Clean hands and a pure heart?: The application of the clean hands doctrine by the Inter-American Court of Human Rights[1]

Renato Antonio Constantino Caycho[2]

Abstract

This article provides an analysis of the practice of the Inter-American Court of Human Rights (IACrtHR) regarding the *clean hands* doctrine and its legitimacy. This text argues that such an approach is unacceptable for the compensation of moral damages in human rights cases. Its use is even more questionable given that IACrtHR has not provided an explanation for its decisions to withhold reparations for moral damages only for some wrongdoers. In this sense, this article reviews cases in which the IACrtHR has (not) awarded monetary compensation for moral damages to highlight its inconsistent jurisprudence, and the lack of clear and defining criteria. Therefore, it concludes that the IACrtHR has applied the *clean hands* doctrine without explicitly stating so, this not being compatible with the international human rights law.

Keywords: clean hands doctrine; Inter-American Court of Human Rights; human rights violations; moral damages; reparations; transitional justice.

Manos limpias y corazón puro?: La aplicación de la doctrina de manos limpias por parte de la Corte Interamericana de Derechos Humanos

Resumen

Este artículo realiza un análisis de la práctica de la Corte Interamericana de Derechos Humanos ("CorteIDH") respecto de la doctrina de "manos limpias" y su legitimidad. El texto argumenta que un enfoque de "manos limpias" para la compensación de daños morales en casos de derechos humanos es inadmisible. Su uso es aún más cuestionable toda vez que la CorteIDH no ha brindado una explicación respecto de sus decisiones de negar reparaciones por daños morales solo para algunos infractores. El texto revisará casos en los que la CorteIDH ha otorgado y no ha otorgado una compensación monetaria por daños morales con el fin de resaltar su inconsistente jurisprudencia, así como la falta de criterios claros y decisivos. Concluiré que la CorteIDH ha aplicado la doctrina de "manos limpias" sin manifestarlo explícitamente, y que esto no es compatible con el derecho internacional de los derechos humanos.

Palabras clave: doctrina de manos limpias; justiciar transicional; reparaciones; Corte Interamericana de Derechos Humanos; violaciones de derechos humanos; daños morales.

Mãos limpas e coração puro? A aplicação da doutrina das mãos limpas pela Corte Interamericana de Direitos Humanos

Resumo

Este artigo fornece uma análise da prática da Corte Interamericana de Direitos Humanos (CIDH) no que diz respeito à doutrina das "mãos limpas" e sua legitimidade. O documento argumenta que uma abordagem das "mãos limpas" para a compensação por danos morais em casos de direitos humanos é inadmissível. Seu uso é ainda mais questionável, uma vez que a CIDH não ofereceu uma explicação para suas decisões de reter indenizações por danos morais apenas de alguns infratores. O artigo analisará casos em que a CIDH concedeu e não concedeu indenização monetária por danos morais para evidenciar sua inconsistência na jurisprudência e a falta de critérios decisivos claros. Concluirei que a CIDH aplicou a doutrina das "mãos limpas" sem declarar explicitamente e que isso não é compatível com o direito internacional dos direitos humanos.

Palavras-chave: Doutrina das mãos limpas; justiça transicional; reparações; Corte Interamericana de Direitos Humanos; violações dos direitos humanos; danos morais.

---

1 Artículo de reflexión. Una versión previa de este documento fue desarrollada para el curso Transitional Justice dictado por Diane Orentlicher en el primer semestre de 2019 en American University - Washington College of Law. Dicho trabajo recibió sus muy enriquecedores comentarios. Durante ese semestre, las conversaciones con Juan Méndez también fueron muy valiosas. Valeria Vegh Weis, Paula Camino, Alan Vogelfanger y Renata Bregaglio también aportaron importantes comentarios. Teresa Arce contribuyó a la edición y revisión del artículo.

2 Docente a tiempo completo del Departamento de Derecho de la Pontificia Universidad Católica del Perú, Perú. Correo electrónico: renato.constantino@pucp.edu.pe. Código ORCID: 0000-0002-5721-1541.

Cómo citar este artículo: Constantino Caycho, R. A. (2022). Clean hands and a pure heart?: The application of the clean hands doctrine by the Inter-American Court of Human Rights. *Estudios de Derecho*, 79 (173), 12-36
DOI: 10.17533/udea.esde.v79n173a01
Fecha de recepción: 14/05/2021 **Fecha de aceptación:** 22/09/2021

Clean hands and a pure heart?: The application of the clean hands doctrine by the Inter-American Court of Human Rights

"El de manos limpias y de puro corazón, el que no pone su alma en cosas vanas ni jura con engaño. Ese obtendrá la bendición del Señor y la aprobación de Dios, su salvador".
Salmos, 24: 4-5

"Dante comprende y no perdona; tal es la Paradoja insoluble"

El verdugo piadoso. Jorge Luis Borges

1. Introduction

Situations where critical human rights violations have occurred require truth, justice, reparations (in the form of indemnizations or other measures) and institutional reforms. In transitional justice contexts, these measures may arrive at different times and with different intensities. That is the case of Peru. From 1980 to 2000, Peru was the scene of a non-international armed conflict (Truth and Reconciliation Commission of Peru, 2014). Peruvian Armed Forces fought the armed movements of Partido Comunista del Perú - Sendero Luminoso ("Shining Path") and Movimiento Revolucionario Tupac Amaru ("MRTA") (Truth and Reconciliation Commission of Peru, 2006, II). By the end of the conflict, more than 60,000 persons had died. In the transitional justice process that followed, the engagement of the Inter-American Human Rights System (IAHRS), especially the Inter-American Court of Human Rights (IACrtHR), has been particularly important since it has developed or confirmed certain standards regarding truth (Olivera Astete, 2015) and justice (LaPlante, 2007). However, compliance with Inter-American Court's decisions is not guaranteed. Political stances of the Legislative, the Judiciary and the Executive have a significant influence on how - or even if - these decisions are implemented (Hillebrecht, 2012).

In the case of reparations, the domestic reparations program in Peru decided to exclude those who were members of armed groups (LaPlante, 2007). Domestic

reparations were established via the "Integral Reparations Plan" (Plan Integral de Reparaciones), following the Truth and Reconciliation Commission's (TRC) recommendations. The program aimed to fulfill the State's obligation to remedy human rights violation through a series of individual, collective and symbolic reparation measures. However, Peru's TRC specifically recommended that reparations should not be made available to members of subversive groups, as persons who had undertaken violent actions against the State and the rule of law could not be considered victims (Truth and Reconciliation Commission of Peru, 2006, IX, p. 150). Congress followed said recommendation when the Reparations Program Act was passed in 2005[1].

This exclusion has been criticized, since, as the Truth and Reconciliation Commission itself acknowledges (Truth and Reconciliation Commission of Peru, 2006, IX, p. 149) there does not seem to be any rule in International Law that provides any grounds for excluding certain groups from accessing reparations. In International Law, it goes unchallenged that no one should be excluded from the possibility of claiming human rights violation in front of a domestic or international court. Likewise, when a violation of human rights violation has been identified, the victim has a right to receive reparations for the violation. In the Inter American System, reparations can take multiple forms: integral reparations, indemnizations, satisfactory measures and non-repetition assurances (González Napolitano et al, 2013). In transitional justice contexts, this means that everybody, regardless of their participation in hostilities, should be able to claim for justice and reparations (LaPlante, 2007).

In the case of Peru, reparations for human rights violations in the context of armed conflict have been problematic, especially regarding victims that have been members of armed groups. As LaPlante stated regarding the Peruvian context, when the IACrtHR issued its decision regarding the *Castro Castro* case, several public officers and politicians mentioned that they would not comply with the reparations decision (LaPlante, 2007). This was because the decision awarded reparations to former members of armed groups, amongst other victims. Then President Ollanta Humala also stated, regarding the *Cruz Sanchez vs. Peru* case, that the State would not pay one sol to any terrorist while awaiting the Court's decision (Redacción Radio Programas del Perú, 2015).

