

ARE ALL VICTIMS ENTITLED TO REPARATIONS? THE CASE OF THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

DIANA CONTRERAS-GARDUÑO

1. INTRODUCTION

Transitional justice processes date back to the Athenian transitions from oligarchy to democracy. However, the actual term is relatively new.¹ In modern history, transitional justice commenced after the Second World War. Hitherto, the prosecutions of the Nazi regime and the reparations programmes carried out by Germany after the war had a clear influence on transitional justice. The German steps represent a large scale effort which ‘was utterly unprecedented and remains unequalled’.²

Like Germany, Latin America has been at the forefront of debates about democratic transitions. Latin-America lived under the rule of authoritarian regimes for decades. During the twentieth century, Latin-American has been the home of bloody conflicts in which all persons who opposed the regime were considered enemies of the state. Enemies were subjects of persecution, extrajudicial executions, arbitrary detentions, tortures or forced disappearances by either state agents or people acting with the acquiescence of the states. Thanks to victims movements immense efforts were made to end the era of impunity and to open the door for the respect and implementation of human rights.³ Those efforts, coupled with

¹ TEITEL, R.G., ‘Transitional justice Genealogy,’ *Harvard Human Rights Journal* Vol. 16 (2003), pp. 69.

² ELSTER, J., ‘Closing the books: Transitional justice in Historical Perspective,’ Cambridge University Press (2004).

³ ALDANA-PINDELL, R., *et al.*, ‘In Vindication of Justiciable Victims’ Rights to Truth and Justice for State Sponsored Crimes,’ 35 *VAND. J. TRANSNAT’L L.* 1399, 1429 (2002).

economic and political crises, international pressure for the observance of universal human rights, *inter alia*, caused the fall of those regimes.

Enormous efforts at promoting justice and truth were undertaken to deal with the problems of the past. Numerous truth and reconciliation commissions were created, as well as administrative reparations programmes. Other measures were institutional reforms, prosecutions and commemorations throughout the region. Undoubtedly, victims' rights movements played an important role in the implementation of justice mechanisms.⁴

A special role was played by the Inter-American System of Human Rights (IASHR) – existing of Inter-American Court of Human Rights' (IACtHR) and the Inter-American Commission of Human Rights. It helped to enforce national projects of accountability and reparations through judicial decisions as well as non-judicial activities. The rulings deeply influenced the prosecution of past atrocities and recalled the imperative obligations that states have towards its victims. The jurisprudence of the Court provides with many standards to conduct national trials related to past abuses. For instance, it gives a definition of enforced disappearance;⁵ establishes the significance of the duties to prosecute and punish crimes of mass scale;⁶ establishes the right to truth that every victim has; establishes the obligation of states to remove all obstacles fostering impunity such as amnesty laws or the application of statute of limitations.

Furthermore, the Court's jurisprudence marked a new era of reparations for victims; its groundbreaking and holistic approach has served as a model for diverse reparations programmes around the

⁴ ALDANA-PINDELL, R., *et al.*, 'In Vindication of Justiciable Victims' Rightsto Truth and Justice for State Sponsored Crimes,' 35 *VAND. J. TRANSNAT'L L.* 1399, 1429 (2002).

⁵ I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*, Merits. Judgment of July 29, 1988. Series C No. 4, paras. 149-150.

⁶ I/A Court H.R., *Case of La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment of November 29, 2006. Series C No. 162, para.110.

world: globally and regionally. The IASHR undoubtedly joined the clamour of thousands of victims who were and are demanding “all the truth and as much justice as possible”,⁷ by encouraging the investigation of facts of violations and making enforceable the rights of the victims recognized by international law. In this light, a brief recollection of the rights of the victims seems to be appropriated.

Writing about victim’s rights in international law means taking for granted a constant and progressive transformation in the understanding of the concept of the victim, the role of victims in international proceedings, and their entitlements such as the right to reparation. This constant transformation is encouraged by the widespread concern for the protection of human beings through international instruments. It must be recalled that in the last century international law shifted from protecting states’ rights to the protection of individual rights, implying that relatively, fundamental rights are placed in a higher position than the rights of states. Because of this development, *the realization of justice* has become the primary goal of international law. Victims were given a centre position in the field.⁸

The IASHR has played a major role in the advancement of a better understanding of victim’s rights in international law; its developments as a victim-oriented system have been praised worldwide. In the realm of reparations, the system has proven to be the most progressive and comprehensive regional regime.⁹ In comparison to other international human rights bodies, the IACtHR has developed a broad range of reparations including the decree to prosecute and punish perpetrators, the identification of victim’s bodies to assure that bodies could be properly buried, the improvement of the life conditions of collective victims, the release

⁷ ORENTLICHER, D.F., ‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency’ in *International Journal of Transitional Justice* (2007).

