary poverty. It is also hard to square the cancer rates and other health crises with US obligations to provide a standard of living including health care, and to square the infant mortality rates with US obligations under section two.<sup>35</sup>

Human rights law and norms as they apply to environmental protection are more complicated, but have gained some substantial ground in international courts and human rights declarations. For example, one of the categories of reparations, mandated by the United Nations, to be paid by Iraq to Kuwait after the first Gulf War was for environmental damages.<sup>36</sup> The Rome Statute for the ICC names as a war crime an attack that takes place with the knowledge that it will cause "long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."<sup>37</sup> The petition brought on behalf of Viequenses before the Inter-American Commission on Human Rights focuses some of its argument on the Stockholm Declaration of 1972, which, while not a treaty and therefore non-binding, is nevertheless "legally significant. The articulation of global values and policies it represents was a prerequisite to establishing international legal norms."<sup>38</sup>

As ever when discussing the applicability of international law and norms to cases involving the United States, the value of human rights instruments and precedents is more normative than

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<sup>34</sup> *Universal Declaration of Human Rights*, Article 25.

<sup>35</sup> For a very good discussion of health concerns on Vieques from a human rights perspective, see Maria Idali Torres, "Organizing, Educating, and Advocating for Health and Human Rights in Vieques, Puerto Rico." *American Journal of Public Health* 95, no. 1 (January 2005): 5-12.

<sup>36</sup> Details about those claims are available here: <http://www.uncc.ch/category-f>

<sup>37</sup> Rome Statute, Article 8, Sec. 2 (b)(iv)

<sup>38</sup> Dinah Shelton, "Stockholm Declaration (1972) and Rio Declaration (1992)" in *Max Planck Encyclopedia of Public International Law*, Section B.4(21). Online resource: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1608>



practicable. The United States has rarely considered itself bound by international law or human rights norms, least of all when it comes to domestic situations. It is not a signatory to the Rome Statute, nor has it behaved at any point as though the Stockholm Declaration guides its behavior. The value, then, of citing human rights precedents and establishing patterns of international norms is that it gives supporters of Viequense reparations tools they can use to put pressure on the Navy, and the U.S. government more generally.

The relevance of political pressure and moral high ground is particularly salient given the experience of the movement that led to the cessation of bombing and exercises in 2003. First in Puerto Rico, and then in the mainland United States, the issue of ending the bombing became a cross-political one. Independence Party leader Ruben Berríos was among those arrested for camping on the target ranges.<sup>39</sup> In 1999, Governor Pedro Rosselló – an advocate of statehood for the island – testified before the Senate Armed Forces Committee demanding the end to live-fire exercises in Vieques.<sup>40</sup> In January 2000, the candidate for the governorship from the party that prefers a variation on the current status, Sila Calderón, repeatedly told the National Press Club that Vieques represented a major human rights problem.<sup>41</sup>

The resonance of the Viequense plight across seemingly irreconcilable political positions was echoed again during the 2000 U.S. Presidential Election. As Charles Swift, then an attorney for the commanding officer at Roosevelt Roads, put it:

The following four people have never agreed on anything in their lives as far as I know—Rudy Giuliani, Hillary Clinton, George [W.] Bush the younger and Al Gore. Can you think of anything that those four people could agree on? There was one exception. They agreed on one thing, that the Navy should close its bombing range on Vieques, Puerto Rico.<sup>42</sup>

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<sup>39</sup> McCaffrey, *Military Power and Popular Protest*, 168-169.

<sup>40</sup> Ivan Roman, "Rossello Wins Praise with Vieques Stand." *Orlando Sentinel*, October 25, 1999:

[http://articles.orlandosentinel.com/1999-10-25/news/9910250046\\_1\\_inhofe-puerto-rico-vieques](http://articles.orlandosentinel.com/1999-10-25/news/9910250046_1_inhofe-puerto-rico-vieques).

<sup>41</sup> A full transcript of her remarks can be found here: <http://www.puertorico-herald.org/issues/vol4n05/CalderonTranscript-en.html>

<sup>42</sup> Charles D. Swift, interviewed by Ronald J. Gerle. *The Reminiscences of Charles D. Swift*. Rule of Law Oral History Project, Columbia University Center for Oral History, 2011: p.80.

That consensus was formed precisely on the basis of political pressure and appeals to moral and human rights propositions. Then, as now, members of both the political and military establishments fought intensely against the protesters and their supporters. That the pressure worked from 1999-2003 does not indicate, of course, that it will work again for the cause of reparations. There are ways in which the challenge of getting the Navy or the U.S. Government more broadly to accept their obligation to pay reparations to the people of Vieques is even greater than the challenge to close the bombing range. The biggest obstacle to the efforts to achieve reparations to this point has been the Navy's refusal to accept its responsibility for the human crises on the island.

### **Part Two: Accepting the Facts, Denying the Truth: The U.S. Government Position**

In Vieques, the essential tension between facts and truth has been for decades the basis of the Navy's denial of the effects of its activities on the island. The Navy's position now does not deny the facts of its long-term bombing, including its use of chemical weapons, nor the large concentrations of heavy metals in the island's air, soil, and water. Indeed, the Navy does not even deny the concentrations of heavy metals in the bodies of the island's residents, nor the fact that there are high rates of innumerable health maladies on the island. In short, the Navy concedes the bombing, and it concedes the health crisis. What the Navy denies, however, is the connection between the two. The denial is made easier by the reports from the ATSDR, which corroborate the Navy's position by consistently failing to find any linkage between bombing and health outcomes. (The ATSDR's 2013 report, for example, approvingly quotes a study from the Puerto Rican Department of Health that blamed cigarettes and hair dye as "possible sources for some but not all the elevated levels" of mercury, aluminum, lead, uranium, cadmium, nickel and arsenic found in their testing.)<sup>43</sup>

The ATSDR's findings are deeply problematic as science, as several independent scientists and studies have shown, and their problems are exacerbated for the question of reparations by the fact that they are widely accepted by U.S. government agencies, including the First Circuit Court, which cited ATSDR reports in its decision on the *Sanchez* suit.

A number of independent scientists have done excellent work dismantling the ATSDR reports' usefulness as scientific documents, which I will discuss in more detail later on, but I will first frame the Navy's current denials in the historical context of its public positions on Vieques during key moments of the occupation. The Navy's denial of the connection between the bombing and the health crisis is completely in line with the Navy's public assertions of its position in Vieques during the past several decades. The specifics of the Navy defense of its presence on an inhabited island have changed, but the basic fact of it has not. The Navy has consistently perpetuated a narrative of itself as a benevolent ruler in Vieques, always alongside arguments about the necessity of Vieques and the entire Roosevelt Roads complex for national defense. When the political situation surrounding the end of the bombing in 2003 made such a position untenable, their position predictably changed to one of denial of responsibility in the face of claims for reparation.

In 1980, during a hearing held by the House Armed Services Committee, Secretary of the Navy Edward Hidalgo said about the role of the Navy in Vieques, "The positive effects upon Vieques of the Navy's activities over these long years have been many, upon the economy, the ecology, the fishing, yes, and the good will among people."<sup>44</sup> Two years before, a wave of protests in Vieques following a successful movement to stop Navy exercises on the nearby island of Culebra

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<sup>43</sup> Agency for Toxic Substance and Disease Registry, U.S. Department of Health and Human Services, *An Evaluation Of Environmental, Biological, and Health Data from the Island of Vieques* ("ATSDR 2013 Report"), Puerto Rico, March 19, 2013: p.63-64.

