# Changing Standards of Reparation – The Inter-American Court of Human Rights and Domestic Reparation Mechanisms[1]

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The individual right to reparation in the form of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition is well established in international human rights law (IHRL),[2] including in regional human rights systems. Since its very first case, *Velásquez-Rodríguez v. Honduras*, the Inter-American Court of Human Rights (IACtHR) has continuously held that victims have a right to adequate reparation,[3] meaning that to fulfil their obligation states have to ensure the reparation provided is adequate. Some transitional justice states (TJ) states, i.e. states transitioning from authoritarianism to democracy or from conflict to peace while attempting to address past violations through mechanisms of truth, justice, reparation, and guarantees of non-recurrence, have argued that they should be allowed to provide reparation to victims in cases before the IACtHR through domestic reparation mechanisms. Consequently, the IACtHR has had to address the issue of how to deal with such reparation mechanisms. One might expect the Court to evaluate domestic reparation mechanisms according to its own standards and only allow states to provide reparation through these mechanisms as long as the reparation is in line with the Court's standards. However, it is unclear whether this is what the IACtHR is doing; in fact, it seems that the Court may be changing the legal standards of reparation applicable to domestic reparation mechanisms. This paper will discuss how jurisprudence from the IACtHR may have begun to change the Court's standard of reparation for domestic reparation mechanisms and briefly explore some of the

[1] This extended abstract is based on research from my PhD thesis entitled 'Addressing Challenges for the Application of Existing Legal Standards of Reparation to Domestic Reparation Programmes in Transitional Justice Contexts', submitted to University of Essex on 29 September 2020.
[2] See e.g. Resolution 60/147: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005) UN General Assembly, A/RES/60/147, as well as extensive case law from regional courts and UN treaty bodies.
[3] *Velásquez-Rodríguez v. Honduras*, IACtHR, Reparations and Costs, Series C No 7, 21 July 1989, para 25.

issues of the Court's approach and what the consequences may be for victims' right to reparation.

Reparation can be provided through domestic reparation mechanisms, such as judgments and decisions following judicial proceedings or domestic reparation programmes (DRPs). DRPs are an out of court, administrative process often used by states to provide reparation to large numbers of victims and where various forms and measures of reparation are provided to specific categories of victims, often based on the violation suffered.[4] DRPs are said to be 'the most effective tool for victims of gross human rights violations and serious violations of humanitarian law to receive reparation',[5] as they provide faster results and are more accessible for victims than courts.[6] Both Guatemala and Colombia have, with varying degree of success, argued before the IACtHR that they should be allowed to provide reparation ordered by the Court through their domestic reparation mechanisms.

Guatemala, unsuccessfully, made the argument in three cases concerning massacres of members the indigenous Maya community committed by the Guatemalan Army during the 1980s. In *Plan de Sánchez*, the state argued that it should be allowed to provide compensation through its already established DRP.[7] However, when discussing reparation, the IACtHR did not appear to analyse the DRP at all, but ordered compensation to be paid according to its standards.[8] In *Rio Negro Massacres*, Guatemala argued that the victims who had already received reparation through the DRP should be considered duly compensated and that it could provide reparation to the remaining victims also through its DRP.[9] The IACtHR did not provide any in-depth analysis of the DRP, but noted that 'the differences between parties stem from the standards or criteria used by the [DRP] to calculate or allocate the compensatory amounts to the victims,' and proceeded to order the state to provide compensation in the amounts set by

[4] See e.g. Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence (UN Human Rights Council, 2014), 6.
[5] Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (UN General Assembly, 2019) A/HRC/42/45, para 32.
[6] Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (UN General Assembly, A/69/518, para 4; Guidance Note on Reparations for Sexual Violence, 6.
[7] *Plan de Sánchez v. Guatemala*, (Reparations), para 71.
[8] Ibid, para 72-111; Clara Sandoval, 'International Human Rights Adjudication, Subsidiarity, and Reparation for Victims of Armed Conflict' in Cristián Correa and others (eds), *Reparation for Victims in Armed Conflict* (Cambridge University Press), 199-200.
[9] *Río Negro Massacres v. Guatemala*, IACtHR, Preliminary Objection, Merits, Reparations, and Costs, Series C No 250, 4 September 2012, para 297.

