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La Corte Interamericana De Derechos Humanos .....	<i>Jorge Luis Delgado</i>

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# THE INTER-AMERICAN COURT OF HUMAN RIGHTS

*Jorge Luis Delgado\**

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## I. ORIGIN OF THE COURT

The Inter-American Court of Human Rights (Court or the Inter-American Court) was created by the entry into force of the treaty known as the American Convention on Human Rights (Convention).<sup>1</sup> The Court was born as the Americas' community effort to restore justice in a continent plagued by conflict and injustice.<sup>2</sup> In the 1960's, dictators, torture, and forced disappearances beset Central and South America.<sup>3</sup> The Convention, also known as the Pact of San Jose for the Costa Rican city where it was signed, was the response of the Americas to such tumultuous times.<sup>4</sup>

The American Convention on Human Rights was adopted in 1969 at an inter-governmental conference in San Jose, Costa Rica.<sup>5</sup> The

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\* The author obtained his Juris Doctor degree from Nova Southeastern University, Shepard Broad Law Center, in Fort Lauderdale, Florida, in June, 1999.

1. THE INTER-AMERICAN COURT OF HUMAN RIGHTS, 1997 ANNUAL REPORT 9, OAS/Ser.L/V/III. 39 (Jan. 21, 1998) [hereinafter ANNUAL REPORT]. For a detailed legislative history of the American Convention on Human Rights, see Conferencia Especializada Interamericana Sobre Derechos Humanos, San José, Costa Rica, 7-22 de noviembre 1969, Actas y Documentos, O.A.S. Doc. OEA/Ser. K/XVII/1.2 (1973).

2. David Padilla, *A House for Justice in Costa Rica*, MAGAZINE AMERICAS, Jan. 1996, at 56.

3. *Id.*

4. *Id.*

5. ANNUAL REPORT, *supra* note 1, at 9.

Convention was arranged by the Organization of American States (OAS).<sup>6</sup> At this convention, OAS expanded the role of the Inter-American Commission on Human Rights (Inter-American Commission or the Commission) and created the Inter-American Court.<sup>7</sup> Both the Inter-American Commission and the Court were charged with the task of protecting the rights delineated in the Convention.<sup>8</sup> The Inter-American Commission was structured as an original forum for individuals asserting to be victims of human rights violations, with the alternative of sending unresolved cases to the Inter-American Court.<sup>9</sup>

Although the Pact of San Jose, Costa Rica was adopted in 1969, it did not enter into force until 1978 when it received its eleventh ratification<sup>10</sup> attributable to a hemispheric full-court press led by President Jimmy Carter.<sup>11</sup> The Inter-American Court itself was formally established in 1979 when the Statute of the Court was adopted by resolution of the General Assembly of the OAS.<sup>12</sup> At the same time that the Court was established, the seat of the Court was fixed in San Jose, the capital city of Costa Rica, in Central America.<sup>13</sup>

## II. ORGANIZATION OF THE COURT

The norms governing the Court's functions are the Convention itself,<sup>14</sup> the Statute of the Court (Statute),<sup>15</sup> and the Rules of Procedure (Rules).<sup>16</sup> The General Assembly of the OAS adopted the Statute of the

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6. Thomas Buergenthal, HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 439 (Theodor Meron ed., 1984).

7. Lynda E. Frost, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Past Judges*, 14 HUM. RTS. Q., 171, 172 (1994).

8. *Id.*

9. *Id.*

10. American Convention on Human Rights, Nov. 22, 1969, 9 ILM 673, OEA/Ser. K/XVI/1.1, doc. 65 rev. 1, corr. 1, (1970). [hereinafter *The Convention*].

11. Padilla, *supra* note 2, at 56. Ironically, The United States has not yet ratified the Convention.

12. Scott Davidson, THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1 (1992).

13. *Id.*

14. The Convention, *supra* note 10, arts. 52-73

15. ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 27, OEA/Ser. L/V/11.50, Doc. 6 (1980), *reprinted in* 19 ILM 635 (1980) [hereinafter *The Statute*]. See Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231, 232 (1982).

16. THE INTER-AMERICAN COURT OF HUMAN RIGHTS: RULES OF PROCEDURE, OEA/Ser. L/V/III.3 doc. 13, Corr. 1 (1981), *reprinted in* 20 ILM 1289 (1980) [hereinafter *The Rules*].

Court immediately after the Inter-American Court was established.<sup>17</sup> A year later, in 1980, the Inter-American Court drafted and adopted its Rules of Procedure.<sup>18</sup> The hierarchy of these instruments governing the Court's functions places the Convention first, followed by the Statute of the Court, and finally, the Rules of Procedure.<sup>19</sup>

In accordance with the Statute, the Inter-American Court of Human Rights is an autonomous judicial institution which has as its purpose the application and interpretation of the Convention.<sup>20</sup> To warrant the appropriate functioning of the Court, the Statute and the Rules provide for the appointment of judges, a President, Vice-President, Permanent Commission, and a Secretariat.<sup>21</sup>

### A. *The Judges*

The judges meet in two regular sessions each year, on the dates established by the Court at the previous session.<sup>22</sup> However, special sessions may be convoked by the President on his own initiative, or at the request of a majority of the Court's judges.<sup>23</sup> The Court consists of seven judges,<sup>24</sup> all nationals of the Member States of the OAS, who are nominated and elected by the states parties to the Convention.<sup>25</sup> A nominating state may nominate a judge from another state as long as the nominee is a national of another OAS Member State.<sup>26</sup> Two judges from the same state cannot be elected to serve during the same term.<sup>27</sup> The judges are elected "[f]rom among jurists of the highest moral authority and of recognized competence in the field of human rights."<sup>28</sup> The judges must

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17. Frost, *supra* note 7, at 172.

18. *Id.*

19. Buergenthal, *supra* note 15, at 232.

20. ANNUAL REPORT, *supra* note 1, at 9.

21. Davidson, *supra* note 12, at 41.

22. Rules, *supra* note 16, art. 11.

23. *Id.* art. 12.

24. Presently, the judges at the Court are: Hernán Salgado Pesantes (Ecuador); Antônio A. Cançado Trindade (Brazil); Máximo Pacheco Gómez (Chile); Oliver Jackman (Barbados); Alirio Abreu Burelli (Venezuela); Sergio García Ramírez (Mexico), and Carlos Vicente de Roux Rengifo (Colombia).

25. ANNUAL REPORT, *supra* note 1, at 9. Article 8 of the Statute provides that the Secretary General of the OAS shall request the State Parties to the Convention to submit a list of their candidates for the position of judge of the Court. In accordance with article 53(2) of the Convention, each State Party may propose up to three candidates.

26. Convention, *supra* note 10, arts. 52(1) and 53(2).

27. *Id.* art. 52(2).

28. *Id.* art. 52.

also possess the qualifications to exercise the highest judicial functions in their own states.<sup>29</sup>

The States Parties to the Convention elect the judges for a term of six years through a secret ballot election.<sup>30</sup> Shortly before the expiration of the outgoing judges' terms, new judges are elected by absolute majority vote in the OAS General Assembly.<sup>31</sup> Vacancies caused by death, disability, resignation, or dismissal shall be filled at the following session of the OAS General Assembly.<sup>32</sup> A judge, whose term has expired, shall continue to serve with regard to those cases which he or she has begun to hear and which are still pending.<sup>33</sup> Judges elected in this manner are referred to as "elected judges" or as "titular judges"<sup>34</sup> to distinguish them from two other types of judges who may sit in the Court. The other judges who may sit on the bench from time to time are "*ad hoc* judges" and "interim judges."<sup>35</sup>

The Convention provides the circumstances in which an *ad hoc* judge may be appointed.<sup>36</sup> If a titular judge is a national of a state party to a case, he or she retains the right to hear that case.<sup>37</sup> Any other state party to the case may appoint a person to serve on the Court as an *ad hoc* judge.<sup>38</sup> Moreover, if among the judges called to hear a case, none is a national of the state parties to the case, each state may appoint an *ad hoc* judge.<sup>39</sup> The appointment of interim judges is envisaged by the Statute when it is necessary to maintain the quorum of five judges<sup>40</sup> or when a judge is disqualified from hearing a case.<sup>41</sup>

The Court's judges take precedence after the President and Vice-President<sup>42</sup> according to their seniority in office.<sup>43</sup> Judges who have the

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29. *Id.* art. 52(1).

30. ANNUAL REPORT, *supra* note 1, at 9.

31. *Id.*

32. Statute, *supra* note 15, art. 6(1)(2).

33. Convention, *supra* note 10, art. 54(3).

34. Rules, *supra* note 16, art. 2(q)

35. Davidson, *supra* note 12, at 33.

36. Convention, *supra* note 10, art. 52.

37. Convention, *supra* note 10, art. 55(1); The Statute, *supra* note 15, art. 10(1).

38. Convention, art. 55(2); The Statute, art. 10(2).

39. Convention, art. 55(3); The Statute, art. 10(3).

40. Statute, *supra* note 15, art. 6(3). Interim judges serve until they are replaced by elected judges.

41. *Id.* art. 19(4). Where one or more judges are disqualified from hearing a case, the President may request the states parties in a meeting of the Permanent Council of the OAS to appoint interim judges to replace them.

42. See text *infra* section B, President of the Court.

same seniority in office shall take precedence according to age.<sup>44</sup> *Ad hoc* and interim judges take precedence after the elected judges, according to age.<sup>45</sup> However, *ad hoc* or interim judges, whom have previously served as elected judges, have precedence over any other *ad hoc* or interim judges.<sup>46</sup>

The decisions of the Inter-American Court are taken by a majority of the judges as long as the Court is in quorum.<sup>47</sup> Judges may only vote affirmatively or negatively on any given issue since abstentions are not permitted.<sup>48</sup> The President presents, point by point, the matters to be voted upon.<sup>49</sup> Voting takes place in an inverse order of precedence.<sup>50</sup> In the event of a tie, the President casts a second deciding vote.<sup>51</sup>

### B. *The President and Vice-President of the Court*

The Inter-American Court elects the President<sup>52</sup> and Vice-President<sup>53</sup> of the Court from its members by an absolute majority of votes.<sup>54</sup> The President and Vice-President are elected for a two-year term<sup>55</sup> and may be reelected.<sup>56</sup> The President has the obligation to "direct the work of the Court, represent it, regulate the disposition of matters brought before the Court, and preside over its sessions."<sup>57</sup> The President is also the link in communications between the Inter-American Court and the Permanent Council or Secretary General of the OAS.<sup>58</sup> The President is required to

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43. Statute, *supra* note 15, art. 13(1).

44. *Id.* art. 13(2).

45. *Id.* art. 13(3).

46. *Id.*

47. Davidson, *supra* note 12, at 47. Quorum is a majority of the entire body.

48. Rules, *supra* note 16, art. 15(1).

49. *Id.*

50. *Id.* art. 15(2).

51. *Id.* art. 15(4).

52. The Court's current President is Hernán Salgado Pesantes (Ecuador).

53. The Court's current Vice-President is Antônio A. Cançado Trindade (Brazil).

54. Statute, *supra* note 15, art. 12(1).

55. Rules, *supra* note 16, art. 3(1). The terms begin on July 1st of the corresponding year.

56. *Id.* art. 3(2).

57. Statute, *supra* note 15, art. 12.

58. Davidson, *supra* note 12, at 41.

serve on a full-time basis.<sup>59</sup> The main task of the Vice-President is to exercise the duties of the President when this is absent.<sup>60</sup>

### C. *The Permanent Commission*

The Court's President, Vice-President, and a third judge named by the President form the Permanent Commission.<sup>61</sup> This body's function is to assist and advise the President in the execution of its duties.<sup>62</sup> The Permanent Commission is governed by the Rules of the Court.<sup>63</sup> The Court has also the discretion to appoint *ad hoc* commissions to deal with special matters, and the President may appoint commissions *proprio motu* to deal with urgent cases.<sup>64</sup> As a matter of practice, the President has always favored to ensure that at least one member of the Permanent Commission resides in Costa Rica, and that he or she has knowledge of the working languages of the Court.<sup>65</sup>

### D. *The Secretariat*

In order to carry out the Inter-American Court's administrative functions, the Court is authorized to establish a Secretariat.<sup>66</sup> The head of the Secretariat is the Secretary,<sup>67</sup> who is also appointed by the Court.<sup>68</sup> The Secretary is a full-time officer who possesses, along with a command of the working languages of the Court, the legal knowledge and experience necessary to carry out his functions.<sup>69</sup> The Court elects the Secretary for a renewable five-year term,<sup>70</sup> but the Secretary may be removed at any time by the vote of no less than four judges by way of secret ballot.<sup>71</sup> Thus, the

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59. Statute, *supra* note 15, art. 16(2). However, Burgenthal notes, this provision has not been interpreted to require the President to reside in San Jose nor to require him to desist from other compatible remunerated activities. See Burgenthal, *supra* note 23, at 233.

60. Statute, *supra* note 15, art. 12(3); Rules, *supra* note 16, art. 5(1).

61. Rules, *supra* note 16, art. 6(1).

62. *Id.*

63. *Id.* art. 6(3).

64. *Id.* art. 6(2).

65. Davidson, *supra* note 12, at 44.

66. Convention, *supra* note 10, art. 59.

67. The Court's current Secretary is Manuel Ventura Robles.

68. Convention, *supra* note 10, art. 58(2).

69. Rules, *supra* note 16, art. 7(1).

70. *Id.* art. 7(2).

71. *Id.*

Inter-American Court “[h]as the power to ensure that its chief administrative officer does not have divided loyalties.”<sup>72</sup>

To assist the Secretary, the position of Assistant Secretary was created.<sup>73</sup> The Assistant Secretary’s function is to assist the Secretary and deputize for him in his absence.<sup>74</sup> The Assistant Secretary<sup>75</sup> is appointed by the Secretary in consultation with the Secretary General of the OAS.<sup>76</sup> If the Secretary and the Assistant Secretary are temporarily absent, the President of the Court may appoint an Acting Secretary in their stead.<sup>77</sup> The Secretariat’s other staff members are appointed by the Secretary General of the OAS in consultation with the Secretary.<sup>78</sup> However, in practice, the Secretary General of the OAS always makes the appointments recommended by the Secretary of the Court.<sup>79</sup>

### III. JURISDICTION OF THE COURT

The Convention set forth the jurisdictions of the Inter-American Court of Human Rights. The Convention confers contentious<sup>80</sup> (also called adjudicatory jurisdiction) and advisory functions on the Inter-American Court.<sup>81</sup> Both jurisdictions have formal and informal effects on the region’s human rights situation.<sup>82</sup> Formally, the Court’s contentious decisions, advisory opinions, and provisional measures protect human rights and develop legal principles of international human rights law.<sup>83</sup> Informally, the Court’s involvement in a case has brought positive action within the state involved.<sup>84</sup>

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72. Buergenthal, *supra* note 15, at 234.

73. Statute, *supra* note 15, art. 14(3).

74. Rules, *supra* note 16, art. 8(1); Statute, *supra* note 15, art. 14(4).

75. Renzo Pomi is the current Deputy Secretary.

76. Rules, *supra* note 16, art. 8(1); The Statute, *supra* note 15, art. 14(4).

77. Rules, *supra* note 16, art. 8(2).

78. Statute, *supra* note 15, art. 14(4).

79. Buergenthal, *supra* note 15, at 234.

80. Convention, *supra* note 10, art. 62.

81. *Id.* art. 64.

82. Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, U. MIAMI INTER-AM. L. REV. 297, 348 (1994-1995).

83. *Id.* Governments called before the Court have attended the public hearings and argued their cases. Governments ordered by the Court to pay full reparations have committed to do so. See e.g. Velásquez Rodríguez v. Honduras (Compensatory Damages), Inter-Am. Ct. H.R., (Ser. C) No. 7 (1988).

84. *Id.* at 351. When the Commission sought the opinion of the Court regarding the execution of defendants in Guatemala, the government of Guatemala attended the public hearing on the matter even though it did not consent to the Court’s jurisdiction. At the hearing Guatemala announced the

### A. *The Contentious Jurisdiction of the Court*

The contentious function involves the jurisdiction to adjudicate disputes relating to charges that a state party has violated the Convention.<sup>85</sup> The Court's contentious jurisdiction enables it to adjudicate actual controversies between two or more parties.<sup>86</sup> The Inter-American Court's judgment in a case is binding on the parties.<sup>87</sup> In a contentious case the Court may award compensatory damages.<sup>88</sup>

Only the State Parties and the Inter-American Commission have the right to submit a case to the Court.<sup>89</sup> Any person, group or private entity legally recognized in a Member State may present petitions with the Commission.<sup>90</sup> The Convention set forth the procedure for the Court to hear a case from the Commission.<sup>91</sup> In cases of extreme gravity, the Court may adopt provisional measures in matters it has under consideration or are being processed by the Commission.<sup>92</sup> A State Party is not deemed to have accepted the jurisdiction of the Court simply by ratifying the Convention.<sup>93</sup> Acceptance of the Court's jurisdiction by a state is optional,<sup>94</sup> and requires a separate declaration or agreement.<sup>95</sup> The State Parties may accept the

suspension of the executions. Charles Moyer & David Padilla, *Executions in Guatemala as Decreed by the Courts of Special Jurisdiction in 1982-83: A Case Study*, 6 HUM. RTS. Q., 507, 516, 520 (1984).

85. Convention, *supra* note 10, art. 62.

86. Mary Caroline Parker, *Other Treaties: The Inter-American Court of Human Rights Defines its Advisory Jurisdiction*, 33 AM. U. L. REV., 211, 215 (1983).

87. *Id.* (citing article 62(1) of the Convention).

88. Frost, *supra* note 7, at 174; (citing Article 63(1) of the Convention). Examples of the Inter-American Court ordering compensatory damages are the *Loayza Tamayo v. Peru* (Reparations), Judgment of November 27, 1998, para. 4, Inter-Am. Ct. H.R. (Ser. C) No. 42 (Peruvian Government ordered to pay US\$ 99,190.30 to Maria Loayza Tamayo); and *Castillo Paéz v. Peru* (Reparations), Judgment of November 27, 1998, para. 1; Inter-Am. Ct. H.R. (Ser. C) No. 43 (Peruvian Government ordered to pay US\$ 245,021.80 to the family of Ernesto Rafael Castillo Paéz.)

89. Convention, *supra* note 10, art. 61(1).

90. *Id.* art. 44.

91. Article 61(2) of the Convention indicates that articles 48 through 50 set forth the procedures the Commission must complete before the Inter-American Court may hear a case.

92. Convention, *supra* note 10, art. 63(2).

93. Buerghenthal, *supra* note 15, at 236.

94. *Id.* (citing article 62(1) of the Convention).

95. *Id.* As of this writing the following State Parties have recognized the Court's contentious jurisdiction: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Chile, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad & Tobago, Uruguay, and Venezuela.

Court's jurisdiction at any time,<sup>96</sup> "[u]nconditionally, on condition of reciprocity, for a specific period, or for specific cases."<sup>97</sup>

### B. *The Advisory Jurisdiction of the Court*

The Court's advisory function involves the power of the Member States listed in the Charter of the OAS, to request that the Court interpret the Convention or other human rights treaties.<sup>98</sup> The advisory jurisdiction extends to all OAS Member States, even those which have not ratified the Convention.<sup>99</sup> The treaty in question does not have to be one adopted within the Inter-American system or a treaty to which only American states may be parties.<sup>100</sup> The Court may interpret any treaty that concerns the protection of human rights in a Member State of the Inter-American system.<sup>101</sup> Direct access to the Court's advisory jurisdiction is extended to all OAS organs, not just the Commission.<sup>102</sup>

The advisory jurisdiction of the Court enables it to hear cases that are inaccessible to the Court under the contentious jurisdiction. Parties that otherwise are not eligible to present cases to the Court, may request the Court's advisory opinion.<sup>103</sup> Also, the procedures required for contentious jurisdiction do not apply for advisory jurisdiction.<sup>104</sup> Moreover, compliance with the Court's ruling does not single out a state as violator of human rights so it is more politically acceptable.<sup>105</sup>

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96. Convention, *supra* note 10, art. 62(1).

97. *Id.* art. 62(2).

98. *Id.* art. 64.

99. Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 3 (1985).

100. *Id.* at 5.