<sup>44</sup> "Naval Training Activities on the Island of Vieques, Puerto Rico." Hearings before the Panel to Review the Status of Navy Training on the Island of Vieques of the Committee on Armed Services. US House of Representatives, Ninety-Sixth Congress, Second Session. May 28, 29, July 10, 11, September 24, 1980: p.4. ("House Committee Hearings.")

had prompted the Committee to hold the hearings.<sup>45</sup> Katherine McCaffrey outlines the crucial historical context:

Vieques' long-simmering conflict with the navy exploded in 1978. The navy intensified maneuvers on Vieques after a militant anticolonial movement on neighboring Culebra forced the military off that island. Heightened bombing and stepped-up maneuvers pushed conflict over the edge. A grassroots mobilization coalesced in Vieques in the late 1970s that aimed to evict the navy and reclaim land.<sup>46</sup>

The mobilization in 1978 was a critical moment in the history of relations between the Navy and the people of Vieques. A number of factors led to the explosiveness of that confrontation, which McCaffrey calls "The Fishermen's War" for the primary position Viequense fishermen played in the protests. The end of the bombing of Culebra emboldened local Viequense activists, while simultaneously causing the Navy to increase its activities in Vieques to make up for the loss of its sister island, which "created particular hardship for the island's fishermen."<sup>47</sup> This hardship was manifest in myriad ways, from the increasing contamination of prime fishing waters and reefs to the physical destruction of buoys, traps, and other fishing gear, to new restrictions on movement that denied fishermen access to the waters they had previously worked.<sup>48</sup> Rafael Cruz, the president of the fishing association in Vieques, explained the reasons for the 1978 protests to McCaffrey, framing the particular conflict in the larger context of the problems caused by the Navy's presence on the island:

The struggle began in 1978 because for years Vieques had been mistreated by the Navy. Women were raped. Men were killed in the streets fighting sailors in years back. I lost a friend on the base when a bomb exploded. But they continued with the abuse and the abuse eventually reached the sector of the fishermen. They bombed the most productive fishing areas. Dropped live bombs. Destroyed many fishing traps...The situation in Vieques is that the fishers have families to support...It's the only source of steady employment in Vieques. And here comes the navy saying for thirty days, you can't fish. This is terrible.<sup>49</sup>

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<sup>45</sup> McCaffrey, *Military Power and Popular Protest*, Chapter 3.

<sup>46</sup> *Ibid.*, p.67.

<sup>47</sup> *Ibid.*, 75.

<sup>48</sup> *Ibid.*

<sup>49</sup> Quoted in *Ibid.*, 76.

About a year prior to Secretary Hidalgo's testimony, in May of 1979, federal marshals arrested 21 protesters who had gathered on military land to demonstrate. Many of the arrested protesters were given fines and sentenced to six-month terms in federal prison by Judge Juan Torruella.<sup>50</sup> Although the protesters came from various political and ideological backgrounds, the Puerto Rican and US governments engaged in a targeted campaign of arrests against *independentistas*.<sup>51</sup> Among those arrested was Angel Rodríguez Cristóbal, a Vietnam veteran and independence activist whose case would become emblematic for the movement. Rodríguez was among those who received the maximum six-month jail term, but it was what happened after he went to prison that ensured his place in Viequense memory. As McCaffrey recounts:

On November 11, 1979, two months into a six-month sentence, Rodríguez was found dead in his prison cell. Prison officials declared the death a suicide, but an independent autopsy the family had performed concluded that he was beaten to death. Photos of the cadaver showed that the face was heavily bruised, inconsistent with charges of suicide by strangulation.<sup>52</sup>

A few weeks later, on December 4<sup>th</sup>, 1979, a bus transporting Navy personnel in Sabana Seca, a town just outside San Juan, was ambushed by armed gunmen. Two sailors were killed and ten others wounded. Literature left behind by *independentista* groups claiming responsibility indicated that the massacre was, in part, an act of retaliation for Rodríguez's death.

It was against this backdrop that the House Armed Services Committee held its hearings, and Secretary Hidalgo gave his testimony. His assertion that the Navy presence benefited the Viequense people's "economy, ecology, and fishing" went unsubstantiated in his testimony, which turned very quickly to the question of national security. As would be the case in future defenses of the Navy's presence in Vieques, the Secretary positioned Vieques as critical for U.S. interests in the Caribbean and the world at large, while dismissing the protesters as, in his words, "noisy dissenters

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<sup>50</sup> Judge Torruella would later write the dissenting opinion in *Sanchez*.

<sup>51</sup> LL Cripps, *Human Rights in a United States Colony* (Cambridge, MA: Schenkman Books, Inc., 1982): 120-132.

<sup>52</sup> *Ibid.*, 90.

with a political or ideological ax to grind.”<sup>53</sup> Katherine McCaffrey explains the particular historical context in which the Fishermen’s War took place:

Protest erupted at a time of increasing international polarization. In the late 1970s, cold war tensions intensified between the United States and the Soviet Union after the Soviet invasion of Afghanistan. A wave of revolutionary movements swept Central America and the Caribbean basin, heightening Washington’s anxiety about the spread of communism and the growing influence of Cuba throughout the region. With U.S. public consciousness shaped by grim images of the hostages in Iran, the political establishment turned markedly to the right.<sup>54</sup>

For Secretary Hidalgo and other Navy officials, the heightening Cold War served as the central defense for the continued presence in and bombing of Vieques. In his testimony, he touched on all the major developments highlighted above by McCaffrey:

The aggressive Soviet satellite in the heart of the Caribbean is strikingly relevant to this panel’s deliberations. So is the strength of the Soviet Navy, with its ever-rising numbers of combatant ships...The burden upon our Navy is heavier than it has been since World War II and, in some respects, Mr. Chairman, than in World War II.

The heroic Iranian rescue mission of April 24 dramatically illustrates the decisive effect of unforeseen or unforeseeable obstacles even when the preparations and training have been painstaking...Anything that deprives our Nation of the Vieques training range or jeopardizes its use would be a severe blow to our national security. I am confident you will not let this happen.<sup>55</sup>

Having paid lip service to the concerns of Viequense fishermen and other residents, Secretary Hidalgo here gets to the heart of his defense of the bombing of Vieques. The strategic value of Vieques – as a training center to prepare for global threats, but also as a bulwark against perceived Cuban aggressiveness in the Caribbean (Secretary Hidalgo would not even mention “the aggressive Soviet satellite state in the heart of the Caribbean” by name,) would supersede the concerns of the inhabitants of the island.<sup>56</sup> Those who disagreed, and particularly those who protested had to be understood as a tiny, radical, anti-American minority. The concerns expressed by Rafael Cruz and

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<sup>53</sup> House Committee Hearings, p. 4.

<sup>54</sup> McCaffrey, *Military Power and Popular Protest*, 67-68.

<sup>55</sup> House Committee Hearings, 4-5.