the Court.[10] Nevertheless, the IACtHR stated that 'the amounts that have already been awarded to the victims in this case at the domestic level under the [DRP] must be recognized as part of the reparation due to them' and Guatemala was allowed to deduct these amounts from the compensation ordered by the Court.[11]

Finally, in the case of *Miembros de la Aldea Chichupac y Comunidades Vecinas del Municipio de Rabinal*, Guatemala argued that its DRP had been subject to improvements and provided victims with restitution, compensation, rehabilitation, and measures to dignify victims, and that there was an office in the municipality of Rabinal, the municipality where the victims lived, as well as suitable personnel that could offer care to victims in their own language.[12] In addition, the state argued that most of the victims of the case had already received reparation through the DRP and had signed a settlement agreement which obliged them not to make any future claims for reparation. [13] The IACtHR, however, noted that the reparation already provided to some victims was for violations outside the jurisdiction of the Court and therefore there was no clear relationship between the reparation provided and the violations established in the case, leaving the Court unconvinced that the victims of the case had received reparation for those violations.[14] The IACtHR noted the evidence provided by Guatemala in relation to compensation paid through the DRP to some of the victims, before ordering compensation.[15] Nevertheless, Guatemala was again allowed to deduct the amounts already paid from the compensation ordered by the Court. In relation to rehabilitation, despite arguments by the state that this could be provided by the DRP, the IACtHR ordered this form of reparation according to standards defined by the Court.[16] While the Court did not really analyse the rehabilitation provided by the DRP, its decision seems to have been based on information that the DRP headquarters in the municipality of Rabinal had closed, meaning perhaps that the Court did not believe Guatemala would be able to provide rehabilitation through its DRP in this location.[17]

[10] Ibid, paras 297-303, 309
[11] Ibid, para 304.
[12] *Miembros de la Aldea Chichupac y Comunidades Vecinas del Municipio de Rabinal vs. Guatemala*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No 328, 30 November 2016, para 1.
[13] *Miembros de la Aldea Chichupac vs. Guatemala*, para 276.
[14] Ibid, para 280.
[15] Ibid, 326-327.
[16] Ibid, paras 301-304.
[17] Ibid, paras 302.

While Guatemala has so far not been able to persuade the IACtHR that it should be allowed to provide reparation through its DRP, Colombia has been more successful.[18] In the cases of *Manuel Cepeda Vargas, Massacre of Santo Domingo,* and *Rodríguez Vera et al.*, the IACtHR allowed Colombia to provide part of the reparation through its domestic reparation mechanisms, including in proceedings before national courts. In all these cases, the court ordered the state to provide measures of rehabilitation, satisfaction, and guarantees of non-repetition according to its usual standards.[19] However, when it came to compensation, the IACtHR seems to have applied different standards than its usual standard of adequate reparation.

In *Manuel Cepeda Vargas*, the IACtHR stated that when national mechanisms exist to provide reparation, unless they 'satisfy criteria of *objectivity, reasonableness and effectiveness* to make adequate reparation for the violations of rights recognized in the Convention […] it is for the Court, in exercise of its subsidiary and complementary competence, to order the pertinent reparations.'[20] The IACtHR found that the victims had received compensation from the domestic mechanism based on objective and reasonable criteria, although without specifying what these criteria were, and that the amounts were reasonable and thus declined to provide reparation for the same harm.[21] The Court did, however, order compensation for some harm that had not been addressed by the domestic mechanism.[22]

In *Massacre of Santo Domingo*, the IACtHR declined to provide compensation to victims who had already received compensation under the domestic reparation mechanism, since this compensation had been what victims had claimed and agreed to, but without explaining or analysing whether this compensation was in line with the standards expected by the Court.[23] Regarding victims who had not yet received compensation through the domestic mechanism, the IACtHR ordered the State to 'grant and execute, within one year and using a

[18] The Court has also allowed this in a case against Chile, see *García Lucero et al. v. Chile*, para 189.
[19] *Manuel Cepeda Vargas v. Colombia*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No 213, 26 May 2010, paras 214-241; *Massacre of Santo Domingo v. Colombia*, IACtHR, Preliminary Objections, Merits and Reparations, Series No 259, 30 November 2012, paras 299-323; *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No 287, 14 November 2014, paras 566-579.
[20] *Manuel Cepeda Vargas v. Colombia*, para 246 [emphasis added]. The Court took the same approach in *García Lucero et al. v. Chile*, para 189.
[21] *Manuel Cepeda Vargas v. Colombia*, para 246.
[22] Ibid, paras 247-253.
[23] *Massacre of Santo Domingo v. Colombia*, paras 334-336.