The Inter American Court has not explicitly evaluated the exclusion. The Court, in 2014, had the chance to address the issue in the case of *Espinoza Gonzales vs.*

1 "Article 4.- Exclusions

Members of subversive organizations and persons processed for the crimes of terrorism or glorification of terrorism are not considered victims until the definition of their status before the law, and thus are not beneficiaries of the program established by this law" (Own translation).

Integral Reparations Program Act 28592. 2005.

Peru. The relatives of the victim (who was a member of an armed group) claimed that they had not had access to the national reparations program. The judgment indicates: 'The representatives indicated that neither Gladys Espinoza nor her brother or mother have had access to reparation under the national reparations plan.' However, the Court did not evaluate their exclusion from the reparations program (Inter-American Court of Human Rights, 2014a, p. 333). Nevertheless, the Inter-American Court has used, perhaps without noticing it (and definitely without a proper justification) a version of the "clean hands" doctrine. This doctrine stems from the maxim of "he who comes into equity must come with clean hands" and was initially applied in English courts to private law disputes (Anenson, 2018, p. 1847). The doctrine has since been applied to a variety of legal fields, including transitional justice, and attends to the culpability of parties in a dispute in establishing fault, liability and remedies (LaPlante, 2007). As LaPlante mentions, this doctrine cannot be used for the admissibility of a claim. Insofar as human rights law provides for the protection of people against State abuses, denying the possibility to file claims against a state to a specific group of citizens would create "a two-class tier of rights holders", where one tier is not entitled to legal protection (LaPlante, 2007, pp. 67-68).

However, the Court does appear to have used the doctrine when deciding on moral damages. Doctrine has recognized that guilty victims "are often excluded from reparations on the grounds of avoiding 'moral equivalence' with innocent victims" (Moffett, 2016, p. 10). The Court has never explicitly adopted a similar position but seems to have applied the reasoning in some cases - especially those regarding the Peruvian armed conflict.

To provide an example, I will use the case of *Cruz Sanchez vs. Peru* (Inter-American Court of Human Rights, 2015). In 2015, the Court issued its decision in the case of *Cruz Sanchez*, about the alleged extrajudicial killings that happened after the *Chavín de Huantar* operation, the take-over of the hostage-taking situation that the MRTA initiated in the residence of the Japanese Ambassador in 1997. In that decision, the Court decided to not awarding any monetary compensation for the victim, a member of MRTA who was extra judicially killed after having surrendered. Judges Pérez Pérez and Ferrer MacGregor expressed their dissent. This is just one of the cases in which the Court has decided not to provide moral damages for the victims.

In this paper, I will provide (i) a legal framework about reparations in post-conflict situations in International Law; (ii) an analysis of the "clean hands doctrine" in International Human Rights Law; a (iii) presentation of the cases without moral damages in the Inter American Court; and finally, (iv) some conclusions on the matter. Throughout the paper, I will try to prove that the Inter American Court of Human Rights has used a "clean hands" approach when deciding reparations for members of armed groups. This doctrine does not apply to the admissibility of a

claim: everyone, no matter their participation in the conflict, can ask for reparations and, in particular, for moral damages. However, it does seem to be common practice to reduce or reject the monetary compensation for moral damages when a person is responsible for crimes during an armed conflict, nor does it seem valid that the Court should adopt this approach without express recognition that it is doing so. By not openly applying the "clean hands doctrine" nor providing justification for withholding moral damages from victims who have committed acts of terrorism, the Court fails to establish clear grounds on which reparations are awarded and a consistent, predictable rationale for reparations decisions. However, I will argue at the end that, in transitional justice cases, a moderated version of the "clean hands" doctrine can be used to lower the amount of the moral damages.

2. Reparations for Guilty Victims in Post-Conflict Context

Reparations constitute a pillar or core element of transitional justice (De Greiff, 2012). They are important not only to victims, but to the international and national communities as a whole. From an economic approach, reparations serve a deterrence function by placing an economic burden on States when they do not fulfill their obligations. This may be useful to avoid future breaches of International Law. According to LaPlante (2004), if States are able to avoid payments generated by the breach of International Law, then reparations will not satisfy the deterrence effect that is meant to be caused by their economic brunt. In this scenario, States are less likely to implement measures to ensure non-recurrence - which the Court often requires - and adequate domestic remedies.

That deterrence function of reparations (LaPlante, 2004, p. 355) though not the only function of reparations in International Human Rights Law ("IHRL"), is adequate and necessary, even if it has not been appropriately considered or justified in international jurisprudence (Shelton, 2002). However, if human rights violations constitute a breach of the values that the international community upholds as most desirable, it is understandable that there is a higher reparation payment for these violations. Despite this, it is important to note that the Inter-American Court has not understood reparations as punitive when referencing article 63 (1) of the Convention. This article provides precisely for the remediation of violations of human rights, when appropriate, through fair compensation to the victims. When interpreting it, the Court has argued that the "expression 'fair compensation', used in Article 63 (1) of the Convention, to refer to a part of the reparation and to the 'injured party' is compensatory and not punitive"(Inter-American Court of Human Rights, 1989, para. 38).

The deterrence approach to reparations may not consider how transitional justice contexts operate. Unlike common human rights violations, human rights

▪ Estudios de Derecho, N.° 173 ene-jun 2022, ISSN-L 0120-1867 ▪
▪ Doi: 10.17533/udea.esde.v79n173a01 ▪

violations that happen during an authoritarian rule or an armed conflict are not that likely to happen again, as they are exceptional events. Therefore, the idea of reparations as a means to avoid a vicious cycle of violation of international standards may not be that accurate(LaPlante, 2004, p. 354). Thus, other approaches need to be taken into account.

De Greiff (2014), former United Nations Special Rapporteur on transitional justice, has argued that States should follow a human rights approach on transitional justice (p. 67). This implies adopting a plurality of approaches that include visions of distributive, restorative, reparative and civic justice (LaPlante, 2015). For those reparations to be useful, they need to consider the past and the future, since transitional justice looks to change situations that allow for widespread human rights violations and the causes of it. In the words of Gray (2010), reparations must "assume the posture of Janus, facing simultaneously the past and the future in order to recognize and by affirmative steps correct, reform, and reshape the underlying causes of pre transitional abuses" (p. 1094).

If this view is to be followed, then guilty victims should have the right to claim reparations - it is not possible, or coherent, to re-build a country while still excluding some groups. Therefore, under this view, it would be necessary to repair every person who was a victim, even if they were also perpetrators. This reasoning can be applied to both pecuniary and non-pecuniary reparations. However, the Inter American Court has, in some cases, openly denied monetary compensations for victims who were perpetrators, arguing that the symbolic value of the Court's ruling should be sufficient reparation. This practice is a staunch departure from the Courts usual custom of awarding a monetary amount for moral damages. In this sense, it is not the lack of monetary damages that is a problem (insofar as non-monetary reparations could be awarded), but the differentiation between cases without providing a clear rationale for doing so.

In the last few years, the "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" (from now on, *Basic Principles*) (United Nations General Assembly, 2005) have guided the implementation of reparations around the world. This soft law instrument adopted by the United Nations General Assembly provides guidelines on how reparations should be awarded in cases of gross and severe violations of IHL, like those that happens in armed conflicts, and compiles current practice and jurisprudence on the matter. For example, regarding reparations, it indicates that "*Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law" (United Nations General Assembly, 2005, para. 20). This could include - depending on the circumstances

of the case - moral damages (United Nations General Assembly, 2005, para. 20.d) which seek to compensate victims for a general "damage to the enjoyment of life" (Shelton, 2006, p. 307) that include intangible "injuries such as physical pain and suffering" (Shelton, 2006, p. 306).