<sup>56</sup> In 1981, for example, Vieques was used by NATO as a staging ground for dress rehearsal for the invasion of Granada. See David Scott, *Omens of Adversity: Tragedy, Time, Memory, Justice* (Durham, NC: Duke University Press, 2014), 182n48.

the fishermen were dismissed as so much “demagogic noise.”<sup>57</sup> (The notion of Viequense protesters as demagogues with an ideological ax to grind is difficult to square with, among many other things, several leaders of the fishing association identifying with the pro-American statehood party. The movement as a whole included *independentista* and socialist elements, but was self-consciously pan-political, in contrast to the genuinely *independentista* movement in Culebra.)<sup>58</sup>

Neither Secretary Hidalgo nor most Navy officers and spokespeople over the years, however, would simply make the argument that, if the price of maintaining U.S. supremacy in the Cold War and anti-Cuban hegemony in the Caribbean was the livelihoods of a few hundred Viequense fishermen (or the health of a few thousand Viequense residents), that it was worth paying. Instead, unsubstantiated and unexamined claims about the ways in which the Navy was actually *good* for the people of Vieques were espoused.

In 1999, the policy of obfuscation of the Navy’s responsibility for the wellbeing of people in Vieques was on full display. It was, once again, subservient to an overall narrative of the necessity of Vieques and Roosevelt Roads for national security. On September 22 and October 19, 1999, the Senate Sub-Committee on Readiness and Management Support, which operates under the Senate Committee on Armed Services, held hearings that were strongly reminiscent of those held by the House Committee in 1980. Once again, the hearings were held in the wake of both prominent protests and a well-publicized tragedy – David Sanes was killed in April of 1999, and the hearings were in part called as a response to the burgeoning anti-bombing campaigns in Vieques, Puerto Rico, and within the Puerto Rican diaspora in the U.S.<sup>59</sup>

Testifying before that committee, Vice Admiral William J. Fallon, the Commander of the Second Fleet, echoed what Secretary Hidalgo had said nearly two decades before, calling Vieques

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<sup>57</sup> Ibid., 4.

<sup>58</sup> McCaffrey, *Military Power and Popular Protest*, 81-84.

<sup>59</sup> For an excellent analysis of the role played by the diaspora, and the role Vieques played in “transnational” identity formation for Puerto Ricans, see Amílcar Antonio Barreto, *Vieques, the Navy, and Puerto Rican Politics* (Gainesville, FL: University Press of Florida, 2002).

“the only place available to East Coast forces which affords them a place to conduct training...

There are very few places left in which we can conduct live ordnance training, and this is the premier and principal location on the East Coast.<sup>60</sup>

As with Hidalgo, Admiral Fallon addressed the ongoing complaints of protesters by denying the ill effects of the Navy presence on the people of Vieques:

I also would like to make the point that I personally feel that our operations down there do not pose a hazard to the civilian population of this island. In fact, if we thought that there were significant hazards to the people, we would not be doing this training. The primary reason we do train at Vieques with live ordnance is that this particular range is particularly well-suited to that, at minimum risk to people.

If one were to look at the island makeup...the impact area where all ordnance training is conducted is at the far eastern end of the island. It is less than 3 percent of the total land area of the island. There is a buffer zone of almost 10 miles, totally uninhabited, between the target range and the nearest population center on the island. The water areas around the northeast and south, also uninhabited, provide the best possible safety buffer to civilian lives. So we feel that the operations are, in fact, safely conducted.<sup>61</sup>

It is clear from Admiral Mullen’s testimony that he and the protesters identified questions of “safety” quite differently, and this difference is illustrative of the Navy’s overall failure to respond to demands for remuneration. Essentially, the Admiral’s definition of safety is based on protecting Viequesens from accidents like the one that killed David Sanes. But talk of buffer zones and safe conduct does not address in any meaningful way the actual complaints of the Vieques protests – Admiral Mullen did not address environmental destruction or its correspondent health effects. He talks about the “uninhabited waters” as though they are a source of security, instead of a source of contamination. From this conception of the Navy’s obligations to the people of Vieques flows quite naturally the Navy’s denial of its accountability after 2003.

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<sup>60</sup> Vieques and the future of the Atlantic Fleet Weapons Training Facility: hearings before the Committee on Armed Services and the Subcommittee on Readiness and Management Support, United States Senate, One Hundred Sixth Congress, first session, September 22 and October 19, 1999: p. 4.

<sup>61</sup> Ibid., 5-6.



Compared to Secretary Hidalgo's essential belligerence in the face of the fishermen's protests, though, Admiral Mullen did acknowledge some legitimacy in the protesters' grievances. He told the committee:

We recognize that our operations impinge on their livelihood down on the island. We would like to meet with the people. We would like to address not only the National security imperatives for continuing our training on the island, but we would also like to help enhance the quality of life of the people and their economic well-being, and with your assistance we look forward to doing that.<sup>62</sup>

Mullen's apparent concern for the economic well-being of Viequenses was not as generous as it looks at first glance. During the period of the 1999-2003 movement, the Navy regularly tied promises of economic aid packages to the islanders' continued support for the bombing and landing exercises. Most explicitly, the Navy offered a \$50 million aid package if Viequenses would vote for the continuation of bombing in 2001 while simultaneously holding the supposed economic benefits of Roosevelt Roads hostage during negotiations.

The poverty on Vieques, and the Navy's substantial share of that responsibility, are crucial components of the reparations debate for the island. Admiral Mullen's admission that the Navy "impinges the livelihood" of Viequenses is welcome, even if it was more of a response to the previous round of protests than it was to the round he was ostensibly addressing. But Mullen's expressed concern about the economic well-being of Viequenses and the Navy's role as a good neighbor to the island's residents was nothing new. Among the "resolutions" to the Fishermen's War was the Fortín Accord, a 1983 agreement between Puerto Rico Governor Carlos Romero-Barceló and James Goodrich, Reagan's Secretary of the Navy. As Amílcar Antonio Baretto explains, the accord served as a foundation for Admiral Mullen's testimony sixteen years later:

One of the top priorities outlined in the agreement was the navy's commitment to find civilian industries willing to locate plants on Vieques. The navy made no commitment to withdraw from Vieques...At the time, many viewed the navy's signature as victory for the people of Vieques. Those cheering this understanding

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<sup>62</sup> Ibid.

forgot one important point: the U.S. Navy's commitment to improving Vieques's economic development was institutional self-interest designed to prolong the use of this island as a bombing range.<sup>63</sup>

By the time Mullen was making similar promises, a decade and a half with no notable improvement in the Viequense economic situation had passed. Critically, because the Navy leadership always saw their role in the economic development of Vieques as tied to their ability to continue bombing unimpeded (and even then, considering the results, did not take that role very seriously,) the end of bombing exercises and the closure of Roosevelt Roads in 2003 seemed to the Navy to represent the end of their obligations.

One of the Navy officials during the transition was Charles D. Swift, who served as legal counsel for the commanding officer at Roosevelt Roads.<sup>64</sup> In 2011, he was interviewed as part of the Rule of Law Oral History Project at Columbia University's Center for Oral History. Swift's insights are invaluable in that they present an analysis of events during the transition that had not previously been reflected in the public record. Of particular note is that, while he is certainly more candid than any of the officers testifying before congressional committees, he maintains the position that the Navy has no extraordinary responsibilities in Vieques after 2003.