101. Parker, *supra* note 86, at 227.

102. Manuel D. Vargas, *Individual Access to the Inter-American Court of Human Rights*, 16 N.Y.U. J. INT'L L. & POL., 601, 612 (1984).

103. Parker, *supra* note 86, at 219.

104. *Id.* at 246, n. 40.

105. Parker, *supra* note 86, at 219.

# TORTURE AND CRUEL, INHUMANE AND DEGRADING TREATMENT IN THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

*Julie Lantrip\**

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## I. INTRODUCTION

Prohibitions against torture and other forms of ill-treatment are well-recognized as basic human rights in international law. However, despite their basic nature, they are by no means simple for the judicial bodies called upon to establish their existence and to condemn the States that commit them.<sup>1</sup>

The Inter-American Court of Human Rights has interpreted the personal integrity provisions of Article 5 of the American Convention on Human Rights in several cases, and has touched on many of the important issues with regard to respecting human dignity, torture and cruel, inhuman,

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1. "However basic this human right may seem, it is most complex indeed." Clovis C. Morrisson, *DYNAMICS OF DEVELOPMENT IN THE EUROPEAN HUMAN RIGHTS CONVENTION SYSTEM* 72 (1981); "Judicial attempts to interpret these concepts or to distinguish clearly among them [torture and cruel, inhuman and degrading treatment] in case law have proven difficult." *Torture in the Eighties: an Amnesty International Report*, AMNESTY INTERNATIONAL.

and degrading treatment.<sup>2</sup> In interpreting Article 5, the Court is faced with the inter-relation between its six provisions, creating a threshold which must be passed to find a violation, distinctions between differing levels of violations, as well as many other issues relating to how far the Court is willing to go in interpreting this broadly written article.

## II. STRUCTURE OF ARTICLE 5 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

The American Convention on Human Rights protects the integrity of persons in very broad terms, and explicitly includes not only the physical integrity but also the psychological and moral integrity of persons. Article 5(1) establishes that “[e]very person has the right to have his physical, mental, and moral integrity respected.”<sup>3</sup>

Other treaties, such as the International Covenant on Civil and Political Rights (ICCPR), do not specifically list psychological and moral integrity in their texts. However, in the case of the ICCPR, the related United Nations Human Rights Committee stated in its General Comments on the Convention that the prohibition against torture or cruel, inhuman and degrading treatment “[r]elates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.”<sup>4</sup> Therefore, although the text of the American Convention is more explicit than other conventions in its inclusion of non-physical integrity, this conception of personal integrity is recognized in other systems.

Although the European Convention on Human Rights does not explicitly include psychological and moral suffering, the European Court of Human Rights has also interpreted its personal integrity provisions to include protection against moral suffering and degrading treatment that creates a sense of fear, anxiety and inferiority in order to humiliate, degrade and break the victim’s resistance.<sup>5</sup> This European standard including psychological trauma has been cited and adopted by the Inter-American Court of Human Rights in a recent case.<sup>6</sup>

The American Convention also prohibits torture and cruel, inhuman and degrading treatment, in the common terms of other human rights

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2. American Convention on Human Rights, Nov. 22, 1969, 9 ILM 673, OEA/Ser. K/XVI/1.1, doc. 65, rev. 1, corr. 1, (1970) [hereinafter *The Convention*], art. 5.

3. *Id.* art. 5(1).

4. M. Cherif Bassiouni, General Comment 20 on Article 7. U.N. Hum. Rts. Comm., 44th Sess., at 24-25.

5. *Ireland v. United Kingdom*, 25 Eur. Ct.H.R. (ser. A) (1975).

6. *Loayza Tamayo v. Peru*, Judgment of September 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997), para. 57.

documents,<sup>7</sup> and goes on in the same provision to prohibit treatment of detained persons that does not show full respect for human dignity.<sup>8</sup>

The remaining provisions of Article 5 deal with the further rights of detainees to be separated based on conviction or pre-trial status and age, and lays out reform and rehabilitation as the only proper goal of imprisonment. These provisions, and the right for detainees to be treated with the respect due human dignity in Article 5(2) are rights usually thought of separately from the right to be free of torture and cruel, inhuman and degrading treatment.<sup>9</sup>

For example, the ICCPR lists torture and cruel, inhuman and degrading treatment in Article 7 and the rights of detained persons in Article 10.<sup>10</sup> However, the practice of the Human Rights Committee, which hears complaints based on that treaty, has been to find violations of both of these two provisions when detainees have been found to have been tortured or suffered cruel, inhuman and degrading treatment.<sup>11</sup> The Committee also has found that treatment due detainees under Article 10(1) goes further than just a prohibition of torture and cruel, inhuman and degrading treatment.<sup>12</sup> It also includes ensuring conditions that are not detrimental to their health.<sup>13</sup>

This sort of consideration is important in the evaluation of the treatment that the Inter-American Court gives to Article 5, since it also includes provisions on the rights of prisoner and is therefore quite broad.<sup>14</sup> The Inter-American Court, to this date, has only ruled on violations relating to torture, cruel, inhuman and degrading treatment and conditions and treatment that are not respectful of human dignity. The other provisions of Article 5 have not been directly interpreted. Therefore, this paper will focus on these provisions, which, as already noted, include conditions of confinement cases. However, in the Court's jurisprudence,

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7. For example, the Universal Declaration of Human Rights, the 1984 Convention on Torture, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights.

8. The Convention, *supra* note 2, art. 5(2).

9. *Id.* art. 5(2).

10. International Covenant on Civil and Political Rights, art 7 and 10. [hereinafter ICCPR].

11. See U.N. Human Rights Committee, Selected Decisions under the Optional Protocol, 2nd - 16th Sess, U.N. CCPC/C/OP/1, Communication. No. 4 (1977) Communication. No. 5 (1977), No. 8/1977. See also Committee's decision in Communication no. 161 (1983) 31st Sess.

12. See U.N. Human Rights Committee, Selected Decisions under the Optional Protocol (2nd - 16th Sessions), U.N. CCPC/C/OP/1, Communication No. 5 (1977).

13. *Id.*

14. *Id.*

as discussed further below, distinctions between the different types of violations of these provisions are not always clear. This lack of clarity may lead to difficulty when the further provisions of Article 5 are reached, since these provisions would naturally include violations that do not reach the level of cruel, inhuman and degrading treatment or torture.

### III. CREATING A THRESHOLD FOR VIOLATIONS OF ARTICLES 5(1) AND 5(2)

With respect to violations of Article 5(1) and (2), it is important to initially address separately the first two provisions and to establish a minimum threshold which must be crossed in the treatment of the victims in order to show their personal integrity has been violated or that they have suffered torture or cruel, inhuman and degrading treatment.<sup>15</sup> Some punishment is necessary in criminal systems, but the Convention establishes that certain types of punishments, conditions, and treatments of any person are restricted in order to preserve the sacredness of the human person. This right is so fundamental that, unlike other important rights, no exceptions to the right to humane treatment are allowed, even under a state of emergency or war.<sup>16</sup> Ironically, even the right to life can be excepted, particularly in the American Convention, which provides for the death penalty.<sup>17</sup>

Therefore, an important task is the creation of a threshold, which can incorporate even the most minor violations of these two provisions of the article and which can never be crossed without condemnation.<sup>18</sup> The creation of a substantive, legal threshold which must be reached in order to hold a State responsible is a task which sometimes becomes blurred in the jurisprudence of the Inter-American Court with the level of proof necessary to prove the facts underlying these violations.

The extensive protections provided in Article 5 leave an interpretation of this article available that could be quite broad in its protection of the individual rights it enshrines. With its definition of the integrity to be

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15. See The Convention, *supra* note 2.

16. The Convention, *supra* note 2, art. 5(2), See also, Hans Haug, *Revista Internacional de la Cruz Roja*, "Instrumentos de Derecho Internacional Público para Luchar contra la Tortura," Año 14, No. 91, enero-febrero 1989, at 10-11 (discussing article 7 of the ICCPR); Ireland v. United Kingdom, 25 Eur. Ct. H. R. (ser A) (1978), Judgment of 18 January 1978, Series A, No. 25.

17. Despite its abolitionist provisions which do not allow expansion or reinstatement of the death penalty, the Convention provides for the continuance of the death penalty in countries that establish it prior to signing on to the Convention. See The Convention, *supra* note 2.

18. *Torture in the Eighties: An Amnesty International Report*, AMNESTY INTERNATIONAL, at 15; See also Ireland v. United Kingdom, 25 Eur. Ct. H. R. (ser A) (1978).

protected as that of the whole being rather than physical torture alone, modern psychological and other tortures can easily be covered<sup>19</sup> as well as physical mistreatments. Further, though the provisions cover the more egregious "tortures," which call to the mind a special degree of disgust, it also covers any treatment which is cruel, inhuman or degrading to the physical, mental or moral integrity of the person.

Yet the threshold of what can constitute a violation of personal integrity under this article does not stop with this type of treatment, but further restricts the treatment that can be forced on a detainee to that which is respectful of human dignity. Since the provision already includes "degrading treatment," in order to read this provision to have some purpose, it would appear that the meaning would be of a treatment that might or might not reach the level covered by "degrading treatment." Thus, it could be found that the article restricts more treatments than just those that reach the level of cruel, inhuman and degrading treatment.

A further interpretation of Article 5(1) and (2) could also incorporate Article 5(6), with regard to prisoners, and could find further protections in the mandate that the deprivation of their liberty can have no other purpose than rehabilitation and reform. A violation of Article 5 could be held to be inherent in any incarceration that does not live up to this standard, including possibly any *incomunicado* holding, disappearance, or other illegal detention since no arbitrary detention could truly have reform or rehabilitation as its goal. With regard to disappearances, in the Velásquez Rodríguez and Godínez Cruz cases, the Court found a presumed violation of Article 5. Also, the Court has previously ruled that the condition of *incomunicado* alone is enough to violate the prohibition against cruel, inhuman and degrading treatment.<sup>20</sup> However, the Court has not always followed these decisions.

#### IV. THRESHOLD FOR PRESUMPTIONS OF ARTICLE 5 VIOLATIONS AND ISSUES OF PROOF

The Court has not yet articulated a presumption based on Article 5(6). However, it has found in several cases that a presumption that the threshold for Article 5(1) and 5(2) violations exists with regard to certain types of detention.

Clearly from its first treatment of forced disappearances in Velásquez Rodríguez and Godínez Cruz, the Court found, without any direct evidence

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19. "The methods of torture are either physical or psychological." Lone Jacobsen & Peter Vesti, *Torture Survivors-A New Group of Patients: The Danish Nurses' Org.* (1990).

20. Suárez Rosero v. Ecuador, Judgment of November 12, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 35 (1997); See also Loayza Tamayo, *supra* note 6.

of a violation to physical well-being, that a violation of Article 5 could be presumed in disappearance cases given the psychological and moral effects of being held *incommunicado* and the prolonged isolations which are inherently part of a disappearance.<sup>21</sup> The Court noted that these violations constituted cruel and inhuman treatment and injured the personal integrity of the victim and the right of detained persons to be treated in a way respectful of human dignity.<sup>22</sup> From this case it is clear that mental and emotional forms of ill-treatment are clearly being accepted by the Court, in line with the Convention's protection of a broadly defined personal integrity, which includes the psychological and moral aspects in addition to the physical.

The threshold for the Court's finding of a violation in disappearances, it would have appeared from this case, was therefore the isolation which is inherent in a disappearance. This inherent violation passed the legal threshold to include both disrespect for human dignity and cruel, inhuman and degrading treatment. However, in a similar case where disappearance was once again proven, the Court found only that human dignity had been disrespected and did not find cruel, inhuman and degrading treatment.<sup>23</sup> The Court did not refer in that case to the isolation inherent in a disappearance but rather to the fact, which had been proven by eyewitness accounts, that the victim had been put into the trunk of a vehicle.<sup>24</sup>

Similarly in the Paniagua Morales case, although the Court declared the existence of the practice of forced disappearance and illegal detention accompanied by mistreatment and torture,<sup>25</sup> it would not presume the existence of violations of Article 5 with regard to these violations, despite its previous decision in the Velásquez Rodríguez and Godínez Cruz cases.<sup>26</sup> Therefore, some of the victims were not found to have had their Article 5 rights violated despite the *incommunicado* nature of their detention.

This is especially confusing in light of the Court's emphasis on this type of isolation in the Suárez Rosero and Loayza Tamayo cases which both concerned *incommunicado* detentions. These cases tend to follow, and in the case of the Suárez Rosero case, explicitly states, ideas similar to

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21. Velásquez Rodríguez v. Honduras, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988), paras. 156, 187.

22. *Id.*

23. Castillo Paez v. Peru, Judgment of November 3, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 34 (1997), para. 66.

24. *Id.*

25. Paniagua Morales v. Guatemala, Judgment of March 8, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 37 (1998), para. 89(a).

26. *Id.* para. 134-135.

that of the Velásquez Rodríguez and Godínez Cruz cases: That isolation alone constitutes a treatment disrespectful of human dignity and cruel, inhuman and degrading treatment.<sup>27</sup> Further, the Court has cited the European Court's decision that stated that illegal detention is an aggravating factor given the vulnerability of the victim in these circumstances.<sup>28</sup>

These cases seemingly rejected a prior case that had possibly limited the presumption that arbitrary detention and isolation inherently violate Article 5. In the Gangaram Panday case, the Court found that in the absence of definitive proof of mistreatment of the victim, who committed suicide during his detention which the Court determined was arbitrary and illegal based on inference of fact did not permit it to presume violations of Articles 5(1) and 5(2) based purely on the arbitrary nature of the detention.<sup>29</sup>

Moreover, given the lack of proof of torture or mistreatment of others by government officials, the Court found that the applicants had not demonstrated a governmental practice from which the Court could presume the victim was tortured or mistreated.<sup>30</sup> The refusal to use a similar presumption in this case was based on the fact that no pattern of mistreatment was shown nor specifically any mistreatment of the victim.

With regard to cases where the Court has not used its presumption despite the existence of a proven pattern or practice of isolated detentions and mistreatment of detainees, the Court instead weighed the medical evidence of torture and cruel, inhuman and degrading treatment it had available.<sup>31</sup> The victims who did not present medical reports showing physical signs of ill-treatment were found to have not suffered it. Given the difficulty of obtaining medical evidence, especially if one is held for some time or tortured using techniques that do not leave easily identified signs,<sup>32</sup> the Court's failure to use presumptions may have an impact on future cases. This may be especially true, since the Court has sometimes

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27. See generally, Suárez Rosero, *supra* note 20 and Loayza Tamayo, *supra* note 6.

28. Loayza Tamayo, *supra* note 6, para. 57, citing Ribitsch v. Austria, Eur. Ct. H. R., (ser. A) (1995).

29. Gangaram Panday v. Suriname, Judgment of January 21, 1994, Inter-Am. Ct. H.R. (Ser. C) No. 16 (1994).

30. *Id.* para. 64.

31. See Paniagua Morales, *supra* note 26.

32. Henry Kruger, EVIDENCE OF TORTURE: STUDIES BY THE AMNESTY INTERNATIONAL MEDICAL GROUP 7 (1977).

been unwilling to find contested facts to be proven based solely on the testimony of the victim.<sup>33</sup>

In cases where specific mistreatment of the victims was shown, the Court has still been willing to find that this was the responsibility of the State. However, the Paniagua Morales case tends to set up a standard that a pattern and specific medical evidence of the mistreatment should be shown rather than just showing a connection to the pattern of disappearances or illegal detentions which included such mistreatment.

In Suárez Rosero, the Court was faced with a living victim whose testimony and that of his family included claims of beatings, incommunicado detention, and poor conditions of confinement.<sup>34</sup> The Court could not specifically use the European standard that an injury proven to have occurred while in the sole custody of the State is presumed to be caused by the State. However, absent a sufficient rebuttal,<sup>35</sup> the Court did find that given the *incommunicado* nature of the first part of his detention, only the victim and the State could have evidence.<sup>36</sup> Therefore, without evidence to the contrary offered by the State, the Court would give weight to the testimony and claims of the victim.<sup>37</sup>

In other words, after proving isolated detention and making initial Article 5 claims the burden shifted to the State to show the claims were untrue. Such a shift of the burden of proof is in line with the nature of these detentions recognized in the prior cases that established the presumption of Article 5 violations in disappearance cases. Thus, not only has the Court on occasion found cruel, inhuman and degrading treatment and disrespect to human dignity based solely on isolation, but it also has used isolation to shift the burden of proof in attempting to prove other, more egregious, violations.

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33. See Paniagua Morales, *supra* note 26 (despite the fact that the Court found the victims had been detained in a pattern that included beatings and mistreatment and that the Commission had argued any injury claimed in custody should be found to be the responsibility of the State absent a rebuttal, the Court denies claims of those who do not present actual medical evidence of their allegations); Loayza Tamayo, *supra* note 6, para. 58 on the issue of rape; *But see*, Suárez Rosero, *supra* note 20 para. 33 (Court discusses in a case where the State did not rebut the victim's allegations that the State is the party that has access to the facts).

34. Suárez Rosero, *supra* note 20, para. 23.

35. The European Court found that in a case where it was undisputed that injuries were sustained during detention by the police that the government was "under an obligation to provide a plausible explanation of how the applicant's injuries were caused." Ribitsch v. Austria, 336 Eur. Ct. H. R. (Ser.A) (1995), para. 34.

36. Suárez Rosero, *supra* note 20, para. 33.

37. *Id.*

The United Nations Human Rights Committee has addressed this issue by stating the following:

With regard to the burden of proof, the Committee has already established in other cases (for example, Nos. 30/1978 and 85/1981) that this cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information. In those circumstances, due weight must be given to the author's allegations.<sup>38</sup>

This decision was based on the obligation of the State to investigate such allegations fully, presumably because if the State had fulfilled this obligation it would have had the information necessary to rebut or explain the allegations. Since this obligation exists in the Inter-American System as well, this conception of the burden of proof should be equally relevant in the Court's analysis. The Court's first decision is evidence of this, given its statement that the States "[c]annot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation."<sup>39</sup> A combination of this flexibility in the burden of proof and the presumptions can go a long way in remedying the problems facing victims in establishing their claims of mistreatment.

#### V. DISTINCTIONS BETWEEN TORTURE AND CRUEL, INHUMANE AND DEGRADING TREATMENT

Once the threshold or presumption has been met, which is perhaps the most important step in the interpretation, it also becomes important to determine the various levels of violation possible under Article 5. This is important for many reasons. First, the State must not only be condemned for a "violation of Article 5" but should also be stigmatized by the labels

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38. *Supra* note 4.

39. Velásquez Rodríguez v. Honduras, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988). In this and the other Honduras Case of Godínez Cruz, the Court defined the standard of proof necessary to prove violations of the rights contained in the American Convention in a way that allowed the applicant to show a governmental practice of violations and a link between the individual case brought and the practice through circumstantial evidence and presumptions consistent with the facts. The Court noted that, given that "[s]tates do not appear before the Court as defendants in a criminal action," and further that the purpose of the proceedings was "[t]o protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible" for violations of their rights the Court has more flexibility than domestic criminal courts in determining the criteria for weighing evidence. *Id.* paras. 127, 128 and 134.

which truly mark the atrocities it has committed. If a state has allowed, condoned, or participated actively in "torture," it should be condemned for this practice by name by the international community and not allowed to escape with a less stigmatizing label.<sup>40</sup> While all violations are to be condemned and cruel, inhuman and degrading treatment is as violatory of the Convention as torture, the severity of the violation must not be overlooked.

Not only should the Court look to condemn violations generally but, because the Inter-American system is based on individual complaints, the horrors committed against each victim should be discovered, where possible, and condemned, even if it is easier to stop at a simple crossing of the threshold and a general denunciation. Through this recognition, the State can be asked to compensate the victim for the extent of their suffering and also so that the judgment can serve as what the Court often sees as the *per se* international recognition of the responsibility of the State for the atrocities committed.<sup>41</sup>

One major distinction that can be drawn is between torture and cruel, inhuman and degrading treatment. The European Court has distinguished succinctly between these two types of violations in its groundbreaking, although criticized,<sup>42</sup> case of Ireland v. United Kingdom. In that case, the European Court found that the various forms of ill-treatment should be separated and defined individually. The writers of the European Convention, that Court noted, meant to give meaning to all the parts of the prohibition and therefore each must be seen as adding something to the provisions. The term "torture", they found, carried a special "stigma" which should be applied to "deliberate inhuman treatment causing very serious and cruel suffering."<sup>43</sup> As noted above, it is because of this stigma that it is important for the determination of which form of violation has occurred in each case, even though all violations should be condemned.