Moral damages, in the IACrtHR's jurisprudence have been tied to a victim's (and their family members") innate suffering and affliction, as well as the detriment to values important to them, and the emotional impact of the violation in the particular context of the victim (Nash Rojas, 2009, p. 53). Regarding moral damages, the IACrtHR has argued that

> while a condemnatory judgment may in itself constitute a form of reparation and moral satisfaction, whether or not there has been recognition on the part of the State, it would not suffice in the instant case, given the extreme gravity of the violation of the right to life and of the moral suffering inflicted on the victims and their next of kin, who should be compensated on an equitable basis. (Inter-American Court of Human Rights, 1996)

Thus, the IACrtHR holds that moral damages should be assessed in light of the circumstances and violations in each case.

Now, it is true that reparations at an International Human Rights court and reparations in domestic programs are not the same. The former deal with specific cases and violations, while the latter aim to redress mass violations of human rights on a wide-reaching scale. Regardless, I agree with García-Godos (2008), who argues that "there is no inherent contradiction between juridical and operational definitions, as they both focus and acknowledge the victim's right to redress" (p. 121). That means that both of them should follow the same principles.

Post-conflict usually generates complex situations. Many persons are involved, not only as victims but also as perpetrators of crimes (Méndez, 2016, p. 2). In addition, they usually do not fit in the common narrative of innocence or blamelessness that accentuates the wrongfulness of the acts of the perpetrators (Moffett, 2016, p. 155). However, it is necessary to recognize different forms of victimhood (Méndez, 2016, p. 2). Thus, "it is not uncommon to find that a single individual can have several roles, that is, be identified as several types of agent at different points in time" (García-Godos, 2008, p. 124). That was the case for many people in the Peruvian case (Gavilán Sánchez, 2012, provides an interesting example). However, under a human rights approach, those roles should not create differentiations in the access to reparations.

The *Basic Principles* do not distinguish amongst victims, even when they are limited to victims of gross violations of human rights. This means that all victims of gross violations of human rights - regardless of whether they were combatants or civilians, are entitled to reparations. The document states that the "application

and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception"(United Nations General Assembly, 2005, para. 25). The document that was the basis for the Basic Principles, the Study Concerning the Right to Restitution, Compensation and Rehabilitation for Gross Violations of Human Rights and Fundamental Freedoms (Van Boven, 1993) does not distinguish between victims either. However, a question remains unanswered: would participation in an armed group be grounds for denying any kind of reparation?

As a principle, we would have to take into account the old Roman idea of *ubi lex non distinguit, nec nos distinguere debemus*[2]. According to De Greiff (2014), a human-rights approach to reparations means that the allegiance to an armed group cannot be ground to be excluded from reparations (pp. 66-67). International tribunals would have to have this in mind when dealing with reparations. They do not make reparation programs, but they order reparations for the cases that arrive at their jurisdiction. Thus, their decisions cannot have the comprehensive reach that a domestic reparations program has. Even though reparations for these cases may differ from the ones dealt in domestic programs, the Inter-American Court has tried to analyze some of these domestic programs and has assessed their compliance to a human rights approach (Sandoval, 2018).

However, the Inter American Court has not answered the aforementioned question. In some cases, it has limited reparations for victim-perpetrators to the symbolic value of the Court's ruling but has never provided an explanation for its decision. In doing so, the Court appears to have found a way around the debate by technically awarding a form of reparation for moral damages (the ruling), but not actually awarding a monetary compensation for moral damages. The symbolic value of the ruling does not add a specific reparation for moral damages and allows the Court to hold that no further reparation is necessary.

3. "Clean Hands" Doctrine in International Human Rights Law

The standing of the "clean hands" doctrine is not clear in International Law. Some argue that it has no standing in International Law and some argue that its importance is undeniable (Pomson & Horowitz, 2015, pp. 226-27). Therefore, "he [or she] who comes into equity must come with clean hands" (Anenson, 2018, p. 1837). The doctrine tries to avoid wrongdoers taking an unfair advantage from any legal system (Anenson, 2018, p. 1845).

2 Own translation: Where the Law makes no distinction, we must not make distinctions.

At the International Law level, no "generally accepted definition of the clean hands doctrine has been elaborated" (Permanent Court of Arbitration, 2007). It has been applied rarely, according to Crawford (2002, p. 162) and the International Court of Justice has "never relied on it to bar admissibility of a claim or recovery" (Dumberry & Dumas-Aubin, 2013). In fact, in a 2019 case between the United States and Iran, the Court expressly stated that "without having to take a position on the "clean hands" doctrine, the Court considers that, even if it were shown that the Applicant's conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the Respondent on the basis of the "clean hands" doctrine" (International Court of Justice, 2019, para. 122).

In human rights jurisprudence, there is one reference to the doctrine in the case of *Chapman vs. The United Kingdom* (European Court of Human Rights, 2001). This case was about Mrs. Chapman, a Gypsy[3] woman, who purchased a plot of land in which she intended to place her caravan. However, the District Council ordered her to vacate said plot, as they did not accept her request for permission to use it. She presented a claim before the European Court of Human Rights. The Court found no violation of rights. Regarding article 8 of the European Convention of Human Rights (respect for privacy and family life), it held that article 8 does not grant the right to housing. It also said that the interference was "necessary in a democratic society" because the land Mrs. Chapman sought to inhabit was under environmental protection, and there was a wide margin of appreciation in favor of national authorities regarding planning laws. Likewise, about discrimination, the Court held that the different treatment was proportionate and had an objective aim and justification. In his separate opinion, judge Bonello stated that: "The classic constitutional doctrine of "clean hands" precludes those who are in prior contravention of the law from claiming the law's protection" (European Court of Human Rights, 2001, Judge Bonello Separate Opinion, para. 5). Taking that into mind, it seems that he was trying to deny not only reparations but also the violation altogether.

According to Shelton (2006), only two cases about arbitrary deprivation of life were not awarded damages from the European Court of Human Rights (p. 304). In the case of *Finucane vs. The United Kingdom*, the Court decided not to award them, arguing that the applicants had already received a significant sum previously (European Court of Human Rights, 2003). However, the most important case on the matter is *McCann and others vs. The United Kingdom* (European Court of Human Rights, 1995). This case was about the extrajudicial killing of three members of the Provisional Irish Republican Army (PIRA), an armed group that wanted to end British rule in Northern Ireland. McCann and two other members of PIRA (Savage

3 Even though some may use "Gypsy" as a derogatory term, it is the word used by the Court.

▪ Estudios de Derecho, N.° 173 ene-jun 2022, ISSN-L 0120-1867 ▪
▪ Doi: 10.17533/udea.esde.v79n173a01 ▪

and Farrell) were on a mission to set up a bomb in Gibraltar. A Special Air Services team managed to eliminate them when they had no arms, bombs or detonators. The European Court, in a 10-to-9 decision, found that the use of force was not strictly proportional, since the members of the PIRA did not represent a threat at the moment of the attack. Regarding moral damages, the Court decided that:

> Having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court does not consider it appropriate to make an award under this head. It therefore dismisses the applicants' claim for moral damages. (European Court of Human Rights, 1995, para. 219)

The Court's response included both pecuniary and non-pecuniary damages, given that the applicants had not distinguished between both in their claim (European Court of Human Rights, 1995). The Court decided this based on the notion that the applicants were about to inflict an equal or larger amount of damage than that which they received. The European Court avoided prospective wrongdoers from taking advantage of reparations, even if they were killed illegally, creating a dissuasive effect for future claims. Therefore, it is clear that the European Court of Human Rights decided to use a clean hands doctrine in this case. It does not appear to have been used since.