⁸ CANCADO TRINDADE, A.A., ‘International Law for Humankind: Towards a New Jus Gentium,’ Leiden: Martinus Nijhoff, 2010.

⁹ FEYTER, KOEN DE, ‘Out of the Ashes: Reparation for Victims of Gross Human Rights Violations,’ Antwerpen: Intersentia, 2005, p. 357.

from prison of unlawful detainees, the reforms of national laws, and the awarding of a scholarship to fulfil the *project of life* of a victim. The innovative substantive remedies often serve as a remedial model for other international judicial and non-judicial bodies.

Because of the innovative reparations, scholars have studied the IACtHR's reparation approach skilfully. Yet, in their analyses, these academics have focused primarily on analyzing the kinds of reparations (collective and individual) or the forms of reparations (restitution, compensation, rehabilitation, satisfaction or guarantees of non-repetition) the Court has awarded.¹⁰ Little attention has been paid to the question how the system identifies the victims or the beneficiaries of the reparations. Significantly, jurisprudence of the Court shows that rules related to the identification of victims often limit the number of victims and beneficiaries in a given case. This limitation could result in a re-victimization; in other words, in an evident injustice.

In transitional justice it is suggested that victims place a centre-role and that their needs need to be addressed.¹¹ Victims and survivors play the role of reconstructing their properties, communities, and primarily, their lives. Reparations programmes can assist victims to shoulder their loss and reconstruct their lives. This makes them a vital element in transitional justice.

Furthermore, the important transitional justice scholar Jon Elster has stated that victims usually share two desires: i) to make the perpetrator suffer what they did, and ii) for the "harm to be undone".

¹⁰ PASQUALUCCI, J.M., 'Victim Reparations in the Inter-American Human Rights System: a critical assessment of current practice and procedure.' *Mich. J. Int'l L.*, 1996 – HeinOnline.; A.J.CARRILLO, 'The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past in the Handbook of Reparations,' 2006., L. LAPLANTE, "Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations and the Duty to Prevention," *Netherlands Quarterly of Human Rights*, Vol. 22, No. 3, pp. 347-388, 2004.

¹¹ ALDANA, R., "Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities", *Journal of Human Rights*, 2006.

Reparations are an effective way to address the latest desire.¹² . However, for those reparations to take place one must identify victims. The identification of victims is of great importance in order to decide who is entitled to reparations. Here the importance of clear rules of defining and identifying victims.

The state of academic research calls for addressing the procedural rules for defining or identifying victims and beneficiaries. This discussion paper analyzes the question of reparations by addressing i) the concept of victims in the IASHR, and ii) victims as individualized/identified persons. By means of this analysis we hope to get closer to answering the bigger question: *are all victims entitled to reparations?*

2. THE CONCEPT OF THE VICTIM IN THE IACTHR

In his writings, former IACTHR Judge Cançado-Trindade has repeatedly stated that the imperative of international law is the *realization of justice*, or, the delivery of justice to victims. Victims are the ones seeking justice. Against this backdrop, the concept of victim is at the basis of international law. The definition of a victim in this field, and, more concrete in international human rights law, differs from the definition of persons entitled to reparations.

Under international law, there are only few documents that define the concept of victim. The first UN instrument defining victims is The 1985 Declaration on Basic Principles of Justice for Victims of Crimes and Abuse of Power. The definition is enshrined in article 1 and 2:

Article 1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws

¹² DE GREIFF, P., 'The Handbook of Reparations,' Oxford University Press, USA (2006).

operative within Member States, including those laws proscribing criminal abuse of power.

Article 2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.¹³

The definition of victims given in the Victims Declaration was mirrored in the UN 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.¹⁴ However, in this document the concept of victim was expanded by including not only persons who, individually or collectively, have suffered harm, but also and “[w]here appropriate, and in accordance with domestic law, [...] the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”¹⁵

The Universal Declaration of Human Rights and the binding international human rights instruments fail in providing a definition of victims.¹⁶ However, these documents do provide for “remedies”, “redress”, “compensation” or “reparation” for the ones who had

¹³ See: <http://www.coe.int/t/dghl/standardsetting/victims/Declaration%20of%20Basic%20Principles%20of%20Justice%20for%20Victims%20of%20Crime%20and%20Abuse%20of%20Power.pdf> [last accessed January 15th, 2012].

¹⁴ <http://daccessdds.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement>.