This idea that torture is a more grave form of cruel, inhuman and degrading treatment is supported by the United Nation's definition of torture, which the European Court cites, that calls torture "an aggravated and deliberate form of cruel, inhuman and degrading treatment or

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40. Even Amnesty International, whose report calls for all violations to be condemned regardless of distinctions, recognizes the special stigma inherent in the term "torture." *TORTURE IN THE EIGHTIES*, *supra* note 1, at 15.

41. The Court has often denied requests by the Commission and victims for an apology or public announcement by the State, stating that its judgment by itself constitutes international recognition of responsibility.

42. *Torture in the Eighties*, *supra* note 18 at 14-15.

43. Ireland v. United Kingdom, 25 Eur. Ct. H. .R.(ser. A) (1978), *supra* note 18, para. 167.

punishment.”<sup>44</sup> However, as the Ireland case shows, the European Court used this criteria to determine that the infamous “five techniques” complained of in that case were not of the “intensity” that the word torture implies,<sup>45</sup> and instead deemed them cruel, inhuman and degrading treatment.<sup>46</sup> Such an approach, which is followed by the Inter-American Court in its cases,<sup>47</sup> has been criticized for making the lower threshold of what constitutes cruel, inhuman and degrading treatment severe enough to be called “torture.”<sup>48</sup>

This approach also requires the use of a case-by-case analysis which leaves the Courts open to criticisms of subjectiveness and a lack of objective factors.<sup>49</sup> However, as the comments of the United Nations Human Rights Committee regarding the torture and cruel, inhuman and degrading treatment article of the ICCPR states:

[T]hat Covenant does not contain any definition of the concepts covered by Article 7 [the torture and cruel, inhuman and degrading treatment article], nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.<sup>50</sup>

This is similar to the approach of the European Court and leaves the judging body discretion to make distinctions based on any criteria it deems relevant to its determination.

The Inter-American Court has followed a similar path, although at times its distinctions and interpretations of what fits within the terms of the Convention have been inconsistent and confusing. The Court, based on the structure of Article 5(1) and (2) discussed above, has used different distinctions: torture, cruel, inhuman and degrading treatment, and treatment disrespectful of human dignity.

With Loayza Tamayo, the Court found that the victim had some medical evidence and witnesses that testified to abuses similar to those she

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44. *Id.*

45. *Id.*

46. *Id.* para. 168.

47. Loayza Tamayo, *supra* note 6, para. 57.

48. *Torture in the Eighties*, *supra* note 1, at 15.

49. La Integridad Personal en el Derecho Internacional (A propósito de la Convención de las Naciones Unidas contra la tortura), Miguel Villavicencio C., Boletín Comisión Andina de Juristas, marzo 1990, No. 24, 28-29.

50. *Supra* note 4.

complained of suffering in the same prison.<sup>51</sup> The victim complained in this case of traditional torture techniques such as "submarine torture," beatings and sexual torture, yet the Court found only cruel, inhuman and degrading treatment based on the facts it considered proven.<sup>52</sup> However, the Court did find the State responsible for cruel, inhuman and degrading treatment based on the other claims including conditions of confinement, the *incomunicado* nature of her detention, beatings and other mistreatments.<sup>53</sup>

The Court did include in this case recognition that different grades of violations from torture to other lesser types.<sup>54</sup> The Court also noted the European Court's definitions of inhumane treatment and degrading treatment as including psychological suffering, but did not make a point of distinguishing strictly between "inhuman" and "degrading" treatment as the European Court has.<sup>55</sup> While recognizing as well that illegal detention aggravates the vulnerability of the detained person,<sup>56</sup> the Court does not use this aggravating factor to find torture rather than cruel, inhuman and degrading treatment.

In determining the distinction between the three different types of violations used by the Court, several other cases are also illustrative. In the Paniagua Morales case, the Court had three different types of victims with regard to Article 5.<sup>57</sup> All victims had been arbitrarily kidnapped and held prisoner, although as previously mentioned, the presumption that this isolation constituted ill-treatment of any kind was not mentioned by the Court. The first set of victims had been held and had not, in the Court's criteria, proven any violence against them or poor conditions of confinement despite claims by some of them that they were beaten.<sup>58</sup> The Court rejected their allegations of Article 5 violations.<sup>59</sup> For those victims who had survived the detention and had shown the Court medical proof of beatings, the Court determined they had been subjected to cruel, inhuman and degrading treatment.<sup>60</sup>

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51. Loayza Tamayo, *supra* note 6.

52. *Id.* paras. 58 and 46.

53. *Id.* para. 58.

54. *Id.*

55. *Id.* paras. 58 and 57. See also Ireland v. United Kingdom, Eur. Ct. H. R., (ser. A) (1978).

56. *Id.* para. 57.

57. Paniagua Morales, *supra* note 26.

58. *Id.* para. 66.

59. *Id.* para. 135.

60. *Id.*

The victims who had been murdered by their captors, for whom the Court had the autopsy reports which showed the treatment of the victims before their deaths, and given the gravity of the suffering obviously caused by the treatment shown in these reports, were deemed to have been tortured.<sup>61</sup> Given that the particular violations in the case of the deceased victims were especially gruesome,<sup>62</sup> this decision was not a difficult one with regard to whether it was "intense" enough to qualify under the test for "torture."

This intensity test, which is similar to the European Court's, was adopted by the Inter-American Court to distinguish between "torture" and cruel, inhuman and degrading treatment,<sup>63</sup> although the Court does not distinguish between cruel, inhuman and degrading as the European Court has done.<sup>64</sup> The intensity standard, as mentioned previously, can be criticized based on its subjectivity. However, the Court seemed to prefer not to list a more specific definition.

As with any subjective standard, the facts of each case must be weighed in order to determine if a violation has occurred, and if so, what level it reaches. This raises another serious issue in physical integrity cases: what is necessary to prove the facts involved? As noted above, torture and its various techniques are not always easy to demonstrate medically, and this can be especially true in cases involving long detentions where access to a doctor can be restricted or where the victim is too afraid to seek medical attention immediately. Therefore, in any discussion of torture and the various levels of violations to physical integrity rights, the related standard of proof issues must be addressed both in terms of the Court's general standard of proof and that concerning Article 5 specifically.

## VI. OTHER ARTICLE 5 ISSUES TREATED BY THE COURT

A greater number of cases coming before the Court each year include more varied violations (other than disappearances and right to life). Therefore, the Court should begin to reach those issues which it may have found easier to dismiss in earlier cases where the more "obvious" or "egregious" violations made it possible to dismiss the lesser or more complicated claims while still finding the State responsible. Some issues

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61. *Id.* para. 134.

62. The autopsy reports showed that the victims' injuries included near-decapitation, removal of fingernails, bruises, non-fatal cuts (including one in the shape of a cross), etc. *Id.* para. 66.

63. Loayza Tamayo, *supra* note 6, para. 57.

64. Ireland v. United Kingdom, *supra* note 18.

dealing with Article 5 outside of the Court's standard disappearance and detention cases have been raised in past cases, though many more exist and will eventually need to be confronted by the Court.

In a case where the more egregious violations were not under the Court's jurisdiction, the Court was confronted with claims concerning the Article 5 rights of the family of a disappearance victim whose disappearance was covered-up by the State. These rights, creatively, were found to be violated since the disappearance and burning of the body of their family member directly caused suffering and gravely affected their lives.<sup>65</sup>

The Inter-American Court has not adequately addressed the distinction between direct and indirect victims, and this becomes apparent in this expansion of Article 5 rights to psychological and moral integrity of relatives of the primary victim, which the Blake case finds to be directly affected by violations to another person. However, this finding has not been used in other cases to find family members to be direct victims where the primary crime was under the Court's jurisdiction, which gives the unfortunate impression that the Court was simply extending this interpretation in the Blake case because of its finding that the victim's disappearance could not be adjudicated because it occurred before the violating State became a Party to the jurisdiction of the Court.<sup>66</sup>

In another important area that might be covered under Article 5, the Court has not yet directly addressed the death row phenomenon which is said to cause mental anguish to prisoners awaiting death sentences. This issue, faced by the European Court in the famous Soering case, has been raised before the Court in its decision on provisional measures in a matter involving death row prisoners in Trinidad and Tobago.<sup>67</sup> While the State argued that the Court should not ask it to delay their executions further because of internal time limits established to avoid the "cruel and unusual punishment" of extended death row stays, the Court did not reach this issue and ordered the stay of execution without any discussion of this substantive issue raised by the State.<sup>68</sup>

With regard to whether violations of Article 5 can be found in a case where death is presumed to have occurred and whether a violent death might be considered to violate Article 5 represented two issues that were

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65. Blake v. Guatemala, Judgment of January 24, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 36 (1998), paras. 112-116.

66. *Id.* paras. 2 and 3.

67. James et al. Case, Order of August 29, 1998, Inter-Am. Ct. H.R., Provisional Measures adopted by the Court in the Matter of the Republic of Trinidad and Tobago, *Having Seen 5(c) and Considering*.

68. *Id.*

addressed by the Court in the Neira Alegria case.<sup>69</sup> In that case, involving the disappearance of prisoners during a prison riot, the Court decided to reject the argument of the Inter-American Commission that the right to not be subjected to cruel, inhuman or degrading treatment was violated, without evidence that such treatment occurred during the alleged detention of the victim.<sup>70</sup> Further, the Court concluded that “[w]hile the deprivation of a person’s life could also be understood as an injury to his or her personal integrity, this is not the meaning of [Article 5] of the Convention.”<sup>71</sup> This concept, that Article 5 does not refer to all injuries to the victim’s body even in the case of a disappearance implies that an element of prolonged suffering is part of the Court’s definition of the treatments included in the prohibitions of Article 5.

The Court has been reluctant also in issues that affect women. For example, in the Loayza Tamayo case, the Court did not find for the victim on her claims of sexual tortures, thereby dodging an important and well-recognized type of torture.<sup>72</sup> The Court, which has only had one female member since its creation, must overcome whatever timidity it has to dealing with women’s issues. This will be especially true not only given the use of sexual tortures against women and men, but also for other Article 5 issues which may arise later. For example, whether a state could be found responsible for domestic violence (an assault to personal integrity rights) in its jurisdiction if the State condones it or does not attempt to.

## VII. CONCLUSION

In conclusion, the Court must continue to clarify its interpretation of Article 5(1) and 5(2). A threshold for violating these first two provisions should be clearly established, and presumptions should be used to allow victims to meet this threshold based on the nature of their detentions which can make them especially vulnerable to physical violence as well as inherently causing them mental and moral anguish. At least, a shift in the burden of proof as in the Suárez Rosero case should occur in these situations. The burden of proof should be clearly established but should not overburden the victim, since, as the Court has noted, it is often only the State that holds access to proof other than the victim’s testimony.

Deciding where the threshold of a violation lies and the distinctions between the different levels of violations (lack of respect for human

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69. Neira Alegria v. Perú, Judgment of January 19, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 20 (1995).

70. *Id.* para. 86.

71. *Id.*

72. Torture Survivors, *supra* note 19.

dignity, cruel, inhuman and degrading treatment, or torture) are subjective, evolving along with society's conceptions, and will always, therefore, be open to criticism. However, the stigma inherent in the terms themselves should be used to vindicate the victim and recognize the extent of the State's responsibility. More complicated situations and types of violations must be addressed fully. The Court should not stop at simply crossing the threshold without condemning all of the violations it can find in any given case.

The Court will surely be faced with various types of violations of Article 5. Cases involving detainees' rights will surely also follow and the Court must be clear on its interpretation of the first two provisions of Article 5 in order to prepare itself to deal with the overlapping remaining provisions which will have their own, presumably lower, threshold of mistreatment.

# THE EXPERT TESTIMONY BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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## I. INTRODUCTION

The purpose of this essay is to provide a review of the doctrine and jurisprudence of the expert testimony as a probatory medium<sup>1</sup> used by the Inter-American Court of Human Rights (ICHR, Court, Tribunal) in the issues presented before it. It is a universally accepted legal principle that courts have the duty of initiating the investigation of the facts presented before them in order to achieve proper administration of justice. The ICHR is not foreign to this obligation, not only because it is an international court, but because of its fundamental knowledge and essential nature to modern societies, it seeks the international protection of human rights.

Article 44 of the Rules of Procedure of the ICHR, relating to the probatory diligences, officiously grants broad powers to the Court when asserting that:

[T]he Court may, at any stage of the proceedings:

1. Obtain, on its own motion, any evidence it considers helpful. In particular, it may hear a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant;
2. Invite the parties to provide any evidence at their disposal or any explanation or statement that, in its opinion, may be useful;

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1. Cafferata Nores, José I., *LA PRUEBA EN EL PROCESO PENAL* 21 (Ed. Depalma 1986). “[T]he means of proof is the process established by Law intended to result in admission of the element of proof in the process.” (Editorial Note: Translated from Spanish).

3. Request any entity, office, organ or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point. The documents may not be published without the authorization of the Court;

4. Commission one or more of its members to conduct an inquiry, undertake an in situ investigation or obtain evidence in some other manner.<sup>2</sup>

When it is so authorized by law that the Court, by its own motion, will procure every proof that it considers useful to request from the parties, entities, offices and authorities, the general legal principle of Freedom of Proof,<sup>3</sup> made up of principles of freedom of object of proof,<sup>4</sup> and Freedom of Means of Proof,<sup>5</sup> basis of every probative system and narrowly linked to the valuation pursuant to the rules of constructive rational criticism, are welcomed.<sup>6</sup>

That pragmatic intention is derived from what is set forth in the Preamble of the American Convention on Human Rights, when it states that the American states signatories of the Convention have the “[i]ntention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect

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2. THE INTER-AMERICAN COURT OF HUMAN RIGHTS: RULES OF PROCEDURE, OEA/Ser. L/V/111.3, doc. 13, corr.1 (1981), *reprinted in* 20 ILM 1289 (1980) [hereinafter The Rules].

3. Alfredo Vélez Mariconde, DERECHO PROCESAL PENAL 198 (Ed. Lerner). Views said principle in this manner: “The principle itself allows the penal process to follow the norm that everything can be proven and through any means, except that which the law specifically prohibits, which occurs in exceptional circumstances.” (Editorial Note: Translated from Spanish).

4. The freedom of the object of proof is recognized as the doctrine of *Thema Probandum*, but it is a freedom understood in terms that the events concern the process thus are in the Judge’s interest in the formation of his conviction.

5. The freedom of medium of proof is the possibility of appealing to any source of proof relating to the truth of the events to create the conviction or reasoning of the judge. Some legislation as sectors of the doctrine sustained the principle of the limitation in the mediums of proof, allowing in the process only those results that the law expressly indicates. Nevertheless, said proposition is not commonly shared and article 44 of the Rules of Procedures does not provide for such limitation.

6. Vélez Mariconde, *supra* note 3, at 361-363. “The method of free conviction or rational criticism (both formulas have the same meaning), consist in that the law does not impose general norms to credit some delinquent facts (as those relating to the body of the crime) nor does it determine the value of the evidence abstractly, but rather it gives freedom to the trier of fact to admit all evidence found to be useful to the clarification of the truth (in principle, everything can be proven and by any means), and to appreciate it according to the rules of logic, psychology, and experience.” (Editorial Note: Translated from Spanish).

for the essential rights of man.”<sup>7</sup> Human rights in our time have become a sacred matter, because their recognition and respect is the basis for the support of the people, pivotal to the socio-economic development.

In the past, the expert testimony was unknown as a probatory means because the methods used were totally non-scientific; they were based on religious beliefs, fear, witchcraft, etc, as evidenced in the famous trials of God. In the mid nineteenth century, with the anthropological studies developed by Lambroso, the beginning of a new era was marked in the expertise field based upon an interest in knowing the causes of criminal activity; in finding suitable means of reinstating the criminal into society as a useful person; and in achieving more efficiency in clarifying the crimes before the high level of existent impunity was born. These factors forced the search of scientific methods of investigating crime.

The advanced technology developed during the end of the present millennium, has led to the birth of new techniques and the development of existing techniques in the field of investigation, of which the Courts of Justice have been witnesses. The latter have had to update themselves, promoting the modernization of legislation and a greater demand in the training of their officers in various fields of human knowledge. Nowadays, we have professionals and tribunals specialized in diverse disciplines.

The enrichment of the knowledge has become so broad that it is difficult to imagine in the early Twenty First Century the existence of geniuses such as Miguel Angel, Leonardo Da Vinci and many others that marked humanity's history for their in-depth and broad general culture in multiple fields. Presently, it is impossible to have extensive knowledge in all sciences, arts or techniques recognized by their level of development, which has enriched this field of study.

In recent years, scientific tests have been perfected such as the carbon 40, the DNA, blood groups and other important genetic markers in the field of the criminal, family, civil rights, as well as in other branches of the human knowledge such as biology, genetics, paleontology, archaeology and many others in charge of enriching the human knowledge.

Presently, the tribunals have at their disposal experts in medicine, social sciences, mathematics, business and other fields, so that before conflicts arise the court may utilize experts, as valuable assistants in the administration of justice, acquiring a more important role every day and strengthening this method of proof that is undergoing study.

It is important to divide the focus of the expert test, into a first part which is the conceptualization of the topic and then pass to the second part, in which reference is made to the jurisprudence and some practices of the Inter-American Court of Human Rights.

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7. American Convention of Human Rights, Nov. 22, 1969, 9 ILM 673, OEA/Ser. K/XVI/1.1, doc. 65 rev. 1, corr. 1 (1970) para. 1 [hereinafter *The Convention*].

## II. CONCEPTUALIZATION

The definition of "expert" is uniform in the doctrine. Experts are considered assistants to the judges<sup>8</sup> which are necessary in discovering how to evaluate the elements of proof that are presented before them.<sup>9</sup> It is necessary to have a specific knowledge in a science, art or technique.<sup>10</sup> This knowledge should be generally unknown to the judge who, as director of the process, will determine whether this method of proof is relevant<sup>11</sup> and pertinent to achieve the access to the relevant information that such elements give him. The report that the expert renders is given different names: know-how, expert report, expert opinion or expert testimony. It is precisely this probative means that becomes a representation of a declaration of the expert's knowledge.

It is the duty of the judges to determine the necessity of asking for an expert's opinion in order to add to the record the specific knowledge that they lack. For that reason it is the judge's discretion to appoint the expert. The parties can request the expert test, but the ultimate decision rests on the tribunal. It is the duty of the tribunal to direct the methods of proof selecting the expert or experts to designate and indicate the specific point in which they must render a decision. This is why the experts have the right

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8. Ricardo C. Nuñez, *CÓDIGO PROCESAL PENAL PROVINCIA DE CÓRDOBA* 230 (Marcos Lerner Eds. 1986). "The expertise is not like a testimony, an independent probatory element, but it always works as an accessory to establish or guarantee the existence or value of the evidence that cannot be noticed or appreciated thoroughly by means of observation and common knowledge." (Editorial Note: Translated from Spanish).

9. CAFFERATA NORES, at 14. "Element of proof, or proof, is all objective fact that is legally incorporated to the process, capable of producing a certain or probable knowledge about the particulars of the criminal imputation." (Editorial Note: Translated from Spanish).

10. *Id.* at 47. "The expert testimony is the means of proof used to obtain an opinion based in specialized scientific, technical, or artistic knowledge; useful for the discovery and understanding of the elements of proof." See also Víctor De Santo, *COMPENDIO DE DERECHO PROCESAL CIVIL, COMERCIAL, PENAL Y LABORAL* (Ed. Universidad 1995). "The expert, as noted, is an advisor that offers to the judges their specialized culture, different from the general and judicial of that of the judges. . . ." See also Eduardo J. Couture, *VOCABULARIO JURÍDICO* 146 (Ed. DePalma). "Assistants of justice, are those who, in exercising a public function or a private activity, are called upon to give an opinion about issues relating to their science, art or practice, thereby advising judges in subject matters foreign to the judges." (Editorial Note: Translated from Spanish).