4. The Application of the Clean Hands Doctrine in some Peruvian Cases

Shelton (2006) recognizes that reparations in the Inter-American Court have "increased in generosity towards victims over the years" (p. 299). Since its first case, *Velasquez Rodriguez*, the Court recognized that a proper reparation included "the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm" (Inter-American Court of Human Rights, 1989, para. 26). Without an express definition of the two concepts, the IACrtHR refers to patrimonial damages about the expenses related to the violation(Inter-American Court of Human Rights, 1989, para. 41) and non-patrimonial damages as emotional harm (Inter-American Court of Human Rights, 1989, para. 50). Thus, regarding emotional harm, it held that "indemnity may be awarded under international law and, in particular, in the case of human rights violations. Indemnification must be based upon the principles of equity" (Inter-American Court of Human Rights, 1989, para. 27). The principles of equity are necessary to establish the quantum of indemnization awarded. They should not, however, be used to bar someone who has committed a violent crime form accessing reparations without further explanation. Thus, I hold that equity could be used to limit the amount of indemnization awarded by factoring in the

crimes committed by the now-victim. Reducing the quantum to zero, as the IACrtHR has done, would violate the principles of equity.

Regarding transitional justice, the Inter-American Court is considered an important reference for all States (LaPlante, 2007). It is safe to say that "its groundbreaking and holistic approach has served as a model for diverse reparations programs" (Contreras-Garduño, 2012, p. 121). Therefore, its decisions are taken as a paradigm of fairness in transitional justice situations. That is why its decisions on reparations need to be properly assessed. Regarding compensation, Antkowiak & Gonza (2017) have said that "a few judgments involving confirmed criminals as victims required no monetary compensation at all for moral damages"(p. 297). Such a decision is problematic, "considering that all victims of rights violation are entitled to adequate redress - and preferably to those reparations that correspond to their situation and needs"(Antkowiak & Gonza, 2017. p. 298). By not awarding economic redress for moral damages in these cases, when the Courts consistent practice has been to provide an economic award for moral damages, it is establishing a distinction between "categories" of victims. As I will show in the following pages, the Inter American Court has not provided a clear explanation on why it has decided in this way.

a) A "Clean Hands" application?

At the Inter American level, there are five judgments in which the Court decided not to award moral damages to the victim. Those are the cases of *Castillo Petruzzi et al. vs. Peru*(Inter-American Court of Human Rights, 1999); *Berenson Mejia vs. Peru*(Inter-American Court of Human Rights, 2004); *Raxcacó Reyes vs. Guatemala*(Inter-American Court of Human Rights, 2005b); *Fermin Ramirez vs. Guatemala* (Inter-American Court of Human Rights, 2005a) and *Cruz Sanchez et al. vs. Peru* (Inter-American Court of Human Rights, 2015). The case of *Berenson Mejia vs. Peru* may seem problematic since she was granted debt forgiveness as redress for moral damages (Inter-American Court of Human Rights, 2004, para. 239). However, I will argue that, as long as the State is not providing a relief but only renouncing to claim a debt, no moral damages were actually awarded. This is because the victim does not receive tangible or symbolic compensation for what had occurred without a clear explanation as to why. It is interesting to note that Berenson's relatives were not awarded non-patrimonial damages either (Inter-American Court of Human Rights, 2004).

In this list, I am not including the judgments that decided not to award damages because there had been some reparation at the domestic level (Bregaglio Lazarte, 2016, p. 297; Sandoval, 2018, p. 1199). This includes, for example, the case of *Gomes Lund*, a case of torture and enforced disappearance against the members of a Brazilian guerrilla known as Araguia Guerrilla (Inter-American Court of Human Rights, 2010, para. 309).

▪ Estudios de Derecho, N.º 173 ene-jun 2022, ISSN-L 0120-1867 ▪
▪ Doi: 10.17533/udea.esde.v79n173a01 ▪

The five cases are only about two States: Guatemala and Peru. The cases of Guatemala are about persons sentenced to death penalty and were not involved in an armed conflict. The case of *Raxcacó Reyes vs. Guatemala* is about Mr. Raxcacó Reyes, who was given the death penalty after being found guilty of kidnapping an underage boy. During his time in prison, he was placed in at least three different penitentiaries, where he was subject to mistreatment from guards, spent most of his time in a small cell, and had limited time outdoors. He developed depression and anxiety, respiratory difficulties, several pains and injuries due to mistreatment, but was not given medical or psychological assistance. The Court ruled that Guatemala had violated the rights to life and the right to humane treatment, as guaranteed by articles 4 and 5 of the ACHR. The State violated the right to life by applying the death penalty, as it was not only applied to the most serious crimes and its application did not consider the level of participation of the accused, the circumstances of the crime or the intensity of the damages caused (Inter-American Court of Human Rights, 2005b, para. 56-82). The other case, *Fermin Ramirez vs. Guatemala* has to do with the death penalty imposed to Mr. Ramírez, a man found guilty of rape of an underage girl. He requested an *amparo*, an incidental plea alleging that the decision was incongruous and a measure of grace, all of which were denied.[4] During his time in prison, detention conditions affected his health, inducing anxiety, insomnia, lack of appetite, gastrointestinal disorder and other health issues. The Court declared that Guatemala had violated the rights to due process, freedom from *ex post facto* law, life and humane treatment. The Court found that the State had violated the right to life insofar as no state organ had the competency to respond to measures of grace (Inter-American Court of Human Rights, 2005a, para. 103-110). Finally, the Court found that the state had violated the right to humane treatment due to inadequate detention conditions (Inter-American Court of Human Rights, 2005a, para. 117-121). In the two cases, though both the IACHR and the victims requested compensation for moral damages, the Court denied the request, arguing that the judgment provided sufficient compensation (Inter-American Court of Human Rights, 2005a, para. 125,126,130, 2005b:119, 124, 131).

Both of these two cases had to do with criminals convicted for crimes against children: rape and kidnapping. Although the IACrtHR has awarded economic compensation in cases where victims were convicted of crimes, it denied economic compensation in these decisions, without providing clear explanation for the change in its jurisprudence. This is especially problematic if we consider that in the case of *Fermín Ramirez*, the victim's culpability can be put into question given that the Court itself found that his conviction had not followed the rules of due process.

4 A measure of grace would have allowed for the commutation of Mr. Ramírez's sentence to an inferior sentence of fifty years in prison. The Decree that regulated measures of grace, however, was annulled (Inter-American Court of Human Rights, 2005a, para. 54).

b. The Peruvian Cases

Unlike the Guatemalan cases, the Peruvian cases with no moral damages are not about common criminals, but about members of armed groups whose rights were violated by the State. Two cases have to do with convicted members of MRTA (*Castillo Petruzzi* and *Berenson Mejia*) and one has to with a member of MRTA who was victim of an extrajudicial killing (*Cruz Sanchez*). It is important to mention that in other cases, throughout the years, convicted or alleged members of armed groups received moral damages (Inter-American Court of Human Rights, 2015, Dissenting opinion of Judge Ferrer Mac-Gregor, para. 17). According to Bregaglio, at least 10 cases of the IACrtHR have dealt with human rights violations against members of Peruvian armed groups. In other cases, the IACrtHR ordered moral damages compensations for those victims (Bregaglio Lazarte, 2016, p. 303).