¹⁵ Principle 8 of the UN Basic Principles.

¹⁶ The International Convention for the Protection of all Persons from Enforced Disappearance also provides for a definition of victim in its article 24 (1) which reads as follows: For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.

suffered harm.¹⁷ In order to be granted a remedy one must be a victim or recipient of such a remedy. The question therefore remains: how can a state grant remedies when it is not clearly defined who is a victim and who is not?

An official definition of the victim is also lacking in the Inter-American System. The founding document of the Inter-American Court of Human Rights, the American Convention on Human Rights, does not set forth a concept. Rather, Article 63 states that upon the determination of state's responsibility for the violations of a right or freedom protected by the Convention, the Court shall rule that the 'injured party' be ensured the enjoyment of his right or freedom that was violated and, if appropriate, be paid a fair compensation. The 'injured party' comprises persons whose rights violation arose from the facts lead to a State's international responsibility, as well as persons whose violated rights arose from the State's violations committed against the former. We could conclude that the term includes persons who *directly* and *indirectly* suffered from a specific violation protected by the Convention.

Only since 1991, the Rules of Procedure of IACtHR (RP) contains a direct reference to the concepts of 'alleged victim' and 'victim'. The Rules indicate that an alleged victim becomes a victim after the determination of violations enshrined in the American Convention.

It is important to note that the American Convention is not the only regional human rights instrument silent in regards to the definition of victim. The European Convention on Human Rights (ECHR) also does not define the concept of victim. Article 34 simply

¹⁷ DECLARATION OF HUMAN RIGHTS (UDHR) (Art. 8); International Covenant on Civil and Political Rights (ICCPR) (Art. 3, 9.5); International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (Art. 13, 14); International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (Art. 6); UN Convention on the Rights of the Child (CRC) (Art. 9); European Convention on Human Rights (ECHR) (Art. 5, 50); American Convention on Human Rights (Art.10, 25, 63(1)).

states that the Court may receive applications from those claiming to be the victim of violations by one of the High Contracting Parties, and Article 41 provides that once the Court finds a State responsible for a violation of the Convention, shall, if necessary, afford just satisfaction to the ‘injured party’.

Similar to its European counterpart, the IACtHR has distinguished between, and recognized, direct and indirect victims. In the jurisprudence of the IACtHR, the concept of indirect and direct victims is found in the opinions of some of the Judges.¹⁸ However, it is important to point out that this Court does not utilize the wording of direct or indirect victims in its jurisprudence.

- Direct and Indirect Victims

It must be noted that in its initial jurisprudence the Court focused more on the foundation of international responsibility which includes the obligation of repair, rather than in defining victims. Nevertheless, since this initial jurisprudence the Court has acknowledged that “next of kin” were affected by the violations against the victims, and suffered damage as a result. Since this damage was directly related to the illicit acts for which a state was responsible, those “next of kin” were entitled to reparations.¹⁹ This reasoning clearly shows that regardless the official implementation of the concepts of direct and indirect victims, this distinction was already made in practice by differentiating between “victims” and “next of kin”.

¹⁸ I/A Court H.R., *Case of Bámaca-Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70: Opinion Judge Cançado-Trindade and Opinion Judge García-Ramírez.

¹⁹ I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, par. 192; *Case of Godínez-Cruz v. Honduras*. Merits. Judgment of January 20, 1989. Series C No. 5, par. 203, *Case of Aloeboetoe et al. v. Suriname*. Merits. Judgment of December 4, 1991. Series C No. 11, par. 17.

In later jurisprudence, the Court has upheld that victim's next of kin are also victims and therefore are owed reparations.²⁰ Victims, therefore, are defined by the Court as persons who *directly* and *indirectly* suffer from a specific violation protected by the American Convention. This reaffirms our conclusion that the concept of victims includes persons who *directly* and *indirectly* suffered from a specific violation protected by the Convention.

The definition of victims by the IACtHR's seems in line with ECtHR's definition of this term. This Court has upheld that the word 'victim' denotes "the person directly affected by the act or omission which is in issue".²¹ Yet, when there is sufficient proof of a direct link between the direct victim and a next of kin, the latter can legitimately claim to be a victim.²² The ECtHR has also adopted the approach that when dealing with victims who have suffered directly and indirectly from a given violations, all are to be considered *direct victims*.

These direct victims comprise of persons whose rights violation arose from the facts lead to a state's international responsibility and persons who suffered from anguish, distress or any other disturbance which could amount a violation of their rights. For instance, in enforced disappearances cases, the next of kin are believed to suffer a prolonged anguish, distress and often denial of justice. Therefore, those persons could legitimately claim to be victims of ill-treatment or access to justice.²³ In extraordinary cases,

²⁰ I/A Court H.R., *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162.