11. 1 GIOVANNI LEONE, *TRATADO DE DERECHO PROCESAL PENAL* 181 (Ed. Jurídicas Europa-América, 1963). "Relevancy of proof means its contribution to the verification in course. This contribution does not necessarily have to be direct or immediate, even allowing it to be only gradual (thus, providing circumstances may be relevant in establishing the credibility of a witness). Relevancy of the proof means its possibility to concur, including mediate and indirectly, to proving; in substance, more than a positive characterization, it is a negative characterization, in the sense that it excludes evidence totally superfluous." (Editorial Note: Translated from Spanish).

of accessing the judicial file in which will be rendering their opinion as well as to the existent elements of proof. Also, the parties to the process have the right of initiative to indicate the areas in which the expert will have to address, indicating to the tribunal their points of interest based on the principle of burden of proof. From those points the tribunal will choose the ones that it considers pertinent and relevant.

The judges, responsible for their decisions, will determine if it is necessary to appoint an expert. If the judge has the necessary knowledge over the specific case, the judge is not forced to require the appointment of an expert. This finds its basis not only in the Principle of Procedural Economy, but also in the fact that the expert's opinion is not binding on the judge. Instead, the judge will appreciate said opinion pursuant to the rules of logic.<sup>12</sup>

The expert, as a technician, will have to have a professional title in the area in which he will render an opinion, except for those cases in which the discipline is not regulated. In the absence of said regulation, the tribunal shall apply a proper criteria in the selection, based on the experience, reputation, published studies, and experience in similar situations.<sup>13</sup>

If the expert opinion results in the fulfillment of irreproducible facts, it is necessary pursuant to the norms of due process and defense that the tribunal notify the parties and allow them to witness these studies, even with the assistance of their technical consultants.<sup>14</sup> Therefore, the experts have to be notified by the tribunal about the necessity of communicating any act that is deemed to be impossible to reproduce in order that the parties may control the expert's work. In those cases in which the expert's opinion does not result in the fulfillment of irreproducible facts, the expert will render his opinion and the tribunal will grant the pertaining hearing to the parties so that they can make the necessary findings; requesting

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12. William Corujo Guardia, *Pericia: Su Valoración Crítica*, 2 REVISTA URUGUAYA DE DERECHO PROCESAL 298 (1991). "The Expert is not the main subject of the process thus he is not concerned with outlining the *Thema Decidendum* (function of the parties) or to solve it (the Judge's function); his opinion is not binding and this approach has been sustained unanimously by Doctrine and Jurisprudence." (Editorial Note: Translated from Spanish).

13. Ernesto Abreu Gómez, *Perito y peritajes*, 9 REVISTA CRIMINALIA 572 (1969). "The expert testimony presumes in the person that will render it, the expert, an exact wisdom of the subject to be dealt with; that is not only what the expert requires, the expert requires an exact and concised knowledge in the field that he will study; under these conditions, it is very natural for the expert to be a person, recognized publicly as an expert in the field. But another attribute is still needed: Honesty. Honesty in experts is a basic commodity." (Editorial Note: Translated from Spanish).

14. The technical consultant is appointed by the interested parties to assist them and collaborate with the defense of their interests and is overseen by the attorney; it is important to note that it is a technical advisor unlike the lawyer who works with the legal part and is responsible for his client's interests.

additions, clarifications, and even, requesting another expert in case of a dispute.

The tribunal, as director of the process, will warn the expert of the obligation to avoid destroying, altering or in any other way modifying the elements of proof that are the subject of analysis. Therefore, if any of the aforementioned situations occur, the expert will need to have the pertaining authorization of the tribunal.

The expert should be warned when accepting the job, of his obligation of not communicating to the parties or any third party, the results of his conclusions and studies because the tribunal is entitled to be the first to know. As a result, we enter in the realm of loyalty to the tribunal, departing from the thesis that in the event of a violation of this obligation, the tribunal has the authority to annul the opinion as a consequence of the appointment that the same gave. It is considered that the expert should also maintain this loyalty after presenting his study, since the comments and opinions given off the record to parties of the process or to third parties endangers the judgment and its objectivity.

What derives from what is stated above is the fact that the expert opinions should be ordered by the competent tribunal to have probatory value. As a result, those carried out beforehand by the parties, such as the preparation of a demand or answer, lack of probatory effectiveness for being extrajudicial, in which case the parties may present them as testimonial proof.

When an expert is appointed, he must formally appear before the tribunal by making a written presentation within the terms granted to show his acceptance of the position and to swear to complete it faithfully. In this manner the expert is notified of his obligation of fulfilling his obligations with strict objectivity, thus giving clear, precise and sustainable statements in his opinion, never making assumptions or presumptions. In the event he is forced to make assumptions or presumptions he will explain the reasons for doing so.<sup>15</sup>

In some cases, because of the nature of the required expertise, the tribunal must appoint several experts so that they can elaborate on the

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15. 3 JORGE CLARÍA OLMEDO, *TRATADO DE DERECHO PROCESAL PENAL* 331 (Ediar S.A. Ed. 1961). "The expert produces his opinion in an objective manner, giving rise to the conclusions as way of making intelligible an element of proof for which direct observation presented difficulties or left serious doubts about its significance." See also 2 HERNALDO DEVIS ECHANDÍA, *TEORÍA GENERAL PRUEBA JUDICIAL* 321, provides that "[t]he foundation of the probatory merit of the expert testimony resides in a concrete presumption, for the particular case, that the expert is sincere, truthful and possibly correct in his conclusion, when he is an honest, capable person, expert in the field; who has also carefully studied the problem presented for his consideration, has carried out his perceptions of the facts or of the probatory material of the trial with efficiency and has given his opinion on such perceptions and deductions that are concluded thanks to the technical, scientific or artistic rules of expertise known and applied to those ends, in an explained, motivated, and convincing matter." (Editorial Note: Translated from Spanish).

commended studies. In such cases, there is an implicit obligation in the experts to administer the tests jointly and to make their deliberations in a secret manner, drawing the opinion jointly if agreed upon. Otherwise, it should be done separately.

Today, the possibility that the expert's opinions be rendered by public and private juridical entities is broadly accepted. Consequently, it is common practice to request expert opinions from auditing companies and universities that carry out studies in diverse fields, such as agronomy, medicine, and pharmacy. Nevertheless, in order for the expert opinion to have probatory value, the interveners should accept the position and be properly sworn in by the tribunal, because otherwise, their probatory value would change,<sup>16</sup> to either documental or testimonial proof.

In disputes where differences exist, like in an agrarian matter, the expertise of institutes is usually required to determine the agricultural vocation of country property. The most common cases in the judicial practice are in the areas of criminal, family and labor law, which studies in psychology, psychiatry, labor medicine, and trauma are required. In other areas they are requested from established public institutions and not to experts in specific areas, since it is already by law that they are official experts. In such cases, the experts are already properly sworn and sufficiently notified of their responsibilities.

As a rule, the expert's opinion must be presented in writing, and should include all observations, tests performed, methods followed, elements of proof observed and valued as well as any detail that would allow the Court and the parties to establish its degree of certainty. Also, the opinion must contain a chapter with conclusions that will allow the judges to know the final valuations to which the technician committed himself during his study. The expert is also committed to provide all additional information or clarification to his opinion, as well as to appear in Court, if necessary, to provide such information and clarification orally before the Court and the parties.

All experts, except the officials that already have an established compensation for their work, solicited by the Tribunal acquire with the execution of their responsibility, the right to be properly compensated for their work, to be notified previous to the acceptance of their position of the amount they will receive and to request, if necessary, approvals to incur additional expenses and rearrange their fees. The above-mentioned is an obligation of the proposing party initially so that after the resolution of the case, when calculating the costs, the appropriate party may proceed to

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16. See 2 MARIO A. ODERIGO, *LECCIONES DE DERECHO PROCESAL PENAL* 204 (Ed. Depalma 1971). "Certain Juridical, public or private entities, such as academies and universities, can be consulted about science, art, or industry, requesting from them the information that will have certain probatory value, proportionate to the authority of the people which integrate them, but they will represent expert testimony, in the precise legal sense." (Editorial Note: Translated from Spanish).

the tribunal to make the unsuccessful party pay for these costs or to absolve it from paying such costs.

### III. PRACTICE AND JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Article 44 of the ICHR's Rules of Procedure sets forth the principle of the freedom of proof and its valuation which must conform the rules of logic.<sup>17</sup> Regarding said principle of the freedom of proof used in jurisprudence, the ICHR is of the view that "[i]nternational jurisprudence has recongized the power of the courts to weigh the evidence freely, although it has avoided a rigid rule regarding the amount of proof necessary to support a judgment."<sup>18</sup>

Regarding the system of valuation that the ICHR has been applying, based on the reasoned opinions, it has been established by jurisprudence that "[t]he Court must determine what the standard of proof should be in [each] case. Neither the Convention, the Statute of the Court nor its Rules of Procedures speak of this matter."<sup>19</sup> Indeed, after reviewing the Court's legal instruments, we do not find any specific norm on the issue, and the Court's case law is considered appropriate since it completely adjusts itself to the spirit of article 44 and other modern doctrines.

The Court, when valuing the proof, has come to apply the reasoned opinion as a criteria of valuation and has given foundation to its application.<sup>20</sup> The jurisprudence of the Court that the valuation of the proof according to the reasoned opinion's rules will allow the judges to arrive to the conviction about the truth of the alleged facts.<sup>21</sup> The ICHR has reinforced article 44 given its condition of international tribunal of human rights, indicating that the criteria of appreciation of proof:

[Has] the greatest amplitude, because the determination of the international responsibility of a State for violation of the person's rights, allows the Tribunal a greater amount of flexibility in the valuation of the proof rendered before it in regards to the

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17. The Rules, *supra* note 2, art. 44.

18. Velásquez Rodríguez v. Honduras, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988), para. 127. See also Godínez Cruz v. Honduras, Judgment of January 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5 (1989), para. 133; Fairén Garbi v. Honduras, Judgment of March 15, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 6 (1989), para. 130.

19. Velásquez Rodríguez, (Ser. C) No. 4, para. 127; Godínez Cruz (Ser. C) No. 5, para. 133; Fairén Garbi, (Ser. C) No. 6, para. 130.

20. Velásquez Rodríguez, (Ser. C) No. 4, para. 129; Godínez Cruz (Ser. C) No. 5, para. 135; Fairén Garbi (Ser. C) No. 6, para. 132.

21. Paniagua Morales et al. v. Guatemala, Judgment of March 8, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 37 (1998), para. 76.

pertaining facts, in accordance with the rules of the logic and based on experience.<sup>22</sup>

The American Convention on Human Rights as well as the Statute and Rules of Procedure of the Court, do not adequately regulate the means of proof commonly used in the processes before this Tribunal, such as the documental, testimonial and expert testimony. Only in Chapter IV of its Rules of Procedure does it refer to the topic of proof in articles 43 through article 54 inclusive, but in a very general way, forcing the Court to resort to the doctrine and international practice that has become concrete in each of its decisions.

In the aforementioned chapter, in connection with the expert testimony, it is established that the expenses will be covered by the party that prolongs it.<sup>23</sup> It is necessary to point out that the practice has been that the Court itself has rarely ordered an expert test. In the majority of the cases, the interested party has been the one that has not only offered the evidence, but also the one who has indicated the technician that the Court will appoint as an expert so that the expert can render the opinion and also take charge of covering the corresponding expenses.

This practice could be modified so the Court could use a list of professionals in diverse disciplines that have been previously chosen by means of convocation systems for the integration of the same. In this manner, the Tribunal will appoint the expert and the interested party will be limited to request the area of practice and to cover its expenses. This system guarantees even more the objectivity in the realization of the expert proof, which was conceived as auxiliary to judges and as necessary proof when specific knowledge is required for a specific problem.

Allowing the parties to appoint the expert has led to problems in terms of credibility of the evidence, since in some cases the experts treated general topics instead of themes relevant to the "thema probandum" of the matter. This is against the principle of "iura novit curia." Said practice prevents the Tribunal from directing the expert opinion and giving it the proper treatment. Further, this test is not that of an expert opinion, but rather of testimonial proof, because the experts assigned in this manner are not assistants to the Judges, but rather witnesses of the appointing party thereby weakening the credibility of the expert testimony, since there may be a subjective focus in the studies to convince the Tribunal, thus, lacks the necessary objectivity that characterizes technical reports, and ultimately hurts the administration of justice.

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22. Blake v. Guatemala, Judgment of January 24, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 36 (1998), para. 50; See also Loayza Tamayo v. Peru, Judgment September 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33 (1997), para. 42; Castillo Páez v. Peru, Judgment of November 3, 1997, Inter-Am. Ct. H.R. (Ser. C), No. 34 (1997), para. 39.

23. Rules, *supra* note 2, art. 45.

In a number of cases, the expert testimony is presented orally at the public hearings rather than in writing. The oral expert testimony is inconvenient to the Court as well as for the opposing party. The Tribunal's right to govern the expert testimony in terms of relevancy and credibility is weakened. Additionally, it prejudices the intervening parties who will hear an oral testimony with all its technicalities without a written copy. This prevents a complete understanding which would allow control of the expert testimony by means of questioning that may clarify, provide adequate explanations, and even to determine the need for a new expert.

Indeed, expert testimony by definition is technical. Not only the judges, but also the parties, and their lawyers lack knowledge in those sciences, arts or techniques. Consequently, in order to provide an adequate defense and due process rights, the parties should be allowed to have the expert's opinion in writing so that the technical consultant may evaluate and control what the expert stated. When the expert testimony is presented orally at a hearing, the party's rights are limited as opposed to if a written report would be provided which the expert must defend at the hearing while the party is exercising the right to a defense. The party could, for example, rebut with an opinion from another expert.

The problem of the oral expert testimony is tied to the practice that the interested party proposes the expert, since it could generate inequalities among the parties that affect the due process as a whole. That is because the proposing party could have had previous comments, which would allow it to know in advance what would be said at the public hearing. Consequently, one party has a primary focus, which the opposing party lacks. This results in an inequality between the parties. Said practice also compromises the expert in his role as auxiliary of the judges and in his commitment of expert loyalty.

In practice, the Court omits the formality that the technicians accept the position like a procedural act prior to surrendering their expert testimony. This is the consequence of not being appointed, it is only under these circumstances that the interested party offers the expert and the technician, the Court summons him and he appears at the public hearing, where he is sworn and renders an opinion.

The acceptance of the position is an essential formality for the expert testimony along with the oath, for when the expert is under oath he is committed to present the opinion and to complete his tasks faithfully and strictly to his technical knowledge. Furthermore, the expert will have the obligation of presenting the report in writing, as well as to appear before the public hearing if required by the Tribunal to make any explanation or clarifications to his testimony which may even be done in writing, thus reinforcing the principle of community of the proof.<sup>24</sup>

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24. It arises from the concept that the expert evidence together with the testimonial and documentary proof, are the fundamental evidence of the whole process and consequently, it is necessary that appropriate and precise regulations exist regarding their practice. The principle of

In accordance with the practice followed by the ICHR, the expert offered by the proposing party and properly summoned by the Court to appear at the public hearing does not always appear. The expert's failure to appear can be avoided by requiring previous acceptance. The Court has the power to propose sanctions by means of its internal legislation. However, when there is no acceptance, the expert can avoid these sanctions because he did not sign an acceptance and was not sworn.

The practice of having experts render live testimony appears to have used the oath as part of the expert's acceptance of the position before the Court. The oath found in article 37 of the Rules of Procedure states that "I swear or I solemnly declare that I will discharge my duty as an expert witness honorably and conscientiously."<sup>25</sup> This oath or declaration set forth in article 37 of the Rules of Procedure has to be completed before the Court, the President or other judges that act for on its behalf. Regulating the oath in this manner, we find that it has promising character since it is taken before the expert testimony is presented. So the assertive oath is not permitted after the opinion, affirming having said the truth, since the formula "I will discharge my duty as an expert" is stated in the future tense.<sup>26</sup>

It is necessary to make the distinction in the practice of the Court, between the act of the acceptance and that of the oath. Although they can be carried out in one act, they are not the same thing. The doctrine is unanimous in considering that the purpose of the oath is to give "a guarantee of the conscientious severity of its tests and of the sincerity of his science and to set forth all the means to respond reasonably and positively to the questions that have been asked."<sup>27</sup> This is the true commitment of expert fidelity.<sup>28</sup> In contrast, the acceptance is a commitment in expert matters that binds the acceptor to the Tribunal in such a way that the failure to fulfill the obligations makes the expert subject to sanctions that the Court may set in accordance with article 51 of its Rules of Procedure, which states that "[t]he Court will be able to request to the States that the State apply the sanctions that its legislation sets forth against those who do not

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the real or material truth requires the elements of proof brought to the process by the parties to be common so that it will not be evidence which will only favor its presenter, but rather it is incorporated to the process as a whole, for the investigation of the truth.

25. Rules, *supra* note 2, art. 37.

26. *Id.*

27. Mittermair, *TRATADO DE LA PRUEBA EN MATERIAL CRIMINAL* 154 (1929).

28. Nuñez, *supra* note 7, at 23. "The expert loyalty implies the duty to affirm the truth, not to deny it, and neither to omit it in his report about the matters to deal with. The non-fulfillment of this duty, besides subjecting the expert to disciplinary sanctions of administrative nature (if an expert in official capacity) or professional nature, is punishable as a crime. . . ." *Id.* (Editorial Note: Translated from Spanish).

appear or refuse to depose without legitimate reason or that, from the Court's standpoint, have violated their oath."<sup>29</sup>

In the acceptance it is implicit the nonexistence of reasons for recusation or inhibition that could prevent the expert from accepting the position, or else the expert is not aware of any. Having knowledge of these and omitting them in a deceitful manner would make the rendered expert opinion null. The acceptance should always be given by the expert in written form by means of a document directed to the ICHR and presented in the terms set forth in article 26 of the Rules of Procedure, presented personally, via courier, facsimile, telex, mail or any other method generally used. Once the acceptance has taken place, the Court will proceed to the ceremony of swearing in.

In regards to recusation and inhibitions, the doctrine and jurisprudence of the Court agree to apply upon the experts the same rules regulating the judges. This is because of their role as assistants to the judges, as set forth in article 19.1 of the Statute.<sup>30</sup> Article 49.1 of the Rules of Procedures provides this position stating that "[t]he reasons for the impediment for the judges set forth in article 19.1 of the Statutes will be applicable to the experts."<sup>31</sup>

In the jurisprudence of the ICHR, there have only been a few cases where recusation and inhibitions were invoked. We find no precedence where recusation has been accepted and the technician been separated. When rejecting the recusation, the Court has always presented its declarations reserving itself the right to reevaluate them at later time.<sup>32</sup>

The jurisprudence and practice of the Court are evidence that the Court and the parties have made great use of the expert testimony. Particularly, it has played an important role in cases of damages to determine the material damages and the moral damages. Inside the *sui generis* practice of the expert testimony before the Court, the presentation of written report in certain cases<sup>33</sup> has been used, especially when the ICHR has ordered it. Nevertheless, the custom is the oral presentation rendered in a public hearing.

In reparation matters, the Court in the *El Amparo* case, considered pertinent the use of the professional services of an expert to determine the

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29. The Rules, *supra* note 2, art. 51.

30. ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 27, OEA/Ser. L/V/11.50, Doc. 6 (1980), reprinted in 19 ILM 635 (1980) art. 49.1 [hereinafter the Statute].

31. The Rules, *supra* note 2, art. 49.1.

32. *Aloeboetoe v. Suriname*, (Reparations) Judgment of September 10, 1993, Inter-Am. Ct. H.R., (Ser. C) No. 15 (1993), paras. 32, 35, and 37

33. *Fairén Garbi*, (Ser. C) No. 6, para. 55.

amounts to reimburse.<sup>34</sup> The Court according to its broad powers in matters of proof appealed to the expert testimony.<sup>35</sup> The Court used a mathematical expert who rendered his report in writing. It is also important to point out that the Court while applying its broad powers of valuation and using the rules of logic, based the compensation, indicating the application and interpretation that it makes from the report and sets the criteria for reparations based on said rules.

There are cases which are against the principle "*iura novit curia*."<sup>36</sup> For example, the judgment in the Loayza Tamayo case of September 17, 1997, it was considered that the experts report about doctrinal points of importance, but that for the principle "*iura novit curia*," they were not relevant, because they are common knowledge among jurists. Said expert testimonies were offered by the interested party, and this prevents the Court from exercising control of relevance and pertinence.