The case of *Castillo Petruzzi et al.* was about four Chilean citizens who were members of the MRTA: Mr. Jaime Francisco Sebastián Castillo Petruzzi, Mrs. María Concepción Pincheira Saez, Mr. Lautaro Enrique Mellado Saavedra and Mr. Alejandro Luis Astorga Valdez. All of them were convicted for treason in a military court, with several due process failures followed by mistreatment in penitentiaries. In 1999, the Inter-American Court decided that Peru had violated the rights to due process, freedom, physical integrity and freedom from *ex-post facto* laws (Inter-American Court of Human Rights, 1999, para. 112, 122, 134, 149, 156, 162, 168,173, 188, 199, 208). In this case, the Inter-American Commission of Human Rights (IACHR) requested compensation for moral damages, requesting "full compensation". Nevertheless, the Court did not award any economic compensation to the victims and held, as it later did in other cases, that the judgement was an adequate reparation (Inter-American Court of Human Rights, 1999, para. 215, 223). Relatives only recovered the expenses made during the domestic and international processes. The Court provided a weak justification on the matter: "the present judgment is in itself a meaningful and important form of compensation and moral satisfaction for the victims and their relatives" (Inter-American Court of Human Rights, 1999, para. 225). Although it is possible that other factors were considered, such as the nature of the crimes perpetrated and the violations committed, without a proper justification we cannot truly evaluate the Court's decision nor rigorously account for those factors.

Years later, in 2004, the Court decided the case of *Berenson Mejia*, a female member of MRTA who claimed to have been subject to arbitrary detention, ill treatment and violations of the due process (Inter-American Court of Human Rights, 2004). She was arrested in 1995 and was shown as a member of MRTA before the press. During interrogations, she did not have access to an attorney, and was then subjected to a military trial with several due process violations. Ms. Berenson was sent to a penitentiary in Yanamayo, a town over 4000 meters above sea level and

with temperatures below 0 degrees Celsius. The Court's judgment indicated that the State had violated the rights to due process, humane treatment and freedom from *ex-post facto* laws (Inter-American Court of Human Rights, 2004, para. 127-128). The IACHR merely stated that the victim could request reparations. The victim did not request any compensation for herself but did request compensation for her parents (Inter-American Court of Human Rights, 2004, para. 227-228). Nevertheless, when deciding on moral damages, the Court decided to provide her with a debt condemnation of around 30 000 dollars (Inter-American Court of Human Rights, 2004, para. 239). It is interesting to note that the Court, when analyzing the damage, indicated that:

> The damage of a non-pecuniary nature caused to Lori Berenson is evident, because it is natural for any person subjected to cruel, inhuman or degrading treatment or punishment, such as that proved in this case, to suffer damage of a non-pecuniary nature. The Court considers that no evidence is required to reach this conclusion. (Inter-American Court of Human Rights, 2004, para. 237)

Even in such an evident case, per its own terms, the Court decided not to provide any further reparation.

Finally, in 2015, the Court issued its judgment in the case of *Cruz Sanchez et al.*, about the alleged extrajudicial killings that happened after the *Chavin de Huantar* operation, the take-over of the hostage-taking situation initiated by MRTA in the residence of the Japanese Ambassador in 1997 (Inter-American Court of Human Rights, 2015). In that decision, the Court indicated that the State was responsible for the extrajudicial killing of Eduardo Nicolás Cruz Sanchez, member of MRTA. It was not possible to determine the responsibility on the deaths of other two members: Herma Luz Meléndez Cueva y Víctor Salomón Peceros Pedraza (Inter-American Court of Human Rights, 2015, para. 319, 343). However, regarding the three victims, the Court found due process violations (Inter-American Court of Human Rights, 2015, para. 431). The Court also found a violation of the right to integrity, due to the suffering Edgar Odón Cruz Acuña, brother of Cruz Sanchez, went through for being denied the body of his brother after his death (Inter-American Court of Human Rights, 2015, para. 450). It is important to say that in this case, unlike the two previous cases, the victims had not been convicted of acts of terrorism, though their participation is clear. Yet again, the IACHR and the representatives requested "adequate compensation" and compensation in equity, respectively, for the victims, but did not specify a compensatory amount (Inter-American Court of Human Rights, 2015, para. 479-480). The Court decided not to award any monetary compensation for the victims (Inter-American Court of Human Rights, 2015, para. 483). It argued that:

> It is not pertinent to award compensation for immaterial damage in relation to the violation of the right to life of Eduardo Nicolás Cruz Sanchez in this case, taking into account that this decision constitutes, per se, sufficient compensation for immaterial damages. (Inter-American Court of Human Rights, 2015, para. 483)[5]

Nevertheless, in this case, two judges issued dissenting opinions on the matter. Judge Perez Perez stated that there should have been a compensation for moral damages. He added that "there are no reasons that justify changing the practice of awarding moral damages" (Inter-American Court of Human Rights, 2015, Dissenting opinion of Judge Perez Perez, para. 4)[6]. By this, the Judge referenced the IACrtHR's usual practice of awarding compensation for moral damages in two forms: awarding an equitable sum of money or implementing public acts or measures as symbolic forms of reparation (Nash Rojas, 2009, p. 56).

Judge Ferrer Mac-Gregor argued for the need to award all victims with moral damages due to the concept of "integral reparation" (Inter-American Court of Human Rights, 2015, Dissenting opinion of Judge Ferrer Mac-Gregor, para. 4). He also indicated that the Court had awarded moral damages in other cases persons accused of belonging to terrorist groups (Inter-American Court of Human Rights, 2015, Dissenting opinion of Judge Ferrer Mac-Gregor, para. 17). This is precisely where the IACrtHR's problem, which I will expand upon in the coming pages, lies. However, it is important to note that, in making this claim, the Judge references that not awarding damages to the relatives of the victims "could be discriminatory, attending the precedents of the Court in similar cases, to move the blame to the relatives for actions not committed by them, and taking into account that the relatives of the direct victim are also victims themselves" (Inter-American Court of Human Rights, 2015, Dissenting opinion of Judge Ferrer Mac-Gregor, para. 23)[7]. Judge Ferrer Mac-Gregor admitted that the compensation should attend "to the particular circumstances of the case" (Inter-American Court of Human Rights, 2015, Dissenting opinion of Judge Ferrer Mac-Gregor, para. 23) in that the quantum must be modified, but the Court should always award a form of compensation.

---

5 Own translation of: "no es pertinente ordenar el pago de una compensación económica por concepto de daño inmaterial en razón de la violación del derecho a la vida en perjuicio de Eduardo Nicolás Cruz Sanchez, tomando en cuenta que esta sentencia constituye, per se, una suficiente indemnización del daño inmaterial".

6 Own translation of: "No existen razones que justifiquen el apartamiento de la práctica de otorgar una indemnización compensatoria".

7 Own translation of "podría resultar discriminatorio en atención a los precedentes de la Corte en casos similares, al trasladar a los familiares el reproche de conductas por ellos no cometidas y teniendo en cuenta que los familiares de la víctima directa resultan víctimas en sí mismas".

c. The Incoherence of the Inter-American Court Regarding Reparations for Members of Armed Groups

One of the most interesting points of the aforementioned decisions is that they are not consistent with other Inter-American Court decisions. In other cases, both against Peru and against other countries, the Court has awarded moral damages for victims who participated in crimes. This happened, for example, in the case of *Miguel Castro Castro Prison vs. Peru*. In that case, members of armed groups were victims of massacres perpetrated by state forces inside penitentiaries (Inter-American Court of Human Rights, 2006). Also, in 2015, the Court issued its decision on the case of *Espinoza Gonzales vs. Peru* (Inter-American Court of Human Rights, 2014a). The case was about sexual violence suffered by Mrs. Gladys Espinoza Gonzales, a member of MRTA, when she was in prison. The sexual violence case was never investigated, and domestic courts' judgments relied on pejorative stereotypes when evaluating her testimony. The Court found violations of the rights to due process, personal liberty, honor, privacy and personal integrity, protected under articles 5, 7, 8, 11, 25 of the ACHR (Inter-American Court of Human Rights, 2014a). It also found that the State had not met its obligations under articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture and article 7.b of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) (Inter-American Court of Human Rights, 2014a).