²¹ E/Court H.R., *Cases of Wilde, Ooms and Versyp ("Vagrancy") v. Belgium*, Judgment of June 18, 1971.paras 23-24; E/Court H.R., *Case Amuur v France*, Judgment June 25, 1996, par. 36.

²² E/Court H.R., *Case Yaşa v. Turkey*, Judgment of September 2, 1998. Reports of Judgments and Decisions 1998.

²³ E/Court H.R., *Case of Kurt v. Turkey*, Judgment of May 25, 1998, Reports of Judgments and Decisions 1998.

the European Court has also recognized those applicants who can be *potentially affected* by an act or omission in issue as victims.²⁴

It is interesting to note that contrary to Human Rights Courts' avoidance of the terms direct and indirect victims, in international criminal law a distinction between direct and indirect victims is provided by the Rules of Procedure and Evidence ("RPE"). Under the RPE, rule 85 (a) establishes that a direct victim is one who has suffered harm as a result of the commission of a crime within the jurisdiction of the Court. Jurisprudence of the International Criminal Court has pointed out that indirect victims are those who have suffered harm as a result of the harm suffered by direct victims.²⁵ It has been suggested that this normative construction was, to a great extent, inspired by the IASHR even though the latter do not utilize this wording.²⁶

It is praised that despite the lack of a definition for victim in the confines of the American Convention, the IASHR has thrived in providing the foundation for the effective protection of victims by including not only direct but also indirect victims as terms. It has therefore contributed to the development of a better protection of victims in the field of international law

- Injured Party

Under the IACtHR's jurisprudence, establishing the injured party necessarily implies the identification of the victims of a certain violation of the Convention. Jurisprudence shows that the terms

²⁴ E/Court H.R., *Case of Klass and Others v. Germany*, Judgment of 6 September 1978, paras. 37 and 56., *Case of Open Door and Dublin Well Woman v. Ireland*, paras. 41, 43 and 98.

²⁵ ICC-01/04-01/06-1813 (Trial Chamber I), 8 April 2009, par. 44.

²⁶ OLÁSULO H. AND GALAIN P., "La influencia en la Corte Penal Internacional de la jurisprudencia de la Corte Interamericana de Derechos Humanos en material de acceso, participación y reparaciones de víctimas", KONRAD, 2010, pp. 379-427. See: http://www.kas.de/wf/doc/kas_23685-1522-4-30.pdf?110823001043 [last accessed January 15th, 2012].

victims and injured party has been used interchangeably but this issue has been never been addressed by the Court.²⁷

In its early case law, the European Court has held that the term “injured party” is synonymous with the term “victim”.²⁸ Yet, the Court changed its approach with respect to later cases and embraced a broader concept of injured victims. This concept comprised not only victims of violations of the ECtHR, but also persons that may be affected as they suffered harm connected to the suffering of the direct victim, even though those persons were not declared victims of violations of any right by the Court.²⁹

The idea of an injured party being synonymous to a victim and the reference to both “victims” and “next of kin”, seems to prove that the IACtHR in its initial jurisprudence had a limited interpretation of the term victim. This is not entirely true, because since its first judgment of *Velásquez Rodríguez* the Inter-American Court, stated that the “next of kin” suffered harm resulted of the direct victim’s rights violations and consequently, they were entitled to reparations.³⁰ Thus, the Court deemed that “victims” and “next of kin” were entitled to receive reparations which in turn are also synonyms with “injured party”.

At first glance, elaborating in the differences of these terms might create confusion, but a deeper analysis shows clearly that the concept of victim and injured party evolved to ensure a better protection of all victims. In this line, Cançado-Trindade has stated that ‘the concept of “victim” itself has evolved and expanded, and so

²⁷ I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Interpretation of the Judgment of Reparations and Costs. Judgment of August 17, 1990. Series C No. 9, para.27.

²⁸ E/Court of HR, *Case of De Wilde, Ooms and Versyp (“Vagrancy Cases”) v. Belgium*, Judgment of March 10, 1972.

²⁹ E/Court of HR., *Case of Aktas v Turkey*, Judgment of October 23, 2003, para. 364.

³⁰ I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7.

have the parameters of protection owed to the justiciable ones and the circle of protected people'.³¹

3 VICTIMS AS INDIVIDUALIZED, IDENTIFIED PERSONS

As discussed in the antepenultimate paragraph, the IACtHR uses different terms when defining the recipients of reparations. Those concepts are 'victims', 'injured party', 'next of kin' and also 'beneficiaries'. According to article 63, to be *titulaire* of reparations, a person must be deemed an 'injured party'. And to be an 'injured party' a person must be considered a 'victim'.