prompt domestic mechanism, the pertinent compensation and indemnities for pecuniary and non-pecuniary damage, if appropriate, which must be established based on the *objective, reasonable and effective* criteria'.[24]

Lastly, in *Rodríguez Vera et al.* the IACtHR again stated that when a national mechanism to provide reparation exists, the Court must 'determine whether the compensation awarded meets the criteria of being *objective, reasonable and effective* to make adequate reparation for the violations of the rights recognized in the Convention that have been declared by this Court.'[25] The IACtHR found that although the domestic mechanism granted compensation on a slightly different basis than the Court, this was done based on criteria that were objective and reasonable and that therefore it was 'not in order for the Court to order additional compensation' to that already provided.[26] Nevertheless, like in *Manuel Cepeda Vargas*, the IACtHR found that some victims had not received compensation from the domestic mechanism, or not for violations found in the Court's judgment, and ordered compensation for these victims, but allowed the state to deduct any compensation already provided at the domestic level.[27]

In *Operation Genesis* and *Yarce y Otras*, the IACtHR had to address Colombia's argument that reparation should be provided through its newly established DRP created by Law 1448/2011, the Victims' Land and Restitution Law.[28] In these cases, the Court stated that in contexts of transitional justice where states must 'provide reparation on a massive scale to numerous victims' DRPs are a legitimate way of satisfying the right to reparation.[29] The IACtHR further stated that in such contexts, the DRPs must be understood in conjunction with the TJ mechanisms of truth and justice, provided they meet certain criteria, including 'legitimacy – especially based on the consultation with and participation of victims; their adoption in good faith; the degree of social inclusion they allow; the reasonableness and proportionality of the pecuniary measures; the type of reasons to provide reparations by family

[24] Ibid, para 337 [emphasis added].
[25] *Rodríguez Vera et al. v. Colombia*, para 593 [emphasis added].
[26] Ibid, para 595.
[27] Ibid, paras 602-605.
[28] Ley 1448 de 2011 (2011) Diario Oficial, No. 48096; *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No 270, 20 November 2013, para 463; *Yarce y Otras vs. Colombia*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No 325, 22 November 2016, para 321.
[29] *Operation Genesis v. Colombia*, para 470; *Yarce y Otras vs. Colombia*, para 326.

group and not individually; the distribution criteria among members of a family (succession order or percentages); parameter for a fair distribution that take into account the position of the women among the family or other differentiated aspects, such as whether the land and other means of production are owned collectively.'[30]

In both these cases, the IACtHR ordered rehabilitation according to its standards, but allowed this to be provided through the DRP stating that victims of the case should receive immediate and priority access,[31] and in *Genesis* the court declined to order some of the restitution measures requested since it considered that this could be provided by the DRP.[32] Except for one victim, the IACtHR in *Genesis* declined to order compensation and said that this could be provided through the DRP, but specified that the state should give victims 'priority access to the said [DRP], and that it proceed to pay them, as soon as possible, irrespective of the time frames that domestic law may have established for this, avoiding obstacles of any type.' In *Yarce*, the IACtHR awarded compensation on the basis of equity since Colombia had not provided sufficient information about the compensation available under the DRP, or any compensation already provided to victims.[33]

Following the above, it seems that the IACtHR in certain instances has departed from its usual standards of reparation when faced with domestic mechanisms of reparation. Furthermore, the Court seems to recognise the particularly challenging circumstances in which reparation is often provided, including difficult political contexts and a lack of financial, human, and institutional resources to implement reparation.[34] While this might be an understandable development considering the very large number of victims and difficult contexts faced by many TJ states, the Court's approach does raise some issues that need to be further addressed and clarified.