The IACHR did not request damages in this case, but the victims requested material and immaterial damages. They did not request a specific amount or form of compensation, but they did highlight the fact neither Ms. Espinoza Gonzales nor her relatives had received reparations form the National Reparations Plan (Inter-American Court of Human Rights, 2014a, para. 333). When deciding on reparations, the State "asked that the Court apply the precedents established in the cases of *Castillo Petruzzi et al*. and *Lori Berenson Mejía*, both against Peru and, consequently, not grant the financial compensation requested by the representatives" (Inter-American Court of Human Rights, 2014a, para. 333). Nevertheless, the Court decided to award 60 000 dollars to Mrs. Gladys Espinoza and 40 000 dollars to her mother and 5 000 dollars to her brother (Inter-American Court of Human Rights, 2014a, para. 334). No explanation was provided on the issue.

Another interesting comparison can be drawn here, regarding the case of *Cruz Sanchez et al.* There is a very similar case in the Inter-American Court's jurisprudence: *Rodríguez Vera et al. vs. Colombia* (Inter-American Court of Human Rights, 2014b). Like the Peruvian case, *Rodríguez Vera et al. vs. Colombia* has to do with human rights violations that happened after the State took over a hostage situation carried out by an armed group. There were several victims; however, the one most similar to the victims in the *Chavin de Huantar* case is Irma Franco

Pineda, member of the M-19 guerrilla group. In 2014, the Court issued its decision on the case of *Rodríguez Vera et al. vs. Colombia*. This case had to do with several human rights violations to different persons during and after the take-over of the Palace of Justice, home to the Supreme Court of Colombia. On November 6 and 7, 1985, the Palace of Justice was seized by members of M-19, a guerrilla group. The State responded by attacking the building with an excessive use of force. In those circumstances, Mrs. Irma Franco Pineda was victim of enforced disappearance, alongside other persons who were not members of the M-19 (Inter-American Court of Human Rights, 2014b, para. 303). The Court found that the State was responsible for that disappearance, among other violations (Inter-American Court of Human Rights, 2014b, para. 303, 513).

When dealing with reparations, the Court had to decide on reparations for a diverse group of persons: different civilians and Mrs. Irma Franco. The representatives of the victims had requested the payment of USD100, 000 in immaterial damages for direct victims and USD50, 000 for their siblings. The representatives acknowledged the possibility that the State would discount the amount paid in damages as a result of domestic judgments (Inter-American Court of Human Rights, 2014b, para. 588). Instead of separating her from the rest, the Court decided to award the same compensation to all of the victims. In doing so, the Court considered its previous decisions on enforced disappearances and "the circumstances of this case, the significance, nature and gravity of the violations committed, the suffering caused to the victims and their families, the time that has passed since the events occurred, and their actual impunity" (Inter-American Court of Human Rights, 2014b, para. 603). With those criteria, the Court decided to award 100 000 dollars to each victim of enforced disappearance. However, once again, the Court did not justify its decision to award moral damages to this particular victim. It is precisely this lack of clear and transparent reasoning that has generated an incoherent line of judgment within the IACrtHR, by virtue of which the Court appears to apply selectively a clean hands doctrine.

All of those criteria were also met in the case of *Cruz Sanchez*. He was also killed in a rescue mission in a hostage situation that his armed group had started. He was killed even after he had been captured, bound and incapacitated by State forces. After his body was found, a long process was initiated in both civil and military justice to determine the circumstances of his death. The military tribunal dismissed the case for lack of proof (Inter-American Court of Human Rights, 2015, para. 161-165,174-191, 313-316). The only difference is the kind of human rights violation (enforced disappearance in the Colombian case and extrajudicial killing in the Peruvian one), but both cases talk about a deprivation of life by the State. And in one case, the member of M-19 received 100 000 dollars in moral damages and in the other case, only one year later, the member of MRTA receives no monetary compensation for moral damages. There is no logical coherence behind

this distinction. As Judge Ferrer Mac-Gregor mentioned, it seems discriminatory towards the victims and their families (Inter-American Court of Human Rights, 2015, Dissenting opinion of Judge Ferrer Mac-Gregor, para. 23).

There are two possible explanations for this difference. The first is that the Inter-American Court was mistaken when it decided not to award moral damages in the aforementioned cases. The second is that, following LaPlante's question, maybe international jurisprudences does not "provide clear enough guidance on" (LaPlante, 2007, p. 89) the criteria for "repairing human rights violations" (LaPlante, 2007, p. 89). If the criteria were clear, the Inter-American Court of Human Rights could apply them. However, the criteria by which the IACrtHR might be identifying cases where a "clean hands" approach is valid remain unclear. This makes it difficult to assess the real motivations of the Inter-American Court as they have not provided any justification on the matter, as will be analyzed in the following pages.

d. The Lack of Explanation when Awarding or Denying Economic Compensation for Members of Armed Groups

The two previous comparisons, between cases were the IACrtHR did not award moral damages to members of armed groups and cases where it did, point out the incoherence of the Inter-American Court regarding reparations for members of armed groups and their family members. As the Court provides no explanation for its decisions beyond a general reference to the suffering that can be inferred from a human rights violation, there is a need to provide some justification. In the case of *Cruz Sanchez*, Correa decided to see if there was any justification for denying reparations (Correa, 2015). He tried to provide four explanations and decided that none of them was adequate for denying compensation. According to Correa, one possible explanation could be that "somebody at war with the state does not deserve compensation for moral damages" (Correa, 2015).

That idea should be disregarded, as the conflict was over at the time of the ruling, and the victim's relatives were not at war with the State. Though they might have been in the past, holding this against them in a reparation" decision would go against the foundations of transitional justice as have been explained in this paper. The second proposal was that persons who have committed heinous crimes do not deserve moral compensation. This is also wrong. The acts committed by the victim do not affect the determination of the State's responsibility, and thus should not affect the decision to award compensation. It is with regards to this point that the IACrtHR has failed to provide sufficient explanations for its decision to tie reparations to previous wrongdoings in certain cases.

The third proposal is that the victim exposed himself to danger. This idea also has to be disqualified, since Mr. Cruz Sanchez was killed while being *hors*

de combat, so he did not pose a threat at that time. Finally, the fourth proposal is that a compromise was needed, keeping the *McCann* case in mind. However, this should also be dismissed. According to Correa, in the case of *McCann*, the victims could be seen as a threat when they were killed. That was not the case of Mr. Cruz Sanchez, who was killed after surrendering himself. Thus, it is impossible to justify not awarding moral damages.

It is possible to arrive at the conclusion mentioned in the fourth proposal by only relying on the Court's own jurisprudence. As mentioned above, in the case of *Rodriguez Vera et al. vs. Colombia*, the Court indicated that, in order to make a decision on moral damages, it had to take into account previous decisions and "the circumstances of this case, the significance, nature and gravity of the violations committed, the suffering caused to the victims and their families, the time that has passed since the events occurred, and their actual impunity" (Inter-American Court of Human Rights, 2014b, para. 603). The Court does not make any reference to the previous acts committed by the victim or her membership to any group. The same reasoning should have been applied to the *Cruz Sanchez et. al.* case. It is not possible, however, to analyze the Court's reasoning in this latter case, because no justification beyond the fact that Cruz Sanchez was a member of an armed group was provided. Unlike in the case of *Rodriguez Vera et al. vs. Colombia*, the judgment on moral reparations did not openly value the circumstances of the case, nature and gravity of the acts, or other relevant factors.

e. Towards a coherent application of the clean hands approach

Everybody is entitled to moral damages. The decision of the Inter-American Court to deny them in the Peruvian cases regarding members of armed groups is unfair, discriminatory and has not been properly explained. This lack of justification of any kind is a fundamental problem in the Court's judgments. Although an argument could be made for a clean hands approach in reparations decisions, the Court has never stated the rationale behind its decisions. As such, we can only assume that it is applying a "clean hands doctrine" approach but cannot find arguments to hold that this approach is not discriminatory without knowing the Court's *ratio decidendi.* LaPlante (2007) argues that "the jurisprudence emanating from the Inter-American system of human rights can be read to reject the Clean Hands Doctrine in reference to international human rights reparations law"(p. 68). This claim is based, fundamentally, on the fact that the Court "has never explicitly referred to the Clean Hands Doctrine" but "has never called into question the guilt or innocence of petitioners when deciding reparations claims", going as far as awarding reparations where the petitioners guilt was unclear (LaPlante, 2007, p. 67). LaPlante (2007) mentions the case of *Neira Alegría vs. Peru*, where the

Court rejected the State's argument that the victims' families should not receive reparations because of the damage inflicted by the victims (p. 68).