The Court in the Castillo Páez case, found the expert testimony relevant and pertinent.<sup>37</sup> Here one has an expert testimony helpful for the investigation of the real or historical truth of the facts for a correct administration of justice and true assistance to the tribunal, in this case, the ICHR. The Court sometimes requires experts that point out the most recent legislation and its application in the internal law of a State. In said situations, there is no contradiction with the principle "*iura novit curia*", since the Court, as an international tribunal, requires knowledge of the law to evaluate the evidence presented by the parties.<sup>38</sup>

In the jurisprudence of the Court, different areas of expertise may be found. For example, in the Godínez Cruz case, an expert was used to determine the presumed moral damage invoked by the Inter-American Commission of Human Rights. The Court found that the expert testimony proved that the victim's immediate family suffered moral damages for which they should be indemnified.<sup>39</sup> This cite also proves the value that the Court places upon the expert, as a form of evidence, to create its

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34. El Amparo v. Venezuela, Judgment of September 14, 1996, Inter-Am. Ct. H.R., (Ser. C) No. 28 (1996), para. 12 and 28. See also Neira Alegria v. Peru, Judgment of September 19, 1996, Inter-Am. Ct. H.R., (Ser. C) No. 29 (1996), para. 34.

35. El Amparo, (Ser. C) No. 28, paras. 12 and 28.

36. Loayza Tamayo, (Ser. C) No. 33, para. 45(h)-(i).

37. Castillo Páez, (Ser. C) No. 4.

38. Paniagua Morales, (Ser. C) No.37, para. 67(i)(j)(k). See also Loayza Tamayo, (Ser. C) No. 33, para. 45(j) and Suárez Rosero v. Ecuador, Judgment of November 12, 1997 (Ser. C) No. 35 (1997), paras. 23 (e) and 29, in this case the Court embraced the expert testimony fully stating so in the valuation given to the evidence in their point 30: "[t]he testimony of the witness, Mrs. [C.A.] and the doctor [E.A.G.]'s expert testimony were not objected to by the State and, therefore, the Court takes as proven the facts declared by the former, as well as the considerations made by the expert on the Ecuadorian Law." (Editorial Note: Translated from Spanish).

39. Godínez Cruz, (Ser. C) No. 8, paras. 49 and 50. See also Velásquez Rodríguez, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 7 (1989), paras. 51 and 52.

conviction on a specific case. There are precedents of expert testimony ordered by the ICHR to better resolve cases.<sup>40</sup>

Similarly, an expert test was ordered in the Fairén Garbi and Solís Corrales cases. In both cases, the expert testimony was useful for the Court as means to determine the real facts. In the case of Fairén Garbi and Solís Corrales the testimonies served as part of the foundation of the Court to prove that the State was not responsible for the disappearance of the victims.<sup>41</sup> In the Gangaram Panday case, the expert testimony together with other evidence gave indications to discard the possibility that the victim had been tortured.<sup>42</sup>

Finally, article 50 of the Rules of Procedure regulates the protection of the experts that have submitted their opinions before the Court, which states that "[s]tates may neither institute proceedings against witnesses or expert witnesses nor bring illicit pressure to bear on them or on their families on account of declarations or opinions they have delivered before the Court."<sup>43</sup> The existence of this protection is important because of the nature of the matters that the Court deals with. The experts render reports on matters of political or social transcendancy for diverse sectors of society. Thus, the safety of the experts and their relatives will only be guaranteed by the above-mentioned protection.

#### IV. CONCLUSION

It is considered that in view that the Court, for over eighteen years, in the cases for its consideration, have examined numerous expert tests rendered in diverse fields. Therefore, it is necessary to establish, based in the jurisprudence of the Tribunal and the doctrine, the pertaining rules as regards expert testimony to strengthen the rights to a defense and due process.

Moreover, the expert is a method of proof that has acquired great importance, due to the success that the diverse arts, sciences and techniques have had in this century. This success has allowed the same to develop as auxiliary of the judges for the administration of justice.

The Inter-American Court as an international tribunal counts with more flexible parameters for the employment and valuation of the proof, by virtue of its nature and matter. The American Convention on Human Rights, the Statute, and the Rules of Procedure of the Court do not contain precise norms that regulate its use. By virtue of the above-mentioned, the Court, through its jurisprudence has determined the approaches as regards to admissibility, realization and valuation of proof, which was cleverly

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40. Gangaram Panday, Judgment of January 21, 1994, Inter-Am. Ct. H.R. (Ser. C), No. 16 (1994), para. 30. See also Fairén Garbi, (Ser. C) No. 6, para. 38.

41. Fairén Garbi, (Ser. C) No. 6, para. 156.

42. Gangaram Panday, (Ser. C) No. 16, para. 56.

43. Rules of Procedure, *supra* note 2, art. 50.

made according to the principles of the freedom of proof and the rules of logic.

It is considered convenient that certain changes be introduced in the practice of the expert testimony, so that the Tribunal is responsible for appointing the experts. Also, it is necessary to regulate the formal act of acceptance of the position, differentiating it from the oath to guarantee the rendition of the expert opinion and that otherwise, article 51 of the Court's Rules of Procedure may be applied. The technical nature of the expert testimony should be regulated so that the opinion is presented in writing, with the obligation of providing explanations or clarifications and the commitment to appear at a public hearing if necessary.

# REPARATIONS IN THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

*Victor M. Rodríguez Rescia\**

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## I. INTRODUCTION

International tribunals in general have within their competence to end conflicts presented by individuals with legal capacity through the issuance of judgments and opinions.<sup>1</sup>

In International Law, judgments seek to establish the responsibility of those subject to International Law for committing an illegal act. In the case of the international human rights law, judgments seek to establish the responsibility of the States for violations of human rights provided in the

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1. American Convention of Human Rights, Nov. 22, 1969, 9 ILM 673, OEA/Ser. K/XVI/1.1, doc. 65, rev. 1, corr. 1 (1970) art. 66 [hereinafter *The American Convention*].

corresponding international convention.<sup>2</sup> It means that in human rights matters, there should always be an individual whose rights have been violated even when, in some cases, the individual is unable to appear before the Court directly.<sup>3</sup>

If an international tribunal determines that there has been international responsibility, that judgment may establish the proper compensations to be awarded to the injured party.<sup>4</sup> It may also technically punish and abstain from determining compensations until later in the legal process. Such has been the practice of the Inter-American Court of Human Rights in most of its cases.<sup>5</sup> Such compensation is “[a]n effective system for the protection of the human rights which allows judgments to be more than mere moral punishment.”<sup>6</sup>

It is through their jurisprudence that the tribunals forge their development and it is their judicial effectiveness that allows a tribunal to achieve prestige and credibility. Hence, since the judgments of the Inter-American Court are not final and not subject to appeals,<sup>7</sup> its jurisprudence must be objective and sufficiently clear so that its decisions are respected by the States Party to the American Convention on Human Rights (Convention or American Convention). Specifically, the judgments on reparations test the State’s compliance with international obligations.<sup>8</sup>

2. *Id.* at art. 63.1; European Convention for the Protection of Human Rights, 213 U.N.T.S. 222, entered into force Sept. 3, 1953 as amended by Protocols No. 3, 5, and 8 which entered into force on Sept. 21, 1970, Dec. 20, 1971, and Jan. 1, 1971, respectively, art. 50.

3. In accordance with article 61 of the American Convention, only the State Parties to the Convention or the Inter-American Commission for Human Rights may submit a case for the consideration of the Inter-American Court of Human Rights. Unlike the European system, where individuals are allowed to go directly to the European Court of Human Rights as provided in article 3 of Protocol No. 9 of November 6, 1990.

4. *Gangaram Panday v. Suriname*, Judgment of January 21, 1994, Inter-Am. Ct. H. R. (Ser. C) No. 16 (1994).

5. See *Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, Inter-Am. Ct. H.R., (Ser. C) No. 4 (1988); *Godínez Cruz v. Honduras*, Judgment of January 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 5 (1989); *Aloeboetoe et al. v. Suriname*, Judgment of December 4, 1991, Inter-Am. Ct. H. R., (Ser. C) No. 11 (1994); *Garrido v. Argentina*, Judgment of February 2, 1996, Inter-Am. Ct. H.R., (Ser. C) No. 26 (1996); *El Amparo v. Venezuela*, Judgment of January 18, 1995, Inter-Am. Ct. H.R., (Ser. C) No. 19 (1995); *Neira Alegria et al. v. Peru*, Judgment of January 19, 1995, Inter-Am. Ct. H.R., (Ser. C) No 20 (1995).

6. Nieto Navia, Rafael, *La Corte Interamericana de Derechos Humanos: Su Jurisprudencia como Mecanismo de Avance en la Protección y sus Límites* 14 (Inter-Am. Ct. H.R. 1991).

7. American Convention, *supra* nota 1, art 67.

8. *Velásquez Rodríguez v. Honduras (Compensatory Damages)*, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 7 (1989); *Godínez Cruz v. Honduras (Compensatory Damages)*, Judgment of July 21, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 8 (1990); *Velásquez Rodríguez v. Honduras (Interpretation of Compensatory Damages)*, Judgment of August 17, 1990,

## II. THE INTERNATIONAL RESPONSIBILITY OF THE STATES FOR HUMAN RIGHTS VIOLATIONS

The responsibility provisions found in regional instruments for the protection of human rights are scarce because they only define the content and extent of the violations of the established obligations. Generally, they refer to the principles and rules regarding the responsibility of the State which dictate the custom or action that created the arbitrary tribunals or the International Court of Justice of The Hague.<sup>9</sup> On the other hand, this theory of international responsibility is established on the basis developed in internal law, hence such principles and rules have a civilistic connotation. The existing difficulty to construe a uniformed theory of international responsibility and even more an international codification should be added.<sup>10</sup>

Even with those limitations, the international responsibility has been developed on the basis that it is inferred, as a principle of international law; that any violation of an international obligation implies that of a reparation in an adequate form.<sup>11</sup>

The Inter-American System for Protection of Human Rights provided in the American Convention, embraces that fundamental principle of international law in article 63.1 which provides that:

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

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Inter-Am. Ct. H.R. (Ser. C) No. 2 (1990); *Godínez Cruz v. Honduras* (Interpretation of Compensatory Damages), Judgment of August 17, 1990, Inter-Am. Ct. H.R. (Ser. C) No. 9 (1990); *Aloeboetoe et al. v. Suriname* (Reparations), Judgment of September 10, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15 (1994); *Gangaram Panday v. Suriname*, Judgment of January 21, 1994, Inter-Am. Ct. H.R. (Ser. C) No. 16 (1994); *Garrido*, (Ser. C) No. 26; *El Amparo v. Venezuela* (Reparations), Judgment September 14, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 28 (1996); *Neira Alegría et al. v. Peru* (Reparations), Judgment of September 19, 1996, Inter-Am. Ct. H. R. (Ser. C) No. 29 (1996).

9. See Aguiar Aranguren, Asdrúbal, *Responsabilidad Internacional del Estado por Violación de Derechos Humanos*, (Impressions on the Pact of San José). Separata de la Revista de Derecho Público, No. 53-54 (Ed. Jurídica Venezolana 1993).

10. See García-Amador, F.V., *Principios de Derecho Internacional que rigen la responsabilidad: Análisis Crítico de la Concepción Tradicional* (Madrid, Escuela de Funcionario Internacionales 1963).

11. Cf. *Usine de Chorzow, Compétence*, arrêt No. 13, 1928, C.P.J.I., (Ser. A) No. 17, at 29; *Aloeboetoe et al.*, (Ser. C) No. 11, para. 43.

breach of such right or freedom be remedied and that fair compensation be paid to the injured party.<sup>12</sup>

That international law obligation governs all aspects of the reparations such as its scope, method, and benefits. As for its scope, article 63.1 distinguishes between the behavior that a State responsible for a violation should observe from the time that judgment is entered and the consequences of that State's attitude during the violation. As to the future, it seeks to ensure the injured party the enjoyment of the right or freedom violated, and otherwise it empowers the Court to impose reparations.<sup>13</sup>

Such reparation, insofar as is possible, consists of the full restitution (*restitutio in integrum*), which consist of the restoration of the prior situation and the reparation of the consequences of the violation.<sup>14</sup> Nevertheless, that is not the only way to repair an international illegal act since there may be cases in which *restitutio in integrum* is inapplicable or is insufficient or inadequate.<sup>15</sup>

Now then, the responsibility in human rights matters is imputed to the State first; and eventually, to the individuals, insurgent groups or liberation movements in connection with violations of the Humanitarian International Law. Additionally, that international responsibility arises, not only from an internationally illegal act, but rather it should represent a violation of a human right protected under an international instrument or in customary international law,<sup>16</sup> particularly, if it is *jus cogens*.<sup>17</sup>

The obligation of the State to respect human rights implies an obligation to not act. Nevertheless, it also implies the duty of guaranteeing those rights, which results in an obligation to act. For example, in the cases of *Velásquez Rodríguez* and *Godínez Cruz*, the Inter-American Court affirmed, in connection with article 1.1 of the American Convention, that the obligation to "ensure" implies the right of the States Party to organize

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12. American Convention, *supra* note 1, art. 63.1.

13. Aloeboetoe et al. (Reparations) (Ser. C) No. 15, para. 46.

14. Velásquez Rodríguez (Compensatory Damages) (Ser. C) No. 7, para. 26.

15. *Usine de Chózwow*, *supra* note 11, at 48.

16. Van Boven, Theo, INFORME DEFINITIVO PRESENTADO A LA SUBCOMISIÓN DE PREVENCIÓN DE DISCRIMINACIONES Y PROTECCIÓN A LAS MINORÍAS DE LAS NACIONES UNIDAS. E/CN.4/Sub. 2/1993/8 at 18; citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS (1987) (provides that a State violates an international human rights if, as a State political issue, it practices, encourages or tolerates a) genocide; b) slavery or the trade of slaves; c) murder or be the cause for the disappearance of persons; d) torture or other punishments or cruel, inhuman and degrading treatment; e) the prolonged detention; f) the systematic racial discrimination; or g) a systematic regime of flagrant violations of internationally recognized human rights.

17. *Id.*

their public protection systems so that they are capable of judicially ensuring the free and full enjoyment of human rights.<sup>18</sup>

The international responsibility for the violations of human rights responds, in any event, to that imputed to the State for acts by its agents and in exercising its functions. That for which the objective theory of responsibility operates, which does not take into account exemptions from responsibility in deceit function or negligence in the agent's behavior, an aspect reserved to the subjective responsibility as an internal law issue. In such manner that if an agent acts in said manner, the State is always responsible for having elected or chosen the officer or agent that acted negligently (*culpa in eligendo*) or the State failed to supervise the acts of its agents (*culpa in vigilndo*).

For all intents and purposes, it is irrelevant to assess the individual fault of the those committing the international illegal act since the agent may not be individualized or identified. The State would only be exempt from responsibility if it did not support or tolerate the transgression. Otherwise, that even if this occurred despite having acted in a preventive manner, it made every effort to ensure that the illegal act would not go unpunished.<sup>19</sup>

However, the objective responsibility of the State can go beyond the acts of its agents. It is possible that the State apparatus act in such a way that allows the violation to go unpunished; or that the victim's rights not be recovered if it has tolerated that individuals or groups act free or unpunished in detriment to the human rights recognized in the Convention.<sup>20</sup>

### III. THE VICTIM'S RIGHT TO REPARATIONS

In regards to human rights protection, the individual, and sometimes a group,<sup>21</sup> have the right to obtain reparations for human rights violations.

It is important to highlight as a specific note to international human rights law, that the right to be repaired substantially modifies the notion of traditional international law. In this case, the State that commits the illegal act is responsible to the injured State at an interstate level and not before the individual or group of persons that suffered the damages, who are

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18. Velásquez Rodríguez (Ser. C) No. 4, para. 166 and 175; Godínez Cruz (Ser. C) No. 6, para. 166, 175.

19. See Velásquez Rodríguez (Ser. C) No. 4, para. 183.

20. *Id.* para. 187.

21. Specially, when it involves flagrant human rights violations as victims of genocide, detentions and general executions, and others which may consist of a group of minimal humanitarian norms as for example, those indicated in article 75 of Protocolo I of the Convention of Geneva, on August 12, 1949 and the Declaration of Minimal Humanitarian Norms aproved in Turku by a group of experts on December 2, 1990 *reprinted in E/CN.4/Sub. 2/1991/55*.

unable to make an international claim.<sup>22</sup> Hence, in international human rights law, the State from which the victim is a national, does not have an inherent right to receive reparations since it does not function as a diplomatic protection.

The Inter-American Court has recognized reparations for individuals as an injured party or in its default, to the victim's relatives. In one occasion, it was attempted to obtain reparation for a group in a case where the demanded State admitted its responsibility for the facts articulated in the demand.<sup>23</sup> Specifically, the Inter-American Commission requested that a tribe be indemnified because it found that the tribe had suffered direct moral damages,<sup>24</sup> but the Court found that in practice, "[t]he obligation to pay moral compensation does not extend to such communities, nor to the State in which the victim participated . . . If in some exceptional case such compensation has ever been granted, it would have been to a community that suffered direct damages."<sup>25</sup>

The theory of the Court, even when it does not grant repair to a group for indirect moral damages, does not necessarily end the possibility of repairing if it is demonstrated that, indeed, a direct moral damages is produced, since the rationale for not repairing the tribe was that the Commission failed to present evidence to prove a "racial motive" and an assumed autonomy of the tribe.<sup>26</sup> It is necessary to wait until a situation arises where the violation of human rights is of such magnitude that it could be demonstrated that a group suffered direct moral damages. In such case, the Inter-American Court would have to interpret if the word "injured" of article 63.1 of the Convention, could cover not only the individual as "injured parties," but also a group, hence it would recognize its international subjectivity.

In my opinion, that extensive interpretation is not proper in cases dealing with civil and political rights violations. However, in situations where economic, social and cultural rights are violated, it is evident that the passive subject of the violation is the group. Thus, it is not strange to find that there is a possibility that not too long from now there would be the opportunity to present to the Inter-American Court a case with these

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22. Rodley, Nigel, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 97 (1987).

23. *Aloeboetoe et al. (Reparations)* (Ser. C) No. 11.

24. In that case it was alleged that "[i]n the traditional Maroon society, a person is not only a member of his own family group, but also a member of the village community and of the tribal group. In this case, the damages suffered by the villagers due to the loss of certain members of its group must be redressed. Since the villagers, in practice, constitute a family in the broad sense of that term . . . they have suffered direct emotional damages as a result of the violations of the Convention." *Id.* para. 19.

25. *Id.* para. 83.

26. *Id.* para. 84.

characteristics, in view of the requirements of the Protocol in Addition to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights.<sup>27</sup> Said protocol establishes as mandatory a wide range of economic, social, and cultural rights. However, in order to become effective, it requires that at least eleven States ratify or adhere to it.<sup>28</sup>

In *Aloeboetoe et al.*, the Court went further since it found that although in the compensation for the heirs of the victims there is a fixed sum for education of minors until they reach a certain age, those objectives “[w]ill not be met merely by granting compensatory damages; it is also essential that the children be offered a school where they can receive adequate education and basic medical attention.”<sup>29</sup>

That method of reparation covers more than the direct benefit to the children of the victims. That is because in a certain form, an obligation was established on the demanded State which protects the social rights, as well as the right for an education and health, that undoubtedly, benefit an entire community.

#### IV. *LOCUS STANDI* OF THE VICTIM IN THE REPARATION STAGE

Article 61 of the American Convention clearly establishes that “[o]nly the States Party and the Commission shall have the right to submit a case to the Court.”<sup>30</sup> Accordingly, neither the victim nor the representatives are parties in the contentious process before the Court, even when granted some participation.<sup>31</sup> Indeed, the representatives of the victim or their relatives can act as assistants of the Commission’s representative before the Court.<sup>32</sup> Hence, the tribunal would hear its points of view in the event that the plaintiff attempts to discontinue the claim<sup>33</sup> or when the parties have

27. Protocol in Addition to the American Convention on Human rights in the area of Economic, Social, and Cultural Rights “Protocol of San Salvador” (Nov. 17, 1988) (visited on May 31, 1999) <<http://www.oas.org/EN/PROG/JURIDICO/english/Treaties/a.52.html>.

28. *Id.* at art. 21.3.

29. *Aloeboetoe et al. (Reparations)* (Ser. C) No. 15, para. 96. (establishing that Suriname is obligated to reopen the school at Gujaba and staff it with teaching and administrative personnel to enable it to function permanently as well as to reopen and make operation the existing medical dispensary).