The prominent position of Secretary Hidalgo, Admiral Mullen, and the US Navy and US Government generally, was that Vieques had crucial and irreplaceable value for military readiness. Swift disagrees. When Swift was asked how severe the loss of Vieques was for the Navy, he responded:

Nonexistent. That was the funny part. There was a lot of pride in it. It bothered me underneath. I knew that Vieques was doomed long before. I understood it a year into my tenure... Vieques was not cleared to drop for GPS. There was a discussion of whether we could ever clear it and whether we would need a new environmental impact statement, which no one wanted to do.<sup>65</sup>

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<sup>63</sup> Barreto, *Vieques, the Navy, and Puerto Rican Politics*, 33.

<sup>64</sup> Swift would go on to gain prominence for representing Guantanamo detainee Salim Hamdan before the Supreme Court.

<sup>65</sup> Swift, 82.

Swift's interpretation that importance of losing Vieques as "nonexistent" for the Navy, which he says is related to changing military technology and the increasing irrelevance of landing exercises and the clearances needed for new GPS-based bombing systems, contradicts nearly everything the Navy said before and during the protests. Swift explains why the Navy would decline to pursue GPS bombing for reasons beyond just changing technology:

Here's the problem. If you drop at thirty thousand feet and the GPS doesn't work, you put Saint Thomas at risk, and no one was going to risk putting a bomb into a cruise ship. For those of you who still believe there is cancer on Vieques, please check the prevailing winds. The prevailing winds don't blow toward downtown Esperanza. The prevailing winds blow to St. Thomas.<sup>66</sup>

As in the public statements of Secretary Hidalgo and Admiral Mullen, Swift misrepresents or misunderstands the arguments for the navy's responsibility for health problems in Vieques, which have little if anything to do with prevailing winds. His opinion that the risk of blowing up cruise ships in the Virgin Islands was too great to accept and that the Navy would have transitioned away from live-fire exercises on Vieques regardless of the protests is contradicted by another statement from the interview, in which he provides an incredibly candid explanation for Vieques' value to the U.S. military, broadly speaking:

Every president says it's unconstitutional, but they passed the War Powers Act. Part of the War Powers Act is about deployment from the continental United States. We are not in the continental United States in Puerto Rico. It's a territory, so it doesn't count as the United States. It's not a state, so you can do some deployments into hostile areas without telling anyone. Before we've had SOC South in Panama for the same reason, so we could do things without telling Congress or limiting it to the gang of four. These are good things.

Besides, it's not like the media has anybody down in Vieques. At least they didn't at that time.<sup>67</sup>

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<sup>66</sup> Ibid., 84.

<sup>67</sup> Ibid., 85.

Swift takes the position, later in the interview, that the Viequense protesters were unsophisticated in demanding that the Navy stop the bombing, which he submits would have happened anyway, and should have instead used their position to insist on environmental clean-up.<sup>68</sup> It is the closest he got to suggesting the possibility of reparation.

The statements from Hidalgo, Mullen, and Swift provide insight into the Navy's mindset regarding their own accountability for the social crises in Vieques, and they all demonstrate a kind of tunnel vision on the issue. Hidalgo and Mullen offer the infeasible position that the Navy did more good than bad for the people of Vieques, and Swift denies that "there is cancer on Vieques" outright. Since 2003, the Navy has maintained this same position, which seems inherited from the arguments it made in 1980 and again in 1999.

### *The ATSDR*

While the Navy's position has remained constant, it has been aided in its more recent denials of responsibility by the issuance of the three ATSDR reports in 2003, 2009, and 2013.<sup>69</sup> The reports consistently fail to discover links between military activities and health problems on the island, while nevertheless acknowledging both.

On October 15, 2015, I attended a conference held at the University of Puerto Rico-Río Piedras. The conference featured panel discussions on the subject of public health in Vieques from Viequense residents, as well as both government and independent scientists, and politicians from both Washington and San Juan.<sup>70</sup> Much of the work done by the independent scientists establishes clear linkages between the presence of toxic levels of heavy metals in samples taken from

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<sup>68</sup> Ibid., 86-87

<sup>69</sup> All the ATSDR reports are available at <http://www.atsdr.cdc.gov/sites/vieques/overview.html>

<sup>70</sup> Video of the conference in its entirety is available here: <https://www.youtube.com/watch?v=lc1ava8EPoM>

Viequenses and their myriad health problems. Again, though, neither the presence of those heavy metals nor the health problems are disputed by either the Navy or the ATSDR. For that reason, the presentations that speak most directly to the cause of reparations were the ones that specifically challenged the ATSDR reports' inability to discover a cause-and-effect relationship between the toxic heavy metals and military activities.

Dr. Carmen Ortiz Roque, a member of the Independent Scientific Commission on Vieques and a professor at the Colegio de Médicos Cirujanos de Puerto Rico (College of Physicians and Surgeons of Puerto Rico), referred to a published paper in which she and a colleague had analyzed mercury concentrations in Viequense women of reproductive age.<sup>71</sup> The paper discovered extraordinarily high levels of mercury in its subjects (26.8% of the Viequense subjects exceeded recommended levels of mercury, compared to 6.6% in mainland Puerto Rico and 7% in the United States,) noting that “Mercury is among the 102 violations to effluent water quality parameters committed by the US Navy in the coast of Vieques. No other source of mercury contamination has been identified in that island.”<sup>72</sup>

During their respective presentations, two different presenters – Dr. Jorge Colón of UPR's Department of Chemistry and Dr. Daniel Colón-Ramos of Yale School of Medicine, both of whom are members of the Independent Scientific Commission – noted that the ATSDR reports rely in part on studies paid for by the Navy, and conducted by CH2M Hill, a contractor that oversees the Navy's post-2003 clean-up efforts, and has a long history of unethical and environmentally destructive behavior.<sup>73</sup>

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<sup>71</sup> Carmen Ortiz Roque and Yadiris López-Rivera, “Mercury contamination in reproductive age women in a Caribbean island: Vieques.” *Journal of Epidemiol Community Health* (2004): 756-757.

<sup>72</sup> *Ibid.*, 756.

<sup>73</sup> Most famously, CH2M Hill built trailers for Katrina refugees that contained formaldehyde and exposed the refugees to toxic fumes. A class action suit related to the trailers was settled in 2012.

Dr. Colón-Ramos, besides criticizing the ATSDR for using CH2M Hill studies specifically, criticized them for relying on data that had been collected by other sources more generally, for giving recommendations without data to back them up, and for using unreliable data. On balance, Dr. Colón-Ramos said, “it offends me to call what the ATSDR does ‘science.’”<sup>74</sup>

The principle achievement of the ATSDR reports has been to validate the post-2003 version of the Navy’s long-standing denials of their culpability for the various crises in Vieques. With the bombing over, the Navy no longer has to defend its presence as actually good for the people of Vieques, or even to offer economic development as a protection racket. Now, with the help of the ATSDR reports, the Navy can simply fall back on the farfetched defense that no evidence links the decades of bombing to the presence of toxic levels of heavy metals on the island.

The bad science of the ATSDR reports, and their seeming collusion with elements close to the Navy, are scandalous on their own. For the sake of reparations for Vieques, though, they have been catastrophic. The case for reparations is much more difficult to make when a supposedly independent agency validates the Navy’s argument that, while the facts of cancer and poverty may be conceded, the truth of culpability may not.