That reading of the Court's jurisprudence is not correct now and it was not correct at the time it was written (2007), and the cases explored in this paper prove that the IACrtHR has in fact valued, in some cases, the guilt or innocence of a petitioner when evaluating claims for moral damages. The Inter-American Court has used that approach in the cases mentioned before, even though it was not explicit. However, that does not make it right. It is clear that the "clean hands" doctrine cannot be used to deny access to justice, and in fact it has not denied wrongdoers access to the Inter-American Human Rights System. That much is clear. However, "clean hands" doctrine should not be used to deny monetary compensation for moral damages either. Although the victims in these cases had access to a legal process that ruled on human rights violations, redress was adjudicated using an arbitrarily differentiated standard. This is problematic, because the doctrine's application without valid justification would imply that the victim's right to due process has not been fully satisfied. Clean hands doctrine should not be used to deny moral damages. However, I do believe that international tribunals need to be careful in these situations. As Judge Ferrer Mac-Gregor said, the compensation should attend "to the particular circumstances of the case" (Inter-American Court of Human Rights, 2015, Dissenting opinion of Judge Ferrer Mac-Gregor, para. 23). Those particular circumstances include transitional justice contexts. Only in those situations, the "clean hands doctrine" could be used to lower the amount of moral damages of victims that are also perpetrators.

LaPlante (2007), however, raised an important question:

> If international enforcement bodies like the Inter-American Court uphold the nondiscrimination principle in human rights protections, in direct contradiction to domestic administrative programs, it could produce two classes of beneficiaries with those "terrorists" excluded from national plans at times winning more generous reparations packages. What new national tensions would this situation create?. (p. 89)

Peruvian cases are like that. I have no doubt that in Peru, and in most transitional justice contexts, the majority of the population dislikes the idea of paying damages to members of armed groups. Given the objectives of transitional justice schemes, this could, if properly justified, be used as an exception that would allow for the application of a "clean hands" approach to reparations. Yet, under a reparative justice view of reparations, it is not fair to do so in light of the suffering they and their relatives went through. In most cases, unlike what the Court has held, the symbolic value of a judgment will not be sufficient reparation for the victim and their relatives. If the Court intends to deny any form of material or immaterial reparation, to victim-perpetrators, that decision should be explicit and transparent.

In addition, under a civic justice view (LaPlante, 2015), it is important to build a State where rule of law is equal for everyone, no matter what they may have done in the past. There is no view that allows for the exclusion of perpetrators.

f. Conclusions

If every breach of International Law creates a duty to repair, then no case should go without reparation. This, in human rights tribunals, means "integral reparation", which includes money compensation for moral damages. It is certainly difficult to deal with complex victims. Persons who have been both perpetrators and victims usually do not get sympathy from the society. They are neglected and excluded. However, transitional justice must look to build a society for everybody, not only the innocent victims. Thus, reparations must be available for every kind of victim.

At the international level, this means that it is not possible to deny moral damages under the "clean hands" doctrine. Nevertheless, international tribunals have used this doctrine to deny monetary compensation for moral damages, usually without being explicit about it. Avoiding explicit mentions of a clean hands doctrine does not make its use valid. International tribunals should not deny monetary compensations for moral damages. In those cases, courts should keep in mind the objectives and views of reparations. Political views may be difficult to surpass but international tribunals need to argue based on fairness, justice and a human-rights approach.

However, I do think that it is possible to use a "clean hands" approach when determining the amount of compensation for moral damages. I think that, if there is no domestic reparations program, the international tribunal should lower what would be considered common compensation. If there were a domestic reparations program, the most adequate thing to do would be to include them in that program. That would be a proper response to the Peruvian situation.

Transitional justice is usually a long process and with no clear end. The Peruvian armed conflict is over, but there are still issues to be solved. Just as an example, there are at least nineteen cases of members of armed groups claiming human rights violations at the IACHR with admissibility report.[8] This means that

8 IACHR. Report No. 8/15, Petition 1413-04 et al; Gloria Beatriz Jorge López et al.; Report No. 164/11, Petition 490-01, Freddy Bill Cordero Palomino; Report No. 113/11, Petition 12.125, Wilbert Apaza Vargas; Report No. 111/11, Petition 240-00 and others, José Félix Arce Apaza y Luis Enrique Quispe Vega; Report No. 110/11, Petition 801-98, Carlos Braulio Arana Franco; Report No. 107/11, Petition 1105-04 y otras, Moisés S. Limaco Huayascachi et al.; Report No. 69/11, Petition 10.949, Magda Mateo Bruno; Report No. 179/10, Petition 979-98, Wilfredo Mas Trigoso; Report No. 155/10, Peticiones 755-04, 802-02, 869-04 y 996-04, Jaime Humberto Díaz Alva, Rubén Galván Borja, Eduardo E. Espinoza Narcizo, Vladimir Carlos Villanueva; Report No. 108/10. 108/10, Petitions 744-98, 614-00 y 1300-04, Orestes Auberto Urriola Gonzáles et al.; Report No. 77/10, Petition 12.154, Luis Alberto Vega Paquillo; Report No.

the discussion over the moral damages of terrorists is far from over. Therefore, the Inter-American Court needs to improve its reasoning when dealing with reparations for these persons in transitional justice contexts. Such reparations cannot be discriminatory but can take into account the conduct and damage that perpetrators did.

Bibliographical References

Anenson, T. L. (2018). Announcing the "Clean Hands" Doctrine. *UC Davis Law Review 51*(5), 1827-1890. https://bit.ly/32HAtFZ

Antkowiak, T. M. & Gonza, A. (2017). *The American Convention on Human Rights: essential rights*. UK: Oxford University Press.

Bregaglio Lazarte, R. (2016). Cuando la Corte no nos mira: las reparaciones como factor diferenciador en una sociedad posconflicto en el caso peruano. En *La desigualdad: Seminario en Latinoamérica de Teoría Constitucional y Política: SELA 2015*. Buenos Aires: Libraria Ediciones.

Contreras-Garduño, D. (2012). Are All Victims Entitles to Reparations? The Case of the Inter-American System of Human Rights. In A. Mihr (ed.), *Transitional Justice: between criminal justice, atonement and democracy. SIM Special No. 37.* (pp. 120-141). Utrecht: SIM. https://bit.ly/32GiHTv

Correa, C. (2015). Inter-American Court's Dangerous Precedent in Limiting Insurgents' Right to Reparations. *Justice Info.* https://bit.ly/3FUlnLr

Crawford, J. (2002). *The International Law Commission's articles on state responsibility: introduction, text, and commentaries*. Cambridge, U.K. New York: Cambridge University Press.

De Greiff, P. (2012). *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff. A/HRC/21/46.* https://bit.ly/3lgFvPU. UN.