30. American Convention, *supra* note 1, art. 61.

31. *Viviana Gallardo et al., Advisory Opinion (Piza Escalante, J.) Inter-Am. Ct. H.R., (Ser. A) No. G 101/81* at 31.

32. RULES OF PROCEDURE OF THE INTER-AM. CT. H.R., ANNUAL REPORT (1991), O.A.S. Doc. OEA/Ser.L/V/III.25 doc 7 at 18 (1992) *reprinted in* Basic Doc. Pertaining to Human Rights in the Inter-American System OEA/Ser.L.V/III.82 doc. 6, rev. 1, at 145 (1992) art. 22.2 [hereinafter Rules of Procedure].

33. *Id.* at art. 43.1.

arrived at a friendly settlement.<sup>34</sup> During the determination of reparations, according to article 44.2 of the Rules of Procedure, the Court is authorized to invite the victim's representatives or its relatives so that they can submit briefs regarding the application of article 63.1 of the Convention.<sup>35</sup> That was the first attempt of the Inter-American system to allow the victim to have certain procedural rights in the Inter-American Court.

The Court, knowing that the objective of the American Convention is to protect individual's rights,<sup>36</sup> introduced a fundamental change in the new Rules of Procedure of the Court, which became effective on January 1, 1997, upon giving *locus standi* to the victim in the reparation stage. Indeed, the Court has recognized its importance upon establishing that in that stage the "[r]epresentatives of the victims or of its relatives may present their arguments and evidence independently."<sup>37</sup>

In essence, the Court will also be able to authorize its autonomous participation in reparation hearings. The reason of being that manner is that in the reparation stage, the victim or its representatives are the proper person to present to the tribunal first hand evidence of expenses and other facts which facilitate the determination of the extent and amount of the compensation. Further, it is the beneficiary or the party directly affected by the decision.

#### V. PROCEDURES TO DETERMINE REPARATIONS

The Inter-American Court has the ability to order reparations along with the judgment on the merits. In essence, it can theoretically punish and reserve its determination for a subsequent procedural stage. The Rules of Procedure of the Court do not provide for a specific procedure to determine reparations. The new Rules of Procedure only has an article which provides that "[w]hen the judgment on the merits does not specifically resolve the reparations, the Court will schedule that opportunity for its later decision and it will determine the procedure."<sup>38</sup>

Back to the process of reparations, the justification of this stage is based upon obtaining sufficient evidentiary proof, including experts, depending on the degree of difficulty of each case, the number of beneficiaries, and the nature of the violations. The general procedural practice<sup>39</sup> has been to grant to the Parties, which include the Commission and the State, a reasonable period of time to reach an agreement or friendly

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34. *Id.* at art. 43.2.

35. *Id.* at art. 44.2.

36. Velásquez Rodríguez (Preliminary Exceptions) Judgment of June 26, 1987, Inter-Am. Ct. H.R. (Ser. C) No. 1, para. 30 (1987).

37. Rules of Procedure, *supra* note 34, art. 23

38. *Id.* at art. 56.

39. Godínez Cruz (Ser. C) No. 8 (the exception to this rule).

settlement, which would be reviewed and confirmed by the Tribunal.<sup>40</sup> In the event that an agreement or confirmation is not reached, the procedural stage of reparations begins, for which the parties are offered a period of time to present the briefs as to the extent, content, and amount of the reparations.

As a procedural practice, the Inter-American Court holds public hearings to allow the parties to present their proof and allegations about the reparations and then issues an appropriate judgment. From there on, the parties enter into another procedural stage known as supervision of the execution of judgments, which consists on determining if the responsible State has fulfilled its obligations in the manner and anticipated time. Only the cases against Honduras have gone through this stage since the Court issued resolutions and found Honduras in compliance with the judicial orders and terminated the process. The parties had previously manifested their consent to terminate the legal proceedings in those cases.

The actions carried out by the Court while exercising its duty to supervise, depend on the nature of the issues resolved in the reparation judgments. In some cases, as those involving Honduras, it should determine the payment of a fixed amount of money as compensation to the relatives of the victims and that trust funds be established in favor of minor beneficiaries. In the case of *Aloeboetoe et al.*, the work is more detailed since in addition to supervising, it must also analyze the annual report presented by the Aloeboetoe Foundation, created by the reparation judgment; specifically, if the resolutions ordered, such as the reopening of the School and the Medical Clinic in Gujaba continue in operation.

Perhaps the most delicate part in the system for the protection of human rights is that referred to the reparations and its compliance because of its intrinsic connection with the judicial effectiveness of the Court's judgments.<sup>41</sup> Consciously, and in order to prevent the Court's judgments from being merely a moral sanction, the American Convention provided "[t]hat part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the State. . ."<sup>42</sup>

This provision is not analogous to any provision found in the European Convention on Human Rights, it allows for the compliance with the reparation judgment. It is a "[c]ertain disposition, which can make possible a form of enforcing judgments of the Inter-American Court, in the event that the judgment stipulates for compensatory damages, effective, fast, pursuant to the true and certain objective of the protection of human

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40. Rules of Procedure, *supra* note 34, art. 56.2.

41. See RODRÍGUEZ RESCIA, VÍCTOR MANUEL, Eficacia Jurídica de la Jurisprudencia de la Corte Interamericana de Derechos Humanos en La Corte y el Sistema Interamericano de Derechos Humanos, NIETO NAVIA, RAFAEL, (Inter-Am. Ct. H.R. 1994).

42. American Convention, *supra* note 1, art. 68.2.

rights.”<sup>43</sup> Nevertheless, the true threatening force of the Court’s judgments should reside in the Member State’s agreement in the Convention, to comply with the Court’s decisions as provided in article 68.1 of the Convention. That “agreement”, may not be used to lessen the coercive force of the judgments since, on the contrary, States Party are obligated to respect the rights and freedoms observed in the Convention according to its article 1.1. In fact, the American Convention acquires an effectiveness of the highest practical importance for acting as internal right of immediate application by the organs of the States Party and for its application in the international law framework.

This does not prevent article 68.1, which is similar to article 53 of the European Agreement for the Protection of Human Rights, and that is imperative for all the States Party, would be reinforced by internal legislation because of their obligation to comply with article 2 of the American Convention, to adopt internal rights provisions to guarantee the exercise of the rights and freedoms not guaranteed under that legislation. In other words, allow the judgments of the Inter-American Court to be executory as well as mandatory.

#### A. *Terminology for Forms of Reparation*

The first thing that should be outlined when dealing with compensation or reparations, is to establish the correct terminology and determine their content and extent. The uniformed and sometimes erroneous use of the terminology in international instruments providing for reparations is evident. This way for example, article 63.1 of the American Convention establishes that when it is established that a Member State has violated the rights or freedom protected under said Convention, the Court would be allowed to fix a “just compensation” to the injured party. The term “compensation,” in strict technical sense, represents only one form or reparation, the latter being the correct generic term to refer to any means of compensation, compensation, restitution, rehabilitation, or satisfaction, which appears to be the meaning and extent of said provision.

The aforementioned implies that in applying correct legislative techniques, the American Convention should have used the word “fair reparation” as a broad term and not “compensation” which, although includes compensation for material and moral damages, it excludes restitution, rehabilitation, or satisfaction.<sup>44</sup>

Perhaps, the terminology problems forced the Inter-American Court to make a broad interpretation of the term “just compensation” in establishing that “[t]he fair compensation describes as “compensatory” in the judgment on the merits . . . includes reparation to the family of the

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43. Ros Espiel, Héctor, *La Convención Americana y la Convención Europea de Derechos Humanos, Análisis Comparativo 221* (Ed. Jurídica de Chile 1991).

44. Van Boven, *supra* note 16, at 63.

victim for the material and moral damages they suffered . . . ”<sup>45</sup> where it compared the term “compensation” with that of “reparation” due to the incorporation of the elements of reparation which are not proper in terms of “compensation.”

However, the jurisprudence of the Inter-American Court itself, in subsequent judgments has used the terms “reparations” and “compensation” indistinctly.<sup>46</sup> In an effort to have uniformity in the terminology at an international level, it is worth noting the effort of Mr. Theo Boven, Special Reporter for the United Nations<sup>47</sup> in proposing a project of principles and basic guidelines within the different forms of reparation would be highlighted given its character. As part of it, it includes restitution, compensation, rehabilitation, satisfaction, and guarantees against reoccurrence.

### B. *Determination and Extent of the Reparations*

Determining a person’s right to restitution, compensation or rehabilitation results in one or more human rights violations. Such a finding or confirmation is generally preceded by a judgment or opinion from an international tribunal, although in some cases there are non-jurisdictional organs and different competence that may issue resolutions or reports with recommendations in that sense. In that manner, the Inter-American Commission of Human Rights, the European Commission of Human Rights the Committee of human rights of the United Nations, the Committee for the Elimination of the Racial Discrimination of the United Nations, the Committee against the Torture of the United Nations, among others.

On the other hand, there is a general erroneous belief in that the reparations in human rights matters are based upon “flagrant violations” of human rights. That is perhaps because many United Nations international conventions on human rights have that characteristic. Nevertheless, some international instruments such as the American Convention on Human Rights, the European Agreement for the Protection of the Human Rights and the Pact of Civil Rights and Political, provide the opportunity to repair and compensate for violations that would not necessarily be considered “flagrant.”<sup>48</sup>

Before the victim or relatives of the victim obtain some form of reparation for a human rights violation, it is required that the illicit

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45. Velásquez Rodríguez (Compensatory Damages) (Ser. C) No. 7, para. 39.

46. Aloeboetoe et al. (Reparations) (Ser. C) No. 15, para. 12; Neria Alegría et al. (Reparations) (Ser. C) No. 20, para. 5; El Amparo (Reparations) (Ser. C) No. 19, para. 5.

47. Van Boven, *supra* note 16.

48. Those civil and political rights, which may not necessarily be considered human rights of lower scale, do not represent violations of such seriousness as genocide, mass discrimination, disappearances.

behavior cease and if it is extended and they have the right to obtain guarantee against reoccurrence.<sup>49</sup> In general, the reparation can adopt the form of *restitutio in integrum*, compensation and securities and guarantees against reoccurrence. The following classification can be made.<sup>50</sup> *Restitutio in integrum* is the re-establishment of the situation to what existed before the international unlawful act. Compensation occurs when the damages cannot be compensated by means of the *restitutio in integrum*. It covers any damages of economic value suffered by the injured party such as physical or mental damages, psychological or physical pain or suffering, opportunity cost; loss of wages and the capacity to earn a living; reasonable medical and other expenses in rehabilitation, damages to goods and trade; including loss earnings; damages to reputation or dignity and reasonable expert fees.<sup>51</sup>

The satisfaction and the non-reoccurrence guarantees seek to obtain particular satisfaction for moral damages and it can adopt the form of an apology, in nominal damages. In the cases of flagrant violations, a compensation for damages reflects the graveness of the violation; the verification of the facts and the public revelation of the truth; a declaratory judgment in favor of the victim; an excuse and acceptance of the responsibility; the prosecution of people presumably responsible for the violations; homages to the victims; and the prevention of a reoccurrence of the violations.

The jurisprudence of the Inter-American Court has made an important development in the matter, continuing in certain form the previous sketch. For example, it has had a noted concern for the obligation of the demanded State in preventing and in essence, for restoring, which are closely linked. Thus, it has stated that:

The State is in the juridical duty to prevent, reasonably, the violations of the human rights, of investigating seriously with the means within its reach the violations that have been made inside the environment of its jurisdiction in order to identify to the responsible ones, of imposing them the pertinent sanctions and of assuring the victim an appropriate repair.<sup>52</sup>

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49. Van Boven, *supra* note 16 at 29.

50. *Id.*

51. *Id.*

52. Velásquez Rodríguez (Compensatory Damages) (Ser. C) No. 7, para. 174; Cf. Juan E. Méndez and José Miguel Vivanco, Disappearances and the Inter-American Court: Reflections on a Litigation Experience, in 13 *HAMLIN L. REV.* 507-577 (1990).

## VI. EXTENT AND CONTENT OF THE REPARATIONS IN THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American Court has had the opportunity to determine the repairs through the interpretation and application of the article 63.1 of the American Convention. Specifically, upon developing the concept of paying a fair compensation to the victim's relatives and upon establishing a consistent reparation in complete restitution (*restitutio in integrum*), which defined, not only the re-establishment of the previous situation, but as the possibility of repairing the consequences of the violation and the payment of a fair compensation like compensation for the patrimonial and non-patrimonial damages including emotional harm,<sup>53</sup> with that which incorporated elements characteristic of the compensation concepts, rehabilitation and satisfaction.

Although the Court has not analyzed in detail the principles that should guide the pecuniary compensations, it has established criteria and guidelines. Thus, special damages and loss earnings should be appreciated reasonably with reference to their liquidation; a criteria should be applied of best benefit that the law of the responsible State offers their nationals and that of the "indexacion" or conservation of the real value of the stipulated amount when the payments should be made in quotas or long terms.<sup>54</sup>

In spite of the fact that the jurisprudence of the Court has established that the reparation is compensatory and not punishing,<sup>55</sup> it is true that, in comparison with the jurisprudence of the European Court of the Human Rights, it has not been very conservative, since it has focused more on the recognition of representative satisfactions in a timid view of the concept of "equal satisfactions" provided in article 50 of the Agreement of Rome.<sup>56</sup>

In the cases against Honduras and Suriname, the Inter-American Court established criteria to determine the reparations, following classic civilistic limits, recaptured by the international arbitral jurisprudence.<sup>57</sup>

In the most recent reparation judgments issued by the Tribunal,<sup>58</sup> the previous jurisprudential criteria was changed and the establishment of reparations for patrimonial and non-patrimonial damages was adopted, which follows the system applied by the jurisprudence of the European Court of Human Rights.

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53. Velásquez Rodríguez (Compensatory Damages) (Ser. C) No. 7, para. 26.

54. Velásquez Rodríguez (Interpretation of the Judgment on Compensatory Damages) (Ser. C) No. 2, para. 30.

55. Velásquez Rodríguez (Compensatory Damages) (Ser. C) No. 7, para. 38.

56. See Piza Rocafort, Rodolfo, *RESPONSABILIDAD DEL ESTADO Y DERECHOS HUMANOS* 210 (San José, Universidad de Centroamérica 1988).

57. Aloeboetoe et al., (Ser. C) No. 11, para. 50.

58. El Amparo (Reparations) (Ser. C) No. 19; Neira Alegria et al. (Reparations) (Ser. C) No. 20.

Nevertheless, for practical effects, we will analyze the jurisprudence of the Inter-American Court under the criteria of loss wages, special damages, and moral damages under the understanding that are a general approach of the right applicable to international law.<sup>59</sup>

## VII. MATERIAL DAMAGES

### A. *Loss Earnings*

As for the compensation for loss earnings, it has been understood that it equals the sum of the victim's income or that which his successors would receive for the labor life if a human rights violations would not have occurred.<sup>60</sup>

The basis to calculate the loss earnings varies and depends on the circumstances of each case. In *Velásquez Rodríguez and Godínez Cruz*, the basis for calculating the liquidation was the earned income of the victims at the time of their disappearance projected until the time for mandatory retirement as provided by internal law. On the contrary, in the cases of *Aloeboetoe et al.*, *Neira Alegría et al.*, and *El Amparo*, since the victims did not depend on a fixed salary, the minimum salary or the value of the "canasta básica alimentaria" were used as basis for calculating the amount.<sup>61</sup> The interests accrued from the time of the action and until the judgment was entered were added to the projected sum.<sup>62</sup>

In order to calculate the victim's projected future income, the life expectancy of the corresponding country was taken into account.<sup>63</sup> A new element introduced to the most recent jurisprudence,<sup>64</sup> was to subtract twenty-five percent to the total sum of the projected income.

### B. *Special Damages*

They are generally understood as the expenses incurred by the victims or their relatives as a result of their efforts to investigate and sanction the

59. The international arbitrary jurisprudence considers that the material prejudices include special damages as well as loss earnings and in addition establish that the compensation should include the moral damages suffered by the victims. *Aloeboetoe et al. (Reparations)* (Ser. C) No. 15, para. 50.

60. *Id.* para. 88.

61. *Velásquez Rodríguez (Compensatory Damages)* (Ser. C) No. 7, para. 46; *Godínez Cruz (Compensatory Damages)* (Ser. C) No. 8, para. 44; *Aloeboetoe et al. (Reparations)* (Ser. C) No. 15, para. 88; *Neira Alegría et al. (Reparations)* (Ser. C) No. 20, para. 50; y *El Amparo (Reparations)* (Ser. C) No. 19, para. 28.

62. *Neira Alegría et al (Reparations)* (Ser. C) No. 20, para. 50.

63. *Id.* See *El Amparo (Reparations)* (Ser. C) No. 19, para 28.

64. *Id.*

actions that violated the victims rights.<sup>65</sup> In essence, all expenses should be demonstrated with proper evidence and would be returned to the person that incurred such expenses. Even when there is insufficient proof, the Court has made compensatory estimates for expenses incurred in different actions in the country appealing to principles of equity.<sup>66</sup>

The return of the costs as part of incurred expenses has been a conflicting matter. First, because in some cases it was not considered reasonable to pronounce judgment for having requested compensatory costs in the process.<sup>67</sup> Subsequently, because it has been reiterated that the procedure of the case before the Inter-American Court operates by means of a system of protection of the human rights instituted in such a way that the Commission and the Inter-American Court finance their expenses within the budget of the Organization of American States.<sup>68</sup> As to the first aspect, the reformation to the Rules of the Procedure, allows that even when the demanding party does not request compensation, it may at anytime.<sup>69</sup>

With respect to the costs before the Court, the fact that the individual has *locus standi* in the stage of reparations and can act as an individual party since the Rules of Procedure became applicable, it seems to change the panorama with regards to the costs in that the individual incurs in the protection of his rights since is not forced to litigate under the aegis of the Commission in that stage and it can opt to contract private professional services.<sup>70</sup>

As for the return of expenses to the victim for the process before the Commission, it appears to represent a problem since in that phase, it is the individual who should incur direct expenses before the organ. If the circumstances in the case allow for a non-governmental organization to represent it before the Commission, and if those expenses are not recognized by the Court, it may be reducing the individual to take action before the Inter-American human rights protection, because it is not necessarily an non-governmental organization may be interested to take the case, or its budget would not allow it. On the other hand, if the individual does not want an non-governmental organization to handle his case before the Commission, it would seem necessary to ask the question of whether the Court would recognize returning the expenses for contracting independent professional services.

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65. Velásquez Rodríguez (Compensatory Damages) (Ser. C) No. 7, para. 41.

66. El Amparo, (Ser. C) No. 19, para. 21.

67. Velásquez Rodríguez, (Ser. C) No. 4, para. 193.

68. Aloeboetoe et al. (Reparations) (Ser. C) No. 15, para. 113.

69. Rules of Procedure, *supra* note 32, art. 44.1.

70. *Id.* at art. 23.

## VIII. NON PATRIMONIAL DAMAGES

A. *Moral Damages*

Within this category of damages, is included in particular, compensation for moral damages by means of different forms of satisfaction. Moral damages with regards to human rights is perhaps the damage that is most justly recouped. That is because it is evidenced and human nature that all persons subjected to aggressions and taunt in violation of their human rights experience moral damages. The Court has clearly indicated that no evidence is necessary to arrive at that conclusion if the responsibility of the State is demonstrated, or if the State expressly acknowledges its responsibility.<sup>71</sup>

Determining moral damages is generally approached by international tribunals in a casuistic manner. Thus, resulting in the establishment of general principles or normative rules in this field. However, some guidelines in determining moral damages and the way to recoup them can be found in the Court's decisions. For example, in the cases *Velásquez Rodríguez* and *Godínez Cruz*, the Inter-American Court embraced the issue of compensation for moral damages in response to the Inter-American Commission's request that the Government be ordered to pay a sum of money to the successors of the victims in reparation of the special damages, loss earnings, and moral damages. To prove the latter, it presented psychiatric experts that the Court found sufficiently established the existence of moral damages.<sup>72</sup>

It is necessary to add that the burden of proof to show moral damages can shift in some cases. In the aforementioned cases against Honduras, the Court established that "[t]he Government was unable to deny the existence of the psychological problems that affected the relatives of the victim."<sup>73</sup>

When it is to the victim directly or the victim's successors who should be compensated for moral damages, there is no doubt that evidence of damages exist. The issue is different when the successors of the victim are not the ones that should be compensated, but instead dependents not named successors. In that case, it is necessary to prove moral damages, but in the case of parents, there is a presumption that the parents have morally suffered the cruel death of their sons and daughters, since "[i]t is essentially human for all persons to feel pain at the torment of their child."<sup>74</sup>

That presumption is stronger when the psychic effects suffered by the victim's relatives are the result of a forced disappearance of people, which

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71. *Aloeboetoe et al.* (Ser. C) No. 15, para. 52.