### **Part Three: Vieques Reparations in Practice**

*Compensation, and I think that’s the way Congressmen are looking at it, but compensation is not the solution to our health problems...I’m sorry, John, but compensation is one thing and God knows this island deserves compensation but it is not our solution. What we have to demand here are clinics and treatments and follow up on complications and health.*

-Myrna Pagán<sup>75</sup>

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<sup>74</sup> UPR Conference, translation by the author.

<sup>75</sup> Quoted in Torres-Vélez, “The Hidden Wounds of Vieques”: 154.

Pagán, a Viequense resident, said these words during the 2003 reparation debates that ended in the decision to go forward with the lawsuit that would become *Sanchez*. Addressing John Arthur Eaves, Jr., the lawyer who would become lead counsel in the class action suit, she expresses concern about the nature of an individually-focused class action suit, and about monetary compensation as the only form of reparation for Vieques. Victor Torres-Vélez, who was present for those debates, echoes Pagán’s worries, pointing out that many Viequenses who are seemingly healthy now are likely to fall ill from bombardment-related causes later, and that the construction of medical infrastructure is of more value than monetary payments.<sup>76</sup>

Many foundational questions about reparations generally, and about the specifics of reparations for Viequenses, emerged from those immediate post-bombing debates. The intergenerational nature of victimization in Vieques, combined with the non-fixed category of victims, lend themselves to the suggestion that reparations for Viequenses should be collective, instead of or in addition to individual. Within a human rights framework, the notion that collective reparations can and should be complementary to individual ones is widely accepted. The ICTJ published a relevant discussion of collective reparations in a 2007 policy paper:

Collective reparations are focused on delivering a benefit to people that suffered from human rights violations as a group...[T]hey might address violations such as bombings or a destruction of villages that had the intention of terrorizing a whole population, affecting means of subsistence, dismantling organizations or destroying public trust among residents. In such contexts, collective reparations may offer an effective response to damage to community infrastructure, identity and trust.<sup>77</sup>

While it would be easy for one to get caught up on the question of “intention,” for the Navy, the *known effect* of their bombing was economic, environmental, and health devastation.<sup>78</sup> The ICTJ report argues for a combination of collective and individual reparations in most situations, as

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<sup>76</sup> Ibid., 154-155.

<sup>77</sup> International Center for Transitional Justice, “Reparations in Theory and Practice.” *Reparative Justice Series* (2007). p.5. <https://ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf>

<sup>78</sup> Much of the next three paragraphs are paraphrased from a term paper I wrote for Prof. David Scott in Fall 2014.

occurred in places like Timor Leste, Chile, and Peru.<sup>79</sup> In Vieques, lawyers involved in the class-action suit framed the individual reparations as sufficient in themselves. Torres-Vélez quotes Eaves as counseling, “When you have money you have a choice. When you are sick you know what your options are...Doctors will come if they receive compensation because they will be able to support their families. Then they will come to Vieques.”<sup>80</sup> This is, as both Torres-Vélez and the residents of Vieques (including Myrna Pagán) who are quoted in his work point out, not the same as building a hospital and medical infrastructure on the island.<sup>81</sup> In short, offering the means to pay for private doctors or the monetary incentive for private doctors to come to the island only for the Viequenses who are participants in the class-action suit accomplishes nothing in terms of alleviating the underlying collective harms to public health.

Thomas McCarthy, arguing for black reparations, makes a pertinent argument in favor of collective compensation and reparation:

A recurring objection to the tort model of reparation is that under it compensation settles the matter once and for all - so that, for instance, if racial inequalities persisted thereafter, there would be no further recourse. Adapting distributive justice principles to reparations purposes, as I am proposing, sets the standard of reparation in terms of doing "about as well as" or being "more nearly equal to" other groups of citizens and thus blunts that objection.<sup>82</sup>

McCarthy says his argument for collective compensation is “not a putatively objective search for monetary equivalents but a democratic deliberation upon the requirements of equal justice.”<sup>83</sup> To apply that deliberation to the Viequense case supports the assertion that the genuine requirement of justice in Vieques is collective. The harm in Vieques is indiscriminate and collective – all those who lived or live on the island have been exposed to the environmental catastrophes from the naval

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<sup>79</sup> ICTJ, “Reparations in Theory and Practice”, 5-7.

<sup>80</sup> Torres-Vélez, “The Hidden Wounds of Vieques”, 156.

<sup>81</sup> *Ibid.*, 154-157.

<sup>82</sup> Thomas McCarthy, “Coming to Terms with our Past, Part II: On the Morality and Politics of Reparations for Slavery.” *Political Theory* 32, no. 6 (2004): 756.

<sup>83</sup> *Ibid.*



bombing and, by extension, their horrific health effects. This is not to say that there is no room at all for individual monetary payments – as the ICTJ makes clear, a combination of both is often desirable. It is instead simply to say that McCarthy’s “recurring objection” could certainly apply in the Viequense case. It would not be justice for the Navy, even of its own free will, to hand over cash payments to select Viequenses and consider its debt paid.

Nevertheless, the decision was ultimately made by Viequenses to go ahead with the class action suit that would become *Sanchez*. To date, it is the strongest and most substantial case for reparations to have been made for Vieques. Its dismissal by the First Circuit Court of Appeals, while undoubtedly a disappointment to the plaintiffs and a step back in the overall movement to secure reparations, offers an opportunity for a fresh look at how reparations can and should be achieved. Understanding the arguments put forth in *Sanchez*, and the reasons given by the majority of the court for its inadmissibility, is essential to addressing those questions.

*Sanchez v. United States*<sup>84</sup>

The *Sanchez* case was filed in 2007 in the District Court of Puerto Rico. Its claims for restitution were made under the Federal Tort Claims Act (FTCA), a law that establishes exceptions to the principle of sovereign immunity – in short, the FTCA outlines the circumstances in which U.S. citizens can sue the government. In 2010, the Puerto Rican district court concluded that “the Court does not have subject matter jurisdiction in the instant case due to the strong presumption for the application of the discretionary function exception, particularly as to the repercussions of military operations upon the adjacent or subsequent civilian population, which has been recognized

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<sup>84</sup> Much of this sub-section is paraphrased from a term paper I wrote for Professor Jon Bush in Spring 2015.

in this and in other circuits, including in the context of the Navy's operations on Vieques.”<sup>85</sup> The issue of “discretionary function” would arise again in the appeal.

The district court, while finding that the lawsuit was inadmissible for the aforementioned reasons, nevertheless took the issue of the Viequense health crisis seriously. The court notes that its decision was made “despite the deeply ‘simpatico,’ or sympathetic, nature of Plaintiffs' claims against the Navy, whose operations on Vieques have allegedly caused them innumerable potentially severe health damage.”<sup>86</sup> The language, though stunted by the legal language of “alleged” causation, is remarkable for its expression of open sympathy for the plight of Viequenses.