De Greiff, P. (2014). *Report of the Special Rapporteur on promotion truth, justice, reparation and guarantees of non-recurrence. A/69/518*. UN.

Dumberry, P. & Dumas-Aubin, G. (2013). The Doctrine of 'Clean Hands' and the Inadmissibility of Claims by Investors Breaching International Human Rights Law. *Transnational Dispute Management, 10*(1).

75/10, Petition 1064-98, Esteban Juan Martínez Pérez; Report No. 74/10, Peticiones 574-98, Luis A. Miranda Moscol; 1067-03, Jorge E. Olivares del Carpio; 766-04, Aurelio Aquino Pari; y 863-04, Boris Mijail Taype Castillo; Report No. 66/10, Petition 737-01, Guillermo Ernesto Yapias Camavilca; Report No. 65/10. 65/10, Petition 827-98, Rutaldo Alejo Saavedra y Raúl Andrés Arias; Report No. 9/10, Petition 703-98 – Luis Enrique López Medrano, 1070-98 – Edwin Elías Genovés Canchari, 1097-98 – Edgard Montaño Zapana, 12.162 – Nancy Gilvonio Conde; Report N° 58/07, Petition 1101-05, Gabriel Orlando Vera Navarrete; Report Nº 85/03, Petition 12.165, Monsi Lilia Velarde Retamozo.

European Court of Human Rights. (1995). *Case of McCann and others vs. The United Kingdom. (Application no. 18984/91)*.

European Court of Human Rights. (2001). *Case of Chapman vs. The United Kingdom. (Application no. 27238/95)*.

European Court of Human Rights. (2003). *Case of Finucane vs. the United Kingdom. (Application no. 29178/95)*.

García-Godos, J. (2008). Victim Reparations in Transitional Justice - What Is at Stake and Why. *Nordisk Tidsskrift for Menneskerettigheter, 26*(2), 111-202.

Gavilán Sánchez, L. (2012). *Memorias de un soldado desconocido: autobiografía y antropología de la violencia*. Lima: Instituto de Estudios Peruanos (IEP).

González Napolitano, S. S.; Mendicoa, J. E.; Gómez Fernández, L. I.; Aisenstein, M.; Rohr, A.; Lavin, R.; Vogelfanger, A.; Roldán, S.; Heffes, E.; Garin, A. S.; Gracia, M. B.; Colmegna, P.; Losada Revol, I.; Salerno, L. & Robles, L. M. (2013). *La responsabilidad internacional del estado por violación de los derechos humanos: sus particularidades frente al derecho internacional general*. Avellaneda: SGN Editora.

Gray, D. (2010). A No-Excuse Approach to Transitional Justice: Reparations As Tools of Extraordinary Justice. *Washington University Law Review, 87*(2), 1043-1103. https://bit.ly/32Ah89v

Hillebrecht, C. (2012). The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter- American Human Rights System. *Human Rights Quarterly, 34*, 959-986. https://doi.org/10.1353/hrq.2012.0069

Inter-American Court of Human Rights. (1989). *Case of Velasquez Rodriguez vs. Honduras. Reparations and Costs. Judgment of 21 July 1989. Series C No. 7*.

Inter-American Court of Human Rights. (1996). *Case of El Amparo vs. Venezuela. Reparations and costs. Judgement of 14 September 1996. Series C No. 28.*

Inter-American Court of Human Rights. (1999). *Case of Castillo Petruzzi et al. vs. Peru. Merits, Reparations and Costs. Judgment of 30 May 1999. Series C No. 52*.

Inter-American Court of Human Rights. (2004). *Case of Lori Berenson Mejía vs. Peru. Merits, Reparations and Costs. Judgment of 25 November 2004. Series C No. 119.*

Inter-American Court of Human Rights. (2005a). *Case of Fermín Ramírez vs. Guatemala. Merits, Reparations and Costs. Judgment of 20 June 2005. Series C No. 126.*

Inter-American Court of Human Rights. (2005b). *Case of Raxcacó Reyes vs. Guatemala. Merits, Reparations and Costs. Judgment of 15 September 2005. Series C No. 133.*

Inter-American Court of Human Rights. (2006). *Case of the Miguel Castro Castro Prison vs. Peru. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160.*

Inter-American Court of Human Rights. (2010). *Case of Gomes Lund et al. ('Guerrilha do Araguaia') vs. Brasil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of 24 November 2010. Series C No. 219*.

Inter-American Court of Human Rights. (2014a). *Case of Espinoza Gonzáles vs. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2014 Series C No. 289*.

Inter-American Court of Human Rights. (2014b). *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) vs. Colombia. Preliminary Objections, Merits, Reparations and Costs. Judgment of 14 November 2014 Series C No. 287.*

Inter-American Court of Human Rights. (2015). *Case of Cruz Sanchez et al. vs. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of 17 April 2015 Series C No. 292.*

International Court of Justice. (2019). *Certain Iranian Assets (Islamic Republic of Iran vs. United States of America). Preliminary Objections. Judgment of 13 February 2019.*

LaPlante, L. J. (2004). Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention. *Netherlands Quarterly of Human Rights,* 22(3), 347-388. https://bit.ly/3pqmNXJ

LaPlante, L. J. (2007). The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition. *American University International Law Review,* 23(1), 51-90. https://bit.ly/3E134Ur

LaPlante, L. J. (2015). Just Repair. *Cornell International Law Journal,* 48(3), 513-578. https://bit.ly/3p6r0iU

Méndez, J. E. (2016). Victims as Protagonists in Transitional Justice. *International Journal of Transitional Justice,* 10(1), 1-5. https://doi.org/10.1093/ijtj/ijv037

Moffett, L. (2016). Reparations for 'Guilty Victims': Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms. *International Journal of Transitional Justice, 10*(1), 146-167. https://doi.org/10.1093/ijtj/ijv030

Nash Rojas, C. (2009). *Las Reparaciones ante la Corte Interamericana de Derechos Humanos (1988-2007)*. Santiago de Chile: Andros.

Olivera Astete, J. (2015). Estándares De La Corte Interamericana De Derechos Humanos Para La Reparación Del Derecho A La Verdad En El Perú Del Posconflicto. *American University International Law Review,* 32(2), 435-468. https://bit.ly/3paXg4m

Permanent Court of Arbitration. (2007). *Guyana vs. Suriname*.

Pomson, O & Horowitz, Y. (2015). Humanitarian Intervention and the Clean Hands Doctrine in International Law. *Israel Law Review, 48*(219), 35. https://bit.ly/3xvgAgH

Redacción Radio Programas del Perú (RPP). (2015). Humala sobre Chavín de Huántar: No voy a dar ni un sol a los terroristas. *RPP Noticias.* https://bit.ly/3nZQlvs

Sandoval, C. (2018). Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes. *The International Journal of Human Rights, 22*(9), 1192-1208. https://doi.org/10.1080/13642987.2016.1268439

Shelton, D. (2002). Righting Wrongs: Reparations in the Articles on State Responsibility. *The American Journal of International Law,* 96(4), 833-856. https://doi.org/10.2307/3070681

Shelton, D. (2006). *Remedies in International Human Rights Law*. 2 ed. Oxford: Oxford University Press.

Truth and Reconciliation Commission of Peru. (2006). *Final Report*. Lima. https://www.cverdad.org.pe/ingles/ifinal/index.php

Truth and Reconciliation Commission of Peru. (2014). *Hatun Willakuy. Abbreviated Version of the Final Report of the Truth and Reconciliation Commission*. Lima. https://cdn01.pucp.education/idehpucp/wp-content/uploads/2017/05/16225831/hatun_willakuy_ingles.pdf

United Nations General Assembly. (2005). *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. A/RES/60/147.*

Van Boven, T. (1993). *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. E/CN.4/Sub.2/1993/8.* UN.