72. *Id.*

73. *Velásquez Rodríguez (Compensatory Damages)* (Ser. C) No. 7.

74. *Aloeboetoe et al. (Reparations)* (Ser. C) No. 15, para. 76-77.

is surrounded of dramatic circumstances, and of an uncertainty which is difficult to vanish.<sup>75</sup> The Court found that the form of liquidation of the compensation for moral damages must conform to principles of equity<sup>76</sup> and in all cases it has translated it to a monetary amount, but that does not mean that the Court has discretion to award them.<sup>77</sup> For example, the results of the psychiatric evaluations would be important technical elements to consider.

Nevertheless, that has not been the only form of compensation of moral damages. There are many cases in which other international tribunals have agreed that the compensatory judgments per se, constitutes sufficient compensation of moral damages, especially the European Court of Human Rights.<sup>78</sup> But since the human rights violations in the cases solved by the Inter-American Court are serious because it involves the right to live which represents a stronger moral suffering, it was found that a compensatory judgment is insufficient in itself, thus additional monetary compensation is allowed according to the principles of equity.

The European Court has established other forms of reparation for moral damages including restitution. For example, in the case *Brigandi*, the Government manifested having repaired the violation upon reinstating to the petitioner a property to which his rights had been denied.<sup>79</sup>

#### B. *Non Patrimonial Satisfaction*

In the cases against Honduras, the Commission requested ordering the government to take some measures, such as the investigation of facts related to the involuntary disappearance of the victims, the punishment of those responsible, the public statements condemning the practice, and the revindication of the victim and others.<sup>80</sup> The Court affirmed that such measures would become part of the reparation of the consequences of the infringement upon the rights or freedoms and not of the compensation.<sup>81</sup> Nevertheless, it found that the indication in the judgment on the merits on the duty to investigate and prevent, are the duty of the responsible State until fully carried out.<sup>82</sup>

Even though the Court did not consent or refer to other requests for satisfaction, it did find that the compensatory judgment, constitutes in

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75. See Velásquez Rodríguez (Ser. C) No. 7, para. 50.

76. *Id.* para. 27.

77. Aloboetoe et al. (Reparations) (Ser. C) No. 15, para. 87.

78. Arrêt Kruslin de 24 avril 1990, (Ser. A) No. 176-A, at 24, para. 39.

79. Eur. Ct. H.R., arret Brigandi du 19 février 1991, (Sér. A) No. 194-B, at 32, para. 34.

80. Velásquez Rodríguez, (Ser. C) No. 7, para. 32.

81. *Id.* para. 33.

82. *Id.* para. 43, 35.

itself, a form of reparation and moral satisfaction of significance and importance for the relatives of the victims.<sup>83</sup> In the case *Aloeboetoe et al.*, the Court found that the public acknowledgment of the responsibility by means of the Court's judgment "[i]s a significant and important form of reparation and moral satisfaction for the families of the victims and the Samaraca tribe."<sup>84</sup>

The victim is the first person with the right to receive reparation for moral damages.<sup>85</sup> However, in cases of human rights violations as serious as the disappearance, it is possible that the right to be compensated be transferred to their heirs by succession.<sup>86</sup> And to demonstrate that character, it is sufficient to show the family relationship without being "required to follow the internal procedures of inheritance law."<sup>87</sup>

## IX. CONCLUSION

In matters of reparations, the jurisprudence of the Inter-American Court has been able to define parameters that facilitate its determination and bases for the calculation of the same. This way for example, there is uniformity within the patrimonial damages in the way of estimating it from the guidelines taken in the first cases, but mainly, in the cases *El Amparo* and *Neira Alegría et al.* With reference to moral damages, there has been a constant jurisprudence about its justification and to the determination of the beneficiaries. What has not been easy, is finding a formula for their calculation that could be applied to all the cases, due to the particularities of each matter and the type of violation. In any event, to calculate the moral damages, it is not advisable to follow the civilistic approaches used in some internal legislation that take as parameter a proportion of the patrimonial damages to calculate the moral damages, since the compensation for moral damages would be larger or smaller according to the victim's income, which does not seem to be a just approach to determine them.

As for other measures of satisfaction, the Court has been reluctant to consider them and has limited itself to issue judgments, as well as the reparation judgment itself, as appropriate forms of compensation. Lastly, as regards costs, we should await the Court's decision when it is presented with the first cases where the individual has autonomous procedural participation in the stage of reparations. Nevertheless, it will also be decisive what it decides when funds for the expenses of cases are presented

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83. *Id.* at para. 36.

84. *Aloeboetoe et al.*, (Reparations) (Ser. C) No. 15, para. 31.

85. *Aloeboetoe et al.*, (Reparations) (Ser. C) No. 15, para. 52 (indicating that it was clear that the victims suffered moral damages for it is characteristic of human nature that anybody subjected to the aggression and abuse described . . . will experience moral suffering.

86. *Id.* at para. 54.

87. *Velásquez Rodríguez*, (Compensatory Damages) (Ser. C) No. 7, para. 54.

before the Commission where patronage of some non-governmental organization does not exist. The victim's continued direct actions the Inter-American system for the protection of human rights and the American Convention fulfills its goals and objectives.

# THE DISCONTINUANCE AND ACCEPTANCE OF CLAIMS IN THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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## I. INTRODUCTION

When analyzing the contentious jurisprudence of the Inter-American Court of Human Rights (“the Court” or “Inter-American Court”), it is necessary to emphasize the fact that, during its first seventeen years of work, the Court has ruled on the merits of nine cases presented for its consideration.<sup>1</sup> In three cases, the demanded States have accepted the claims formulated by the Inter-American Commission of Human Rights (“the Commission”).<sup>2</sup> In another case, the Court admitted the

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\* Secretary of the Inter-American Court of Human Rights.

1. Velásquez Rodríguez v. Honduras, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988); Fairén Garbí v. Honduras, Judgment of March 15, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 6 (1989); Godínez Cruz v. Honduras, Judgment of January 20, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 6 (1989); Aloeboetoe et al. v. Suriname, Judgment of December 4, 1991, Inter-Am. Ct. H.R. (Ser. C) No. 11 (1994); Gangaram Panday v. Suriname, Judgment of January 21, 1994, Inter-Am. Ct. H.R. (Ser. C) No. 16 (1994); Neira Alegría v. Perú, Judgment of January 19, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 20 (1995); Caballero Delgado v. Colombia, Judgment of December 8, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 22 (1995); El Amparo v. Venezuela, Judgment of January 18, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 19 (1995); Garrido v. Argentina, Judgment of February 2, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 26 (1996).

2. Aloeboetoe v. Suriname, Judgment of December 4, 1991, Inter-Am. Ct. H.R. (Ser. C) No. 11 (1994); El Amparo v. Venezuela, Judgment of January 18, 1995, Inter-Am. Ct. H.R.

discontinuance of the action presented by the Commission.<sup>3</sup> It should also be pointed out that in one of the nine cases, the Court released the demanded State from all responsibility.<sup>4</sup> In one case, the Court accepted three of the preliminary exceptions interposed<sup>5</sup> and in another, the Court did not accept the interposed petition and remitted it to the Commission for its consideration.<sup>6</sup>

When analyzing the aforementioned information, it is important to note that in five cases in which the Court has entered judgment on the merits and found a State responsible for violating the American Convention on Human Rights ("the Convention"),<sup>7</sup> the processes have concluded in an unusual manner. That is, as consequence of "[t]he situation or the procedural act, either unilateral or bilateral, voluntary or mandatory, which interrupts the normal development of the process."<sup>8</sup> To wit, the *Cayara Case*<sup>9</sup> concluded during the preliminary exceptions stage. *Maqueda Case*<sup>10</sup> concluded because of the discontinuance presented by the Commission and in the cases *Aloeboetoe et al Case*,<sup>11</sup> *El Amparo Case*<sup>12</sup> and *Garrido and Baigorria Case*,<sup>13</sup> the States recognized their international responsibility for the events that gave rise to the demand. In other words, there have been five cases in which the process has not normally developed until its completion.

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(Ser. C) No. 19 (1995); *Garrido v. Argentina*, Judgment of February 2, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 26 (1996).

3. *Maqueda v. Argentina*, Judgment of January 17, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 18 (1995).

4. *Fairén Garbí v. Honduras*, Judgment of March 15, 1989, Inter-Am. Ct. H.R. (Ser. C) No. 6 (1989).

5. *Cayara Case*, Preliminary Objections, Judgment of February 3, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 14 (1994).

6. *Matter of Viviana Gallardo et al.*, Inter-Am. Ct. H.R. (Ser. A) No. G 101/81 (1984).

7. American Convention on Human Rights, Nov. 22, 1969, 9 ILM 673, OEA/Ser. K/XVI/1.1, doc. 65, rev. 1, corr. 1, (1970) [hereinafter *The Convention*].

8. Luis Alvarez Juliá et al., *MANUAL DE DERECHO PROCESAL* 299 (Editorial Astrea 1992).

9. *Cayara v. Perú*, Preliminary Objections, Judgment of February 3, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 14 (1994).

10. *Maqueda v. Argentina*, Resolution of January 17, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 18 (1995).

11. *Aloeboetoe v. Suriname*, Judgment of December 4, 1991, Inter-Am. Ct. H.R. (Ser. C) No. 11 (1994).

12. *El Amparo v. Venezuela*, Judgment of January 18, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 19 (1995).

13. *Garrido v. Argentina*, Judgment of February 2, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 26 (1996).

There are four cases that are important to analyze because the process has finished in an unusual manner because of the discontinuance in one case and the acceptance of the claim in three other cases. Consequently, it is convenient to analyze the procedural forms of discontinuance and acceptance of a claim. Subsequently, it is necessary to analyze their regulation in the Rules of the Court and in the European Court of Human Rights, the two regional international courts currently existing regarding human rights, as well as in the Rules of the International Court of Justice. Finally, it is important to analyze its application in the inter-American system of protection of human rights by the Court in the four cases previously mentioned.

#### A. *Discontinuance*<sup>14</sup>

The discontinuance is an unusual manner of completing the process, by means of a procedural act of a dispositive nature, without entering a judgment on the merits. To such end, one abdicates the right to act or the right is waived in the course of the process, creating a form similar to that of the renouncement, a means to extinguish obligations. That is to say, the discontinuance can be of two classes: action and of right. In the first case, the renouncement does not prevent the matter in question from being outlined in a subsequent action. In the second case, giving up the right upon which the action is founded terminates the proceedings. In any event, the discontinuance is always a unilateral act on the part of the plaintiff.

#### B. *Acceptance of a Claim*<sup>15</sup>

The procedural form of acceptance of a claim takes place when the demanded party subjects itself to the substantial causes of action formulated in the claim. Acceptance may be made at any time during the process, but before a judgment on the merits is entered, since it implies the subjection the petitioner's demands. It may be effective, if it is accompanied by the fulfilling obligation. It may be expressed or implicit and may also be total or partial, if it covers some or all of the petitioner's pretenses. In any event, it implies the renouncement to the right to a defense.

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14. Alvarez Juliá et al., *supra* note 8, at 300-01; 2 MARIO ALBERTO FORNACIARI, MODOS ANORMALES DE TERMINACIÓN DEL PROCESO 111 (Editorial DePalma 1988); José Ovalle Favela, DERECHO PROCESAL CIVIL 191 (Editorial Harla 1994); 2 JUAN MONTERO AROCA ET AL., DERECHO JURIDICIONAL 349 (Editorial José María Bosch 1994); 2 Aldo Bacre, TEORÍA GENERAL DEL PROCESO 557 (Editorial Abeledo-Perrot 1991); 1 ENCICLOPEDIA JURÍDICA BÁSICA 2438 (Editorial Civitas 1995) 2 NUEVAS ENCICLOPEDIA JURÍDICA 282 (Editorial Seix, 1950).

15. Alvarez Juliá et al., *supra* note 8, at 300, 302; Alberto Fornaciari, *supra* note 14, at 112; OVALLE FAVELA, *supra* note 14, at 191; Montero Aroca et al, *supra* note 14, at 331; 1 Eduardo J. Couture, ESTUDIO DE DERECHO PROCESAL CIVIL 357 (Editorial DePalma 1979); Bacre, *supra* note 14, at 406; ENCICLOPEDIA JURÍDICA BÁSICA, *supra* note 14, at 434; NUEVAS ENCICLOPEDIA JURÍDICA, *supra* note 14, at 615.

C. *Rules of the Inter-American Court of Human Rights*<sup>16</sup>

Article 52.1 of the Rules of the Inter-American Court of Human Rights regulates the form of discontinuance. This article states as follows:

When the party that has brought the case notifies the Court of its intention not to proceed with it, the Court shall, after hearing the opinions of the other parties thereto and the representatives of the victims or their next of kin, decide whether to discontinue the hearing and, consequently, to strike the case from its list.<sup>17</sup>

The Rules of the Inter-American Court are limited to regulating the effects of the discontinuance, if such is applicable, previous consultation with the petitioner's counsel, the presumed victim or relatives, if proper, and consequently, whether it follows to supersede the case and file it. However, even when a discontinuance is granted, article 54 of the Rules provides that "the existence of the conditions indicated in the preceding paragraphs notwithstanding, the Court may, bearing in mind its responsibility to protect human rights, decide to continue the consideration of a case."<sup>18</sup> One of these conditions is the discontinuance.

As for the procedural form of acceptance of the claim, the Rules of the Inter-American Court do not contemplate it and article 31 of the Rules regulates the application of article 63.1 of the Convention. That article would also be applied in the event of an acceptance of a claim. This article states:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.<sup>19</sup>

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16. THE INTER-AMERICAN COURT OF HUMAN RIGHTS: RULES OF PROCEDURE, OEA/Ser. L/V/111.3, doc. 13, Corr.1 (1981), *reprinted in* 20 ILM 1289 (1980) [hereinafter *The Rules*].

17. *Id.* art. 52.1.

18. *Id.* art. 54.

19. The Convention, *supra* note 7, art. 63.1.

#### D. *Rules of the European Court of Human Rights*<sup>20</sup>

Article 48 of the Rules of the European Court of Human Rights is very similar to article 52.1 of the Inter-American Court of Human Rights, because the latter was taken from the former. Indeed, in Europe there is also express regulation concerning the discontinuance, but these regulations do not mention the acceptance of a claim. It is also stated that the Chamber of the Court familiar with the case, considering its responsibilities concerning the court in accordance with article 19 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>21</sup> can order to continue the examination of a case in the presence of a discontinuance. article 48, in its pertinent parts states the following:

When the party which has filed the case before the Court notifies the Secretary of his intention not to proceed and the other parties accept the discontinuance, the Chamber, after consulting with the Commission and the applicant, will decide whether or not there is place for the acceptance of the discontinuance and, consequently, the closing of the case.<sup>22</sup>

The Chamber, according to the responsibilities that concern the Court following to article 19 of the Convention, may order that the examination of the case continue regardless of the discontinuance, friendly settlement, transaction, etc.<sup>23</sup> Article 49 of the Rules of the European Court is also similar to article 31 of the Rules of the Inter-American Court. It regulates what is relevant to the application of article 50 of the European Convention, which is applied in the case of a discontinuance. Article 50 states that:

If the decision of the Court declares that a resolution or a measure ordered by a judicial authority or any other authority of a contracting party is totally or partially against the obligations

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20. R. Eur. Ct. H.R. (repealed 1998).

Editor's note: The new European Court of Human Rights came into operation on November 1, 1998. However, Protocol No. 11 provides that the European Commission should continue until October 31, 1999 to deal with cases which had been declared admissible before the date of entry into force. With the establishment of the new court, the newly elected judges drafted new rules of procedure for the European Court. See *The New European Court of Human Rights, Historical background, organization and procedure* (visited May 31, 1999) <<http://194.250.50.200/eng/PRESS/New%20Court/infodoc%20revised%202.htm> Transitional period >.

21. Eur. Conv. H.R., art. 19. (September 1953) (visited May 31, 1999) <<http://www.coe.fr/eng/legaltxt/e-dh.htm#conv-dh>>.

22. R. Eur. Ct. H.R., *supra* note 20, art. 48.

23. *Id.*

derived from the present Convention, and if the internal right of this party only allows in an imperfect manner to repair the consequences of this resolution or measure, the decision of the Court will grant, if it proceeds, a just satisfaction to the injured party.<sup>24</sup>

It is important to emphasize that article 48 regulates what is established by article 37 of the European Convention that states in part as follows:

The Commission may at any stage of the proceedings decide to strike a petition of its list of cases where the circumstances lead to the conclusion that:

The applicant does not intend to pursue his petition, . . .

[H]owever, the Commission shall continue the examination of a petition if respect for human rights as defined in this Convention so requires.<sup>25</sup>

#### *E. Rules of the International Court of Justice*<sup>26</sup>

The Rules of the International Court of Justice regulate matters related to the discontinuance in a wide and detailed manner. Article 88 states that:

1. If at any time before the final judgment on the merits has been delivered the parties, either jointly or separately, notify the Court in writing that they have agreed to discontinue the proceedings, the Court shall make an order recording the discontinuance and directing that the case be removed from the list.

2. If the parties have agreed to discontinue the proceedings in consequence of having reached a settlement of the dispute and if they so desire, the Court may record this fact in the order for the removal of the case from the list, or indicate in, or annex to, the order, the terms of the settlement.

3. If the Court is not sitting, any order under this article may be made by the President.<sup>27</sup>

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24. *Id.* art. 50.

25. Eur. Conv. H.R., *supra* note 21, art. 37.

26. R.I.C.J. (April 14, 1978) (visited May 31, 1999) <<http://www.icj-cij.org/icjwww/ibasicdocuments/Basetext/irulesofcourt.html>>.

Article 89 further states that:

1. If in the course of proceedings instituted by means of an application, the applicant informs the Court in writing that it is not going on with the proceedings, and if, at the date on which this communication is received by the Registry, the respondent has not yet taken any step in the proceedings, the Court shall make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. A copy of this order shall be sent by the Registrar to the respondent.

2. If, at the time when the notice of discontinuance is received, the respondent has already taken some step in the proceedings, the Court shall fix a time-limit within which the respondent may state whether it opposes the discontinuance of the proceedings. If no objection is made to the discontinuance before the expiration of the time-limit, acquiescence will be presumed and the Court shall make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. If objection is made, the proceedings shall continue.

3. If the Court is not sitting, its powers under this article may be exercised by the President.<sup>28</sup>

It is appropriate to highlight that the Rules of the Inter-American Court and those of the European Court of Human Rights do not make reference to acceptance of a claim.

## II. CONTENTIOUS JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

### A. *Discontinuance*

#### *Maqueda v. Argentina*<sup>29</sup>

The *Maqueda Case* was filed in the Inter-American Court by the Inter-American Commission on May 25, 1994.<sup>30</sup> The issue was whether there had been a violation, by the Argentinean Government, of the American

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27. *Id.* art. 88.

28. *Id.* art. 89.

29. *Maqueda v. Argentina*, Judgment of January 17, 1995, Inter-Am. Ct. H.R. (Ser. C) No.18 (1995).

30. *Id.* para. 1.