The plaintiffs appealed to the First Circuit Court of Appeals. Once again, their case was dismissed on the basis of discretionary function and sovereign immunity, but once again, the court rejected the Viequenses’ claim for action while still acknowledging the severity of the community’s health crisis:

Nonetheless, while the majority's view is that the dismissal of the suit must be affirmed, and the dissent disagrees, the plaintiffs' pleadings, taken as true, raise serious health concerns. The government has acknowledged the existence of these concerns. The majority and the dissent agree that these issues should be brought to the attention of Congress. The Clerk of Court is instructed to send a copy of this opinion to the leadership of both the House and Senate.<sup>87</sup>

Although the language of the decision remains ambiguous – the government acknowledges health *concerns*, which is easy enough to do – it is nevertheless an important high-level recognition of Vieques’ health crisis, which should be valuable to future assertions of the need for remedy. While the Navy has and will surely continue to point to the conflicting evidence surrounding their direct responsibility for the ill health of Viequenses, the facts of the health problems faced by people on the island and their paucity of health care resources remain. Both the district court and court of appeals acknowledge this.

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<sup>85</sup> *Sanchez v. United States*, No. 09-CV-1260, [707 F.Supp.2d 216](#), 231, 2010 WL 1626118, p.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Sanchez ex rel. D.R.-S. v. United States*, 671 F.3d 86 (1st Cir. 2012) [2012 BL 38863], p. 13

The majority's decision in *Sanchez* is largely based on its finding that the Navy's bombardment of Vieques was covered as a discretionary function, and by extension ineligible for a sovereign immunity exception under the FTCA. The plaintiffs anticipated this objection, but the Court rejected their arguments:

The plaintiffs...assert that the Navy is susceptible to suit and acted beyond its discretion because it allegedly (1) violated mandatory directives concerning water pollution issued pursuant to the Clean Water Act (CWA), (2) violated a pair of permits, which are not part of the record, that purportedly forbid firing depleted uranium bullets on Vieques; (3) violated unidentified internal regulations, policies, directives, and orders; and (4) failed to comply with a purported duty to warn the plaintiffs about pollution.

The district court rejected these arguments as well as several others not raised on appeal. We affirm the dismissal with prejudice for lack of jurisdiction.<sup>88</sup>

The complaints numbered two and three above did not contain sufficient documentation to be proven, and are therefore not given a great deal of attention in the majority's decision. The court's findings on theories one and four are worthy of attention, as they draw on the more substantial and theoretical legal considerations in the case. That is, they address the FTCA and the issue of the discretionary function exception at length, and seem therefore to provide the clearest picture of whether Viequenses can secure reparation via an FTCA lawsuit going forward. The plaintiffs' contention that the Navy's activities on and around Vieques were not covered as discretionary function because they violated the Clean Water Act hinges on the existence of a permit granted the Navy by the Environmental Protection Agency in 1984.<sup>89</sup> That permit:

required that the Navy maintain water concentrations of certain compounds below the higher of (1) specific numerical requirements and (2) natural background concentration levels. The permit stated that "at no time shall the maximum values contained in the effluent exceed the water quality standards after mixing with the receiving water."<sup>90</sup>

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<sup>88</sup> *Ibid.*, p.2. Original citations omitted.

<sup>89</sup> *Ibid.*, p. 4.

<sup>90</sup> *Ibid.*

The plaintiffs cited memos and studies that demonstrated that those requirements had not been met, but the court found that there could be no FTCA claims based on the Clean Water Act because it was outside Congress's intent when the act was passed.<sup>91</sup> Judge Torruella, a Circuit Judge from Puerto Rico, writing his dissent in *Sanchez*, denies the relevance of congressional intent as regards the Clean Water Act, pointing out that the suit has been filed not under that Act, but under the FTCA:

Furthermore, this is a suit under the FTCA, which only has one exception that is arguably relevant to the case before us, the discretionary function exception of **28 U.S.C. § 2680(a)**. The issue in this case is not whether the CWA or NEPA created a private cause of action for damages... Indeed, the CWA, NEPA, and other regulations are of relevance only in determining whether the Navy comes within the discretionary function exception. This Court is bound by the higher authority of *Gaubert* and *Berkovitz*, which establish the inapplicability of the discretionary function exception when there are mandatory legal requirements, such as exist in the present case by reason of court rulings (*Romero-Barceló*), federal statutes (*e.g.*, NEPA and CWA), and specific permit standards (*e.g.*, the NPDES permit), all of which the Navy has *allegedly* disregarded to the claimed prejudice of Plaintiffs.<sup>92</sup>

The other argument made by the *Sanchez* plaintiffs was that the Navy allowed fishermen and cattle ranchers to conduct their work in areas contaminated by heavy metals, thus failing in the duty to warn Viequenses about the presence of dangerous toxins in those areas. The failure of that duty is, according to the plaintiffs' claim, just that – a failure of a duty, and by definition not a discretionary act.

For the majority, the plaintiffs did not provide a sufficient source for the duty to warn. The plaintiffs' sources were 1) a provision in the Navy's Vieques range manual that prohibits bombing during certain hours in order to allow fishermen to retrieve their traps, and 2) an academic article that asserts without citation that the Navy allowed cattle to graze on the bombing ranges.<sup>93</sup> The

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<sup>91</sup> Ibid., p. 6-8.

<sup>92</sup> Ibid., p.21

majority states that “The source of this alleged non-discretionary duty to warn suffers from vagueness and indeterminacy,” and so does not create a duty to inform at all.<sup>94</sup>

Further, the majority makes several important points about the discretionary necessity of the military *not* disclosing certain activities to the public, and cites a variety of precedents wherein the Navy’s informing or not informing the public about its actions was decided to be discretionary.<sup>95</sup> Judge Torruella’s dissent addresses these points at length, finding similarities to previous cases that the majority dismissed as different, and basing his argument on the notion that the Navy was violating both Puerto Rican and federal law, in addition to its own policy, when making these “discretionary decisions.”<sup>96</sup> Torruella passionately argued for the necessity of military accountability:

I find it hard to see how there is any reasonable or permissible policy analysis that could justify the Navy's failure to warn Plaintiffs of the known dangers created by the Navy's violation of the laws and regulations applicable to its conduct...In our constitutional system of government the military is subordinate to the civil authority. Thus, whatever discretion the military has, it is not without bounds. When necessary, the courts have stepped in to affirm that there are limits on what can be done in the name of national security. I cannot countenance a legal concept or theory that would give the military qua military carte blanche license to harm U.S. citizens through its negligent actions without any consequence.<sup>97</sup>

As powerful and appealing as Judge Torruella’s argument is, it is possible he is arguing against a straw man here. It is not at all clear from the majority’s decision that it disagrees – its contention is not that the Navy’s discretion is “without bounds” or that the military has “carte blanche license to harm U.S. citizens without any consequence,” but rather that the bounds within which military discretion exists include the actions the Navy took in Vieques.

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<sup>93</sup> Ibid., p. 4. The cited article is A. Massol-Deyá, et al., *Trace Elements Analysis in Forage Samples from a U.S. Navy Bombing Range (Vieques, Puerto Rico)*, 2 Int’l J. Envtl. Res. & Pub. Health 263, 264 (2005)

<sup>94</sup> Ibid., p. 10

<sup>95</sup> Ibid., 10-13.

<sup>96</sup> Ibid., 20-23.

<sup>97</sup> Ibid., 23. Citations omitted.

Indeed, the order to send the decision to Congress demonstrates not only that the majority takes the harms perpetrated against Vieques seriously, but that they take Viequense claims for reparation seriously. They only believe that the law as it exists does not provide for them, and that the legislature is the appropriate venue to secure them. The court's dismissal of the case "with prejudice," anyway, complicates the possibility of following the class action route to reparation, however. Rather than modifying the existing claims in *Sanchez* and trying the case again, the plaintiffs would need to find harms for which there was sufficient evidence under the FTCA. The First Circuit's decision on the matter is final, as the U.S. Supreme Court declined to hear the plaintiffs' appeal in 2013. This is one reason that a political rather than legal settlement might be preferable for Viequenses.