First of all, as seen above, the IACtHR does not use the same criteria when evaluating domestic reparation mechanisms, even in cases from the same country. However, no explanation for this has been provided in its judgments. Furthermore, the IACtHR does not explain the criteria used or their relationship to the Court's standard of adequate reparation, nor

[30] *Operation Genesis v. Colombia*, para 470; *Yarce y Otras vs. Colombia*, para 326.
[31] *Operation Genesis v. Colombia*, para 453; *Yarce y Otras vs. Colombia*, para 340.
[32] *Operation Genesis v. Colombia*, para 461.
[33] *Yarce y Otras vs. Colombia*, para 328-330: Sandoval in *Reparation for Victims in Armed Conflict*, 210.
[34] Sandoval in *Reparation for Victims in Armed Conflict*, 215.

applied them to the facts of the cases, which leaves several questions. In the cases where the IACtHR used the criteria of objective, reasonable and effective, it is unclear whether the Court considers that as long as decisions on what forms and measures of reparation, including levels of compensation, are provided based on these criteria the reparation is considered adequate, or whether as long as decisions are made based on these criteria the Court is less concerned about particular forms and measures being adequate. *Manuel Cepeda Vargas* and *Rodríguez Vera et al.* seem to suggest the former, but this should be made clearer in the Court's analysis.

Similarly, the criteria used for DRPs in *Operation Genesis* and *Yarce* were not explained or applied in the Court's analysis. Nor did the Court in these cases explain how the criteria relate to adequate reparation. As has been pointed out elsewhere, several important questions about these criteria need to be answered such as when victims need to be consulted, what kind of consultation would fulfil the standards of the Court, whether the consultation is about process or about the forms of reparation to be provided, how the Court understands what compensation would be proportionate and reasonable, whether states could provide less compensation than what would be provided by the Court in individual cases, and whether states could legitimately argue that a lack of financial means prevents them from providing reparation to the Court's standards.[35]

Additionally, the fact that the IACtHR may be adopting a new approach to domestic reparation mechanisms poses questions about what this means for the right of victims to reparation. In *Chichupac*, Guatemala cautioned against the IACtHR becoming a 'parallel instance of reparation' for some of the victims of the armed conflict with different procedures for determining the beneficiaries of reparation and for defining the forms and amounts of reparation which would, in addition to exceeding the financial capacities of the state, also hinder the proper functioning of its DRP.[36] Regardless of whether this argument was made in good faith, these are issues that need to be addressed. Furthermore, if some victims in a state where a domestic reparation mechanism exists are able to receive reparation from the IACtHR at the Court's standards whereas victims who are not able to bring their case to the Court have to receive reparation through the mechanism, this may also create inequalities and tensions between groups or communities of victims which does not benefit transitional justice efforts,

[35] See Sandoval in *Reparation for Victims in Armed Conflict*, 216.

victim satisfaction and redress. It may therefore seem logical that the IACtHR allows states with a functioning domestic mechanism to provide reparation in cases before the Court through these programmes, as long as they fulfil the criteria set by the Court.

However, the new approach to domestic reparation mechanisms may also produce inequalities between victims who bring cases before the Court and are from states were no such mechanism exists or where the mechanism is not accepted by the Court, and who will therefore be awarded reparation according to the Court's usual standard, and victims in states where a domestic reparation mechanism is accepted by the Court. This of may course depend on whether the IACtHR considers that its criteria for domestic mechanisms are different to the standard of adequate reparation normally employed by the Court, or whether the fulfilment of the criteria means that the reparation provided by the mechanism is adequate and thus fulfils the standard of the Court. Because of this, it is vital that the IACtHR makes its criteria of reparation for domestic reparation mechanisms, including their relationship to adequacy, clear to all involved parties and relevant stakeholders, as mentioned above.

The IACtHR is bound to continue to adjudicate on cases where states argue that they should be allowed to provide reparation to victims in the case through an existing domestic reparation mechanism. The fact that the IACtHR has not explained its criteria or clearly applied them to the facts to provide a proper analysis is problematic both to states and for victims who need to understand the criteria and arguments of the Court, as well as for other relevant stakeholders involved in discussions about the scope of the right to reparation for victims of armed conflict.[37] As has been argued elsewhere, it seems that at the moment all that is clear is the IACtHR is reconsidering its approach to reparation and domestic mechanisms when it sees good-faith efforts by states to provide reparation to victims.[38]

[37] Sandoval in *Reparation for Victims in Armed Conflict*, 215-216.
[38] Sandoval in *Reparation for Victims in Armed Conflict*, 215.