Convention by virtue of the sentencing of Guillermo José Maqueda, an Argentine citizen, to ten years of imprisonment, in violation of the Convention.<sup>31</sup> Among the rights that the Commission alleged that Argentina had violated in detriment of the alleged victim, were the right to be heard by an impartial court;<sup>32</sup> the right to the presumption of innocence;<sup>33</sup> and the right to appeal a decision before a judge or superior tribunal.<sup>34</sup> The Commission also requested that the Court find that the Argentinean State ordered Guillermo Maqueda's immediate release by means of pardon or commutation of the sentence, the payment of an appropriate compensation, and of the costs of the proceedings.<sup>35</sup>

According to the petition, Guillermo Maqueda was an active member of Movimiento Todos por la Patria (All for the Fatherland Movement), a political movement of a democratic nature that is legally recognized.<sup>36</sup> Mr. Maqueda attended a movement meeting held on January 22, 1989.<sup>37</sup> At the meeting, motivated by the possibility of a military uprising in the La Tablada Quarters, he decided to participate in a demonstration against the uprising that was to take place the following day.<sup>38</sup> Upon his arrival to the vicinity of La Tablada Quarters, the group was faced with an armed confrontation among a group of people that attempted to take over the base and the military.<sup>39</sup> These circumstances prevented the group from carrying out the peaceful mobilization programmed and Maqueda left the place a few hours later.<sup>40</sup> Several members of the *Movimiento Todos Por La Patria* participated in the attack and were detained and condemned for the commission of several offenses.<sup>41</sup>

Several months later, on May 19, 1989, Mr. Maqueda was arrested.<sup>42</sup> On June 11, 1990, the San Martín Federal Chamber sentenced him to ten years of prison as an accomplice in the crime of qualified unlawful assembly, and an accessory in the offenses of rebellion, illegal seizure, aggravated robbery, aggravated unlawful imprisonment, consummated and attempted doubly aggravated homicides, and serious and minor damages.<sup>43</sup>

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31. *Id.* para. 2.

32. The Convention, *supra* note 7, art. 8.1.

33. *Id.* art. 8.2.

34. *Id.* art. 8.2.h.

35. *Maqueda*, (Ser. C) No.18, para. 2.

36. *Id.* para. 3.

37. *Id.*

38. *Id.*

39. *Id.* para. 4.

40. *Maqueda*, (Ser. C) No.18, para. 4.

41. *Id.* para. 5.

42. *Id.* para. 6.

43. *Id.*

His legal representatives lodged a special appeal that was rejected by the San Martin Federal Chamber of Appeals on October 25, 1990.<sup>44</sup> In view of such denial, they lodged a complaint appeal for rejection of the special appeal with the Supreme Court of the Nation which was also rejected on March 17, 1992, thereby exhausting all existing procedural possibilities provided for in the internal jurisdiction.<sup>45</sup> According to the Commission, Guillermo Maqueda did not have the possibility to lodge a remedy for review of the judgment, since Law 23.077 does not provide for the possibility of any appeal or broad remedy before any Court of Appeals (only Appeal After Execution of the Judgment, an exceptional resource and subject to restrictions), for which he also requested the Court that it declared that Argentina should establish an ordinary mechanism that guaranteed the double instance in the procedure established by the stated Law 23.077.<sup>46</sup> The Argentinean Government was notified of the complaint on June 24, 1994.<sup>47</sup>

On October 4, 1994, less than four months after filing the complaint, the Commission notified the Court of its decision to discontinue the action in the *Maqueda Case* because an agreement had been executed which "welcomes the interests of the parties and . . . is in conformity with the spirit and letter of the Convention."<sup>48</sup> In accordance with this agreement signed on September 20, 1994, the Argentinean State committed to dictate an ordinance of commutation of sentence which allowed Mr. Maqueda to be paroled immediately.<sup>49</sup> Subsequently, in December of 1994, Cejil and Human Rights Watch/Americas in representation of Guillermo Maqueda's parents informed the Court that they consented to the discontinuance formulated by the Commission, and on December 12, 1994, the Government expressed its favorable opinion concerning the request by the Commission.<sup>50</sup>

Consequently, taking into account the above mentioned and considering that the principal matter of the case was the violation of Mr. Maqueda's right to freedom, and that this right had been restored by the agreement between the parties, the Court decided that the agreement did not violate the letter and spirit of the American Convention. Although the Commission submitted other rights protected under the Convention in its complaint citing mechanisms and provisions of internal law, these rights were pleaded in relation to the right to freedom. Notwithstanding such conditions, the Court, mindful of its responsibility to protect human rights,

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44. *Id.*

45. *Maqueda*, (Ser. C) No.18, para. 6.

46. *Id.*

47. *Id.* para. 12.

48. *Id.* para. 16.

49. *Id.* para. 18.

50. *Maqueda*, (Ser. C) No.18, para. 21, 22.

reserved the power to reopen and proceed with consideration of the case, should at any future time a change occur in the circumstances that gave rise to the agreement.<sup>51</sup>

Therefore the Court, by means of its January 17, 1995 resolution, admitted the discontinuance of the action presented by the Commission in the *Maqueda Case*, and dismissed it.<sup>52</sup> However, the Court reserved the authority to reopen it and to continue the procedure of the case if there would be in the future a change of circumstances that may give rise to the agreement.<sup>53</sup>

## B. *Acceptance of a Claim*

### *Aloeboetoe et al. v. Suriname*<sup>54</sup>

This case was filed in the Inter-American Court by the Inter-American Commission on August 27, 1990.<sup>55</sup> The issue was whether the Government of Suriname violated the American Convention to the detriment of Daison Aloeboetoe, Dedemanu Aloeboetoe, Mikuwendje Aloeboetoe, John Amoida, Richenel Voola, Martín Indisic Banai and Beri Tiopo, all citizens of Surinam. Among the rights that the Commission alleged were violated by Suriname were the right to life; the right to humane treatment; the right to personal freedom; and the judicial protection.<sup>56</sup> The Commission also requested that the relatives of the victims be awarded a fair compensation.<sup>57</sup>

In accordance with the guidelines of the Rules of the Court, the Commission presented its memorandum of law on April 1, 1991, and the Court received the memorandum in response from Suriname on June 28, 1991.<sup>58</sup> The Government of Surinam presented preliminary exceptions along with its memorandum.<sup>59</sup> A public hearing was held on December 2, 1991, with the purpose of hearing the arguments of the parties regarding preliminary exceptions.<sup>60</sup> Although the hearing was scheduled to deal with

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51. *Id.* para. 27.

52. *Id.*

53. *Id.*

54. *Aloeboetoe v. Suriname*, Judgment of December 4, 1991, Inter-Am. Ct. H.R. (Ser. C) No. 11 (1994).

55. *Id.* para. 1.

56. *Id.* para. 2.

57. *Id.*

58. *Id.* para. 8.

59. *Aloeboetoe*, (Ser. C) No. 11, para. 8.

60. *Id.* para. 9.

preliminary exceptions, at the meeting, the Government also recognized its responsibility for the events giving rise to this case.<sup>61</sup>

According to the facts denounced before the Commission, the events occurred on January 15, 1988, in Atjoni (landing stage of the village of Pokigron, District of Sipaliwini) and in Tjongalangapassi, off kilometer 30 in the District of Brokopondo.<sup>62</sup> In the first of those places, Atjoni, more than twenty unarmed, male maroons were beaten with rifle-butts by soldiers who had detained them under the suspicion that they were members of the Jungle Commando.<sup>63</sup> They were forced to lie facedown on the ground while the soldiers stepped on their backs, tortured them, and urinated on them.<sup>64</sup> The Captain of the village of Gujaba made a point of telling Commander Leeflang of the Army that the persons in question were civilians from several different villages.<sup>65</sup> Commander Leeflang ignored this information.<sup>66</sup>

Following the Atjoni incident, the soldiers allowed some of the maroons to continue their trip.<sup>67</sup> However, the seven people previously mentioned were blindfolded and dragged into a military vehicle and driven towards Paramaribo along the Tjongalangapassi road.<sup>68</sup> Upon reaching the kilometer 30, the vehicle stopped, and the victims were taken out and ordered to dig.<sup>69</sup> Richenel Voola tried to escape.<sup>70</sup> They shot at him and he fell to the ground, wounded, but they did not go after him.<sup>71</sup> Soon after, shooting and screaming were heard.<sup>72</sup> The other six maroons were killed.<sup>73</sup>

On Monday, January 4, 1988, men from Gujaba and Grantatai arrived at kilometer 30 at 7 p.m.<sup>74</sup> They found Aside, who was seriously wounded and in critical condition, as well as the bodies of the other victims.<sup>75</sup> Aside indicated that he was the only survivor.<sup>76</sup> The bodies of the other victims

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61. *Id.* para. 10.

62. *Id.* para. 11.

63. *Id.*

64. *Aloeboetoe*, (Ser. C) No. 11, para. 11.

65. *Id.* para. 12.

66. *Id.*

67. *Id.* para. 13.

68. *Id.*

69. *Aloeboetoe*, (Ser. C) No. 11, para. 14.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Aloeboetoe*, (Ser. C) No. 11, para. 14.

74. *Aloeboetoe*, (Ser. C) No. 11, para. 15.

75. *Id.*

76. *Id.*

had been partially devoured by vultures.<sup>77</sup> Aside was admitted in the Academic Hospital of Paramaribo on January 6, 1988, but died soon after.<sup>78</sup> The accusation before the Inter-American Commission was signed by Stanley Rensch who talked to Aside twice about what happened and who corroborated the information stated by more than fifteen persons.<sup>79</sup>

At the hearing, convened on December 2, 1991, for the purpose of dealing with the preliminary objections, the Agent for Suriname declared that "[t]he Republic of Suriname, having reference to the first case being considered in the proceedings now before the Court, accepts responsibility for the consequences of the *Pokigron* case, better known as *Aloeboetoe et al*."<sup>80</sup> He later added: "I simply wish to reiterate [that Suriname] accepts its responsibility in the instant case."<sup>81</sup> Following a request for clarification by the Commission's Delegate, Mr. Jackman, the Agent for Suriname subsequently explained: "I believe my statement was clear: it accepts responsibility. Consequently, the Court has the right to close the case, file it, determine the compensation payable or do whatever is appropriate under the law."<sup>82</sup>

Consequently, a judgment dated December 4, 1991, noted the admission of responsibility made by the Republic of Suriname and decided that the controversy had ceased regarding the facts that gave rise to this case.<sup>83</sup> Later, by judgment dated September 10, 1993, the Court ordered the pertinent actions on the reparation in this case.<sup>84</sup>

#### *El Amparo v. Venezuela*<sup>85</sup>

The Inter-American Commission filed this case in the Court on January 14, 1994.<sup>86</sup> The issue to be decided was whether the government of Venezuela had violated the American Convention in detriment of José R. Araujo, Luis A. Berríos, Moisés A. Blanco, Julio P. Ceballos, Antonio Eregua, Rafael M. Moreno, José Indalecio Guerrero, Arín O. Maldonado, Justo Mercado, Pedro Mosquera, José Puerta, Marino Torrealba, José

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77. *Id.*

78. *Id.*

79. *Aloeboetoe*, (Ser. C) No. 11, para. 16.

80. *Id.*

81. *Id.* para. 22.

82. *Id.*

83. *Id.* decision, para. 1.

84. *Aloeboetoe v. Suriname (Reparations)*, Judgment of September 10, 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15 (1994).

85. *El Amparo v. Venezuela*, Judgment of January 18, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 19 (1995).

86. *Id.* para. 1.

Torrealba and Marino Rivas, all Venezuelan citizens.<sup>87</sup> The Commission alleged that Venezuela had violated the right to life; the right to humane treatment; the judicial guarantees; the equality before the law; and the judicial protection.<sup>88</sup> The Commission also requested that Venezuela compensate and reimburse the direct relatives of the victims.<sup>89</sup> Venezuela answered the demand on August 1, 1994.<sup>90</sup>

According to the petition, on October 29, 1988 in the “*La Colorada*” canal, Distrito Páez, State of Apures, Venezuela, sixteen fishermen residents of the town “*El Amparo*” were traveling in the direction of the ‘La Colorada’ Canal on the Arauca River to participate in a fishing trip, at approximately 11:20 a.m.<sup>91</sup> When some fishermen were leaving the boat, members of the military and the police of the “*Comando Especifico*” José Antonio Páez” that were conducting a military operation denominated “*Anguila III*,” killed fourteen of the sixteen men.<sup>92</sup> Two of the fishermen, Wollmer Gregorio Pinilla and José Augusto Arias, escaped by jumping into the water and swimming across the “La Colorada” Canal.<sup>93</sup> The survivors were protected by the Commander of the Police of El Amparo, Adán de Jesús Tovar Araque, in spite of the fact that he was subjected to pressure by police and military functionaries of San Cristóbal, State of Táchira.<sup>94</sup> According to the petition, the Chief Inspector of the Intelligence and Prevention Services Directorate, Celso José Rincón Fuentes, visited the Chief of Police of El Amparo in the afternoon of October 29, 1988, and said that they had killed fourteen guerrilla members and two had escaped.<sup>95</sup>

By note of January 11, 1995, the government informed the President that Venezuela “[d]oes not contest the facts referred to in the complaint and accepts the international responsibility of the State,”<sup>96</sup> and requested the Court to ask the Commission “[t]o come together to a non-litigious procedure with the object of determining in friendly fashion, under supervision by the Court, the reparations applicable, the preceding in conformity with the provisions of articles 43 and 48 of the Rules of Procedure of the Court.”<sup>97</sup> The Inter-American Commission was informed

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87. *Id.* para. 2.

88. *Id.*

89. *Id.* para. 4.

90. *El Amparo*, (Ser. C) No. 19, para. 9.

91. *Id.* para. 10.

92. *Id.*

93. *Id.* para. 11.

94. *Id.*

95. *El Amparo*, (Ser. C) No. 19, para. 12.

96. *Id.* para. 19.

97. *Id.*

about this note by the Secretariat, and acknowledged receipt of the same on January 13, 1995.<sup>98</sup>

Consequently, by judgment dated January 18, 1995, the Court, took note of the recognition of responsibility made by the Republic of Venezuela.<sup>99</sup> The Court decided that the controversy concerning the facts that originated the case had ceased, and it decided that Venezuela was liable for the payment of damages and to pay a fair indemnification to the surviving victims and the next-of-kin of the deceased.<sup>100</sup>

*Garrido and Baigorria v. Argentina*<sup>101</sup>

This case was filed in the Court by the Inter-American Commission on May 29, 1995.<sup>102</sup> The issue was whether the Government of Argentina violated the American Convention in the disappearance of Raúl Baigorria and Adolfo Garrido, Argentinean citizens.<sup>103</sup> The Commission alleged that Argentina had violated the alleged victims' right to life;<sup>104</sup> the right to humane treatment;<sup>105</sup> the judicial guarantees;<sup>106</sup> and the judicial protection.<sup>107</sup> The Commission also requested that Argentina fully indemnify the families of the victims for the grave material and moral injury caused.<sup>108</sup> On September 11, 1995, Argentina answered the petition.<sup>109</sup>

According to the demand, based upon the testimony of eyewitnesses, on April 28, 1990, at approximately 4:00p.m., Adolfo Argentino Garrido-Calderón and Raúl Baigorria-Balmaceda were detained while driving around.<sup>110</sup> They were detained by uniformed personnel of the Police of Mendoza in the General San Martin Park.<sup>111</sup> The vehicle in which the detainees traveled was found by their relatives in the Fifth Police Station of Mendoza.<sup>112</sup> The Police stated that the vehicle had been found in the

98. *Id.*

99. *Id.* decision, para. 1.

100. *Id.* para. 1, 2.

101. *Garrido v. Argentina*, Judgment of February 2, 1996, Inter-Am. Ct. H.R. (Ser. C) No. 26 (1996).

102. *Id.* para. 1.

103. *Id.* para. 2.

104. *See* The Convention, *supra* note 7, art. 4.

105. *Id.* art. 5.

106. *Id.* art. 8.1.

107. *Id.* art. 25.

108. *Garrido*, (Ser. C) No. 26, para. 2.

109. *Id.* para. 7.

110. *Id.* para.10.

111. *Id.*

112. *Id.* para.12.

General San Martín Park as a result of an anonymous call claiming that there was an abandoned car in that location.<sup>113</sup>

Mr. Garrido's relatives asked that Attorney Mabel Osorio find his whereabouts since there was a judicial order for his detention.<sup>114</sup> However, Mr. Garrido was not detained at any police division.<sup>115</sup> On April 30, 1990, a writ of habeas corpus was filed on behalf of Mr. Garrido without any results and the same thing happened to another habeas corpus filed on May 3, 1990, on behalf of Mr. Baigorria.<sup>116</sup> On September 19, 1991, a new writ of habeas corpus was filed on behalf of both missing persons, but it was rejected.<sup>117</sup> The resolution was appealed before the Third Criminal Chamber of Mendoza, which denied the appeal on November 25, 1991.<sup>118</sup>

On May 2, 1990, the Garrido family filed a formal complaint for the disappearance of both men, which was processed in the Fourth Court of Investigation of the First Judicial District.<sup>119</sup> Several years later the court documents in this case were still in the initial stage of the proceedings.<sup>120</sup> The family also denounced the facts before the governmental authorities of the County of Mendoza.<sup>121</sup>

During the first five years following the disappearance of Mr. Garrido and Mr. Baigorria, their relatives denounced the events at the local, national, and international level.<sup>122</sup> They made diverse claims before the governmental authorities and they carried out an intense search in judicial, police, and health facilities, all to no avail.<sup>123</sup>

The Court considered it pertinent to transcribe the following two paragraphs of Argentina's answer to the complaint:

The Government of Argentina accepts the facts set forth in Item II of the application in relation to the situation of Mr. Raúl Baigorria and Mr. Adolfo Garrido, facts which substantially coincide with those raised in the presentation before the Illustrious Inter-American Commission on Human Rights that were not questioned at that time.<sup>124</sup>

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113. *Garrido*, (Ser. C) No. 26, para. 12.

114. *Id.*

115. *Id.*

116. *Id.* para. 13.

117. *Id.* para. 17.

118. *Garrido*, (Ser. C) No. 26, para. 17.

119. *Id.* para. 14.

120. *Id.* para. 19.

121. *Id.*

122. *Id.*

123. *Garrido*, (Ser. C) No. 26, para. 19.

124. *Id.* para. 24.

The Government of the Republic of Argentina accepts the legal consequences to the Government resulting from the facts referred to in the previous paragraph in light of article 28(1) and (2) of the American Convention on Human Rights inasmuch as the competent court has not been able to identify the person or persons criminally responsible for the crimes against Raúl Baigorria and in that way clarify their whereabouts.<sup>125</sup>

During the hearing held on February 1, 1996, the Alternate Agent from Argentina, Ambassador Humberto Toledo expressed that his government “[t]otally accept[ed] its international responsibility” and reiterated “the acceptance of international responsibility of the Argentine State in a case of this kind.”<sup>126</sup>

At the same hearing, the Commission expressed its agreement to the terms of the acceptance of responsibility made by the Alternate Agent of Argentina.<sup>127</sup>

Consequently, by means of judgment entered on February 2, 1996, not having outlined the discontinuance of the right, but instead of the action, it took note of the acceptance made by Argentina of the acts stated in the application and the acceptance of international responsibility for those acts.<sup>128</sup> Additionally, it granted the parties a period of six months to reach an agreement on reparations and compensation.<sup>129</sup> Failure to reach an agreement would allow the Court to continue the proceedings regarding reparations and compensations.<sup>130</sup>

### III. CONCLUSION

The following conclusions may be reached from the analysis of the use of the procedural forms of discontinuance and acceptance of a claim in the jurisprudence of the Inter-American Court:

1. The discontinuance is a procedural form of extreme importance because it is a medium to which the Commission can appeal, after it has presented a case to the Court and arrived to an agreement with the demanded State to terminate the process. It reflects a serious and responsible attitude by the parties in a case,

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125. *Id.*

126. *Id.* para. 25.

127. *Id.*

128. *Garrido*, (Ser. C) No. 26, decision, para. 1.

129. *Id.* para. 2.

130. *Id.* para. 4.

to utilize the principle of procedural economy and thus, avoid unnecessary expenses to the Inter-American System.

2. The acceptance of a claim also has an enormous importance because it represents a serious and responsible attitude by the States demanded before the Court, since they opt to assume its responsibilities rather than contend the facts of the demand and they do not subject the Court and the system to a long and difficult process.

3. The procedural form of acceptance of a claim is properly regulated in the Rules of the Court.

4. In the case of the acceptance of a claim, this procedural form is not in the Rules of the Court therefore, given its importance, it would be convenient to regulate it as well as its procedural effects. Mainly, the Court should expressly point out the rights that the demanded States would be responsible of violating as a consequence of the acceptance of a claim.

5. The precedents invoked in this comment can end up being relevant in the measure in which in the future, other States decide to follow them thereby strengthening the Inter-American system for the protection of human rights.