#### *The Inter-American Petition*<sup>98</sup>

The legal challenge that followed *Sanchez*, in fact, bears in mind the greater possibilities for a political solution. In September of 2013, three lawyers, along with the Alianza de Mujeres Viequenses (Viequense Women's Alliance), filed a petition before the Inter-American Commission on Human Rights alleging human rights violations against residents of Vieques by the United States government. Claims before international bodies alleging violations of Puerto Rican human rights are not novel – there has been testimony to that effect before the UN Decolonization Committee on a near-annual basis for decades. The petition in question is, in that tradition, a meaningful alternative to the remedies sought under *Sanchez*, appealing as it does to international human rights law rather than the entangled domestic considerations of the FTCA and sovereign immunity. Any conclusions reached by the Inter-American petition are neither binding nor enforceable in the United States, but

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<sup>98</sup> Some of this sub-section is paraphrased from a term paper I wrote for Prof. Jon Bush in Spring 2015.

the petition serves as an opportunity to put both domestic and international pressure on the U.S. government to fulfill its duty of redress in Vieques.

The Inter-American petition reframes the arguments in *Sanchez* as violations of established human rights, including the rights to life, health, access to information, and judicial remedies.<sup>99</sup> The petition adds claims of violations of the rights to free movement, residence, work, and fair remuneration, based on various policies enacted by the Navy during their 60-year presence in Vieques.

The petition takes an expansive approach to identifying the Navy's violations of Viequeses' right to life.<sup>100</sup> In addition to the more explicit and obvious threats to the right to life in Vieques posed by the environmental devastation and its resulting health effects, the petition notes that "In spite of the gravity of the situation, the State's inadequate responsiveness shows an evident disregard for the human right to life in contravention of its international obligations under the American Declaration."<sup>101</sup> This is a critical point to make. Even focusing on reparations only for the human rights violations perpetrated as a result of Navy occupation, the temporal question is broader than it first appears. The Navy is responsible for reparation not just for its actions from 1941-2003, but also for its *inactions* in the ensuing years. The end of the bombing does not equate to the end of Navy responsibility.

The petition further expands on the violation of the right to life in Vieques. Significantly, it points out that both the Inter-American Commission and the Inter-American Court for Human Rights:

have also interpreted the scope of protection of the right to life as to include living conditions that ensure a decent existence...The right to life is not limited to the mere

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<sup>99</sup>Inter-American Petition.

<sup>100</sup> The right to life, as it is commonly understood in human rights literature, is actually the right not to be arbitrarily deprived of life. It is hard to imagine a delineation more arbitrary than residence in a particular geographic space.

<sup>101</sup> Inter-American Petition, 37.

existence as a human being, but extends to the conditions created or permitted by the States to make effective the enjoyment of this right with dignity.<sup>102</sup>

Arguments related to the right to health extend naturally from this conception of the right to life.

The conception that the right to life required not just keeping people physically alive but providing dignified conditions of living is useful in framing the discussion of reparations for Vieques because it helps to identify and define the harms suffered by Viequenses. It is not only that they *die* of cancer and other maladies at extraordinary rates, to put it one way, is it also that they *live with* cancer and other maladies at extraordinary rates.

There are, of course, strengths and weaknesses worth acknowledging in the international law approach. Should the petition lead to a decision by the Inter-American Commission favorable to the Viequenses, the moral authority and relative political weight of international customary law would be behind a program of reparations. Though that weight – the weight of soft law – is not the most practicable, to say the least, it nevertheless gives supporters of Vieques reparations in the United States a tool and the Congress a political incentive to fulfill their obligations of redress so as to make clear that it is fulfilling its international human rights obligations.

On the other hand, it is much more difficult in a legal setting to come up with a temporally comprehensive settlement – one that addresses the equally important harms of the past, present, and future. However, the understanding of *Sanchez* as an exhaustion of domestic legal remedies is important to the framing of the entire Viequense question. That interpretation, if it is correct, reinforces the argument that the best and possibly only avenue by which reparations can be achieved is political. Once again, there are clear advantages to that approach. It is perhaps more feasible, given the power dynamics, to gather a coalition and put political pressure on Congress than it is to win a legal case. It is also more likely that a political settlement could include a comprehensive, collective-

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<sup>102</sup> Ibid., 38-39.



mindred reparations package rather than being focused on the monetary payments of a class-action suit.

### *Elements of a Reparation Policy for Vieques*

In the event of a legislative solution, one seemingly obvious measure for Congress to take would be either an amendment to the FTCA or new legislation opening the door for FTCA claims for Viequenses specifically, or for environmental damage and public health claims against the military more generally.<sup>103</sup> There is precedent for expanding FTCA coverage to incorporate previously unincorporated claimants, and any substantial movement of public interest on the Vieques case and/or other similar ones could push that kind of reform.<sup>104</sup>

Another possible avenue for Congress would be to bypass the FTCA altogether and pass a reparations bill similar to the one for Japanese-American victims of internment. There are, of course, major differences between the situations of Viequenses and that of Japanese-Americans that imply very different ways of approaching a reparations bill. For one thing, it was relatively easy to identify the victims of internment – payments went to those who were in internment camps and only those who were in the camps, which one either was or was not. If the reparation program for Viequenses followed the line of *Sanchez* and addressed the public health crises on the island, the reparations would have to go to those who have become sick due to the Navy's bombardment. Setting aside even the previously discussed difficulties of proving the origins of those sicknesses, which would itself be a substantial problem, identifying the victims of the bombing of Vieques is much more complicated than it was for Japanese-Americans.

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<sup>103</sup> The next four paragraphs are paraphrased from a term paper I wrote for Prof. Jon Bush in Spring 2015.

<sup>104</sup> See, for example, Anne R. Riley, "United States v. Johnson: Expansion of the *Feres* Doctrine to Include Servicemembers' FTCA Suits against Civilian Government Employees." *Vanderbilt Law Review* 42 (1989): 233-268.

One potential solution would be to provide compensation for anyone in Vieques who has one of the diseases with higher rates than in mainland Puerto Rico, including cancer and hypertension, as well as to mothers whose children were born with birth defects or who fell victim to the island's terrible infant mortality rate. The problem with that, clearly, is that many of the people who have been victims of the Navy's activities have died because of it, which is another distinguishing feature compared to Japanese-American internees. A better approach might be to include kin and heirs of the dead in addition to the currently sick. That approach, though, suggests an even more comprehensive one. The "heirs of the dead," if that is taken to mean those who died of bombardment-related diseases dating back to the beginning of the bombing in 1941 encompasses entire generations of Viequense people. As mentioned earlier, too, there are some who are not yet sick but will be and some who are not yet born who will be affected. So, the Japanese-American model suddenly seems, of all things, insufficient.

The answers to the question of how reparations should be paid, and who the beneficiaries should be, can and must come from Vieques. When it comes to local demands for the "four D's" of demilitarization, decontamination, devolution (return of the lands), and development, what interests me for the purposes of this thesis is not exactly how those things should be achieved, but how they can or cannot be framed as reparations.

I do not, for example consider decontamination to be a form of reparation. The agreement by which the Navy left Vieques in 2003 included provisions for a comprehensive clean-up of the waste left behind. So, environmental clean-up represents merely the fulfilling of a previously contracted duty for the Navy, and hardly counts as reparation. On the other hand, there is a strong claim for reparation for the years during which the environmental cleanup has been neglected, and especially for the additional health problems it has caused. As long as the pollutants from the

bombing remain in the Viequense land, water, and air, the catastrophic health effects from the bombing are not over. Environmental cleanup is a prerequisite for any reparations aimed at the health crisis on the island to be meaningful. It is, in sum, necessary but not sufficient.

Many of the demands for reparation coming from Vieques include some form of land restitution. The local advocacy organization Vieques Vive, La Lucha Continua includes “Devolution (return of the lands)” as one of its four demands:

We demand the return of all of the land which is currently controlled by the federal government - the U.S. Navy and the U.S. Fish and Wildlife Service (USFWS) - and it must be restored to the condition in which it was found when it was expropriated in the 40s. Half of the island continues to be restricted to the civilian population.<sup>105</sup>

Even if the Department of the Interior were to give back all the former Navy land, even after a thorough and satisfactory decontamination, it would not be *restoring* any previously worthwhile condition of land ownership on the island but creating a new one. The above demand that the land be “restored to the condition in which it was found” at the time of expropriation makes sense as a demand for environmental clean-up, but is problematic when it comes to property ownership.

César Ayala and José Bolívar’s work shows that at the time of the Navy expropriations in 1941, the vast majority of the land in Vieques was concentrated in the hands of a few rich sugar plantation owners.<sup>106</sup> In fact, one of the reasons it was so easy for the Navy to expropriate so much of Vieques so quickly (and also one of the main points of propaganda mentioned by the Navy when defending their actions) was that they only had to settle accounts with a handful of land owners.<sup>107</sup> There has never been a time in Viequense history dating back at least to the arrival of European colonizers during which the land of the island was genuinely in the hands of its people.

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<sup>105</sup> Vieques Vive, La Lucha Continua Brochure. “The Struggle Continues in Vieques.” Copy in possession of the author.

<sup>106</sup> Ayala and Bolívar, *Battleship Vieques*, chapters 1 and 2.

<sup>107</sup> Ibid.

This is not to say that Viequense demands for an end to federal ownership of land on the island are not legitimate, it is just to say they are not restitution. Despite that, a genuine devolution of the lands – one that took into account the economic condition of Viequenses, gave them privileged access to ownership, and included built-in barriers to gentrification – could operate as a valid and valuable reparation, one that was simultaneously forward and backward-looking.

The provision of proper medical services and a decent medical infrastructure on the island would be a critical component of any reparations paid by the US Navy, as it addresses a direct problem caused by their presence.<sup>108</sup> It would not be wholly sufficient, however, to do so. A hospital that residents could not afford would be useless as reparation or otherwise, and providing the same paltry services in an updated facility would not achieve anything approaching the health needs of the people on the island.

For this, it is useful to adapt Boris Bittker's argument against social welfare programs as an alternative to reparations for African Americans. For Bittker, the mere fact of alleviating the conditions of inequality does not "compensate for the deprivations of the past."<sup>109</sup> Reparations that genuinely addressed the health problem on Vieques would need to provide not just health infrastructure but health *care*. There is an international precedent to support this. The UN's Basic Principles on Reparation include rehabilitation as one of the five forms of reparation, and specify that it refers to medical and psychological care along with legal and social services.<sup>110</sup> Provision of health care as a form of reparation has occurred in numerous transitional justice contexts, including in Chile, Peru, and Sierra Leone. In the U.S., the settlement of the class action lawsuit brought by Vietnam Veterans for exposure to Agent Orange (a particularly salient parallel given the use of that

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<sup>108</sup> Versions of the next two paragraphs first appeared in a term paper I wrote for Prof. David Scott in Fall 2014.

<sup>109</sup> Boris Bittker, *The Case for Black Reparations* (Boston: Beacon Press, 1973): 134.

<sup>110</sup> United Nations, "Basic Principles and Guidelines on Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law." December 16, 2005. Article IX, Par. 22. The other four forms of reparation are restitution, compensation, satisfaction, and guarantees of non-recurrence, all of which are relevant to the Viequense case to some degree. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

chemical in Vieques) included not just monetary remuneration, but also created the Class Assistance program, which provided, among other things, counseling and medical care to veterans.<sup>111</sup>

Reparations for Vieques, in sum, should include compensation as well as programs dedicated to the rehabilitation of Viequenses' health, environment, and economy. It should be active rather than passive, and provide services in addition to monetary redress. It must particularly take Vieques' precarious economic situation into account by guaranteeing access to health services regardless of people's ability to afford them or their insurance status, as well as by guarding against development and tourism projects that provide a tourist destination for mainland Puerto Rican and U.S. expats at the expense of the victims of the bombing. It will not do to clean up the beaches outside Esperanza so they can become part of a Marriott Resort.

## **Conclusion**

It is my view that the principle objective toward the end of achieving reparations for the people of Vieques is a concerted effort to publicize the extraordinary work being done by activists on the ground, and the independent scientists who work tirelessly to counter the pseudo-science proffered by the Navy and the ATSDR. If the movements against the bombing during the decades of occupation are any indication, and I believe that they are, the plight of Viequenses resonates with broad swaths of society.

The military is, without question, a formidable opponent. In 2013, a class action suit was filed by the residents of an upscale, white, politically-connected neighborhood in Washington, DC called Spring Valley. The area had been used for toxic waste storage by the U.S. Army in the 1930s, and the residents of the neighborhood filed suit, just as Viequenses did, under the FTCA and lost.<sup>112</sup>

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<sup>111</sup> A summary of the Agent Orange Settlement Fund can be found here: [http://www.benefits.va.gov/compensation/claims-postservice-agent\\_orange-settlement-settlementFund.asp](http://www.benefits.va.gov/compensation/claims-postservice-agent_orange-settlement-settlementFund.asp)

It is tempting for one to look at the Spring Valley case and wonder, if environmental justice from the American military is not possible for people in that neighborhood, what hope 10,000 geographically and politically isolated Puerto Ricans have.

Much the same could have been, and was, said in 1999 about the hope that protesters building camps on beaches could bring about the end of bombing in a place the Navy insisted was irreplaceable for its purposes. Given the pan-political support for Vieques 15 years ago, this seems difficult but not unsurmountable.

Quite simply, the Navy and the government of the United States owe Viequenses reparations – not merely money for development, or improvements to the clinic on the island, or a long-delayed cleanup of the six decades’ worth of shells and toxins the Navy left behind in 2003, but reparations that acknowledge the harm done, and aim to repair it. For David Sanes, and for the many who have already died from Navy-related cancer and other diseases, it is too late. There can never be perfect justice – no one can bring back the dead, or take away the years of suffering from the living sick. There is, nevertheless, a moral imperative for the United States to clean up both its literal and figurative mess, not because Viequenses are U.S. citizens, but because they are human beings.

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<sup>112</sup> Harry Jaffe, “The Toxic Waste Pit Next Door”, *The Washingtonian* February 28, 2013.  
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