Although the American Convention does not elaborate on the concept of victim, the Court has constructed a definition of it in its jurisprudence which seems in line with the first definition of victim in international law given by the Victims Declaration.³² The definition is restricted to physical persons as the Court has upheld in several judgments that "every individual has human rights, [and any] violation of those rights be examined on an equally individual basis."³³ Interestingly, it also establishes that the alleged victims

³¹ I/A Court H.R., *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162. Opinion Judge Cançado-Trindade, para. 60.

³² DECLARATION ON BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIMES AND ABUSE OF POWER (the "Victims Declaration") on 29 November 1985. Article 1: "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. Article 2: A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship.

³³ I/A Court H.R., *Case of the "Juvenile Reeducation Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, para. 106.

“must be properly identified and named in the application that the Inter-American Commission files with this Court”.³⁴ It is necessary to highlight that the Court has also recognized the existence of victim groups.³⁵ When dealing with indigenous groups, the Court has taken account of the importance to include cultural perspectives. For example, the impact of violations made to a person or various persons belonging to a group will not only have an individual impact, but also a collective one. For cultural reasons, the harm done by human rights violators affects the group as a whole.

However, this is not *jurisprudence constante* because the same Court has accepted the Commission to include more persons as victims, who were not mentioned in the application, in a later stage. The Court has considered that these inclusions were fair due to the fact that upon the Commission’s request, the respondent state is given time for submitting observations, in other words, to object the Commission’s request. However, when former does not object it, the inclusion might be granted. The Court, therefore, considered appropriate and in accordance to the state’s right to defense, to include more victims to the original application.³⁶ Furthermore, the Court has not only allowed the Commission to include victims in a later stage, whenever the respondent states do not object this petition, but also when dealing with a large number of victims, mainly, in cases concerning massacres or indigenous people.

- Procedural Rules

³⁴ I/A Court H.R., *Case of the "Juvenile Reeducation Institute" v. Paraguay*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112, para. 109.

³⁵ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment of June 17, 2005. Series C No. 125, para. 176.

³⁶ I/A Court H.R., *Case of the Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, paras. 72-74.

During contentious process, international tribunals must identify the alleged victims themselves or through diverse bodies or commissions pursuant of a normative instrument. Former IACtHR Judge, García- Ramírez has stated that this is “a matter of fundamental importance in international human rights law, both because of its substantive implications - to identify the passive subject of the injury, holder of the affected rights and others generated by the respective conduct - and because of its procedural consequences - to define the competency and the corresponding capacity to act at different moments of the proceeding.”³⁷ The first substantive implication constitutes the basis to define the injured party and thereby the recipient of reparations.³⁸

Before discussing the rules of procedure related to the identification of victims in contentious cases before the Court, it is important to mention that provisional measures can be provided to those who can be identified and not necessarily individualized.³⁹ An in-depth analysis of provisional measures far exceeds the scope of this paper and it is enough to point out that the rules governing the identification of victims in litigious cases are not applicable to provisional measures cases.

Turning to the issue of identifying victims, it is important to stress that nothing in the binding documents governing the IASHR makes any reference to which organ does have the duty to identify the victims of an alleged violation. However, the IACtHR has found that some of its instruments do actually offer enough guidelines to

³⁷ I/A Court H.R., *Case of Bámaca-Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70: Opinion Judge García-Ramírez, para.2

³⁸ I/A Court H.R., *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para.201.

³⁹ I/A Court H.R., Order of the Inter-American Court of Human Rights of November 24, 2000 Provisional Measures in the matter of the Peace Community of San José de Apartadó regarding Colombia, Order of the Inter-American Court of Human Rights of July 5, 2004 Provisional Measures regarding Colombia Matter of Pueblo Indígena de Kankuamo.

define the body that bears this responsibility. Despite the latter, it remains quite unclear the procedural moment of such identification.

As said, the normative instruments of the IASHR do not make any specific reference to when the procedural moment to identify victims is and who bears this responsibility.

However, the Court has come to the conclusion that pursuant article 50 of the American Convention and art 33 (1) of the Court's Rules of Procedure, alleged victims must be indicated in the application and in the Commission's Report. According to this interpretation it is for the Commission, and not the Court, to identify the victims in any case before the Court:

“The Court considers that, in accordance with Article 33(1) of the Rules of Procedure of the Court, it corresponds to the Commission, and not to the Court, to identify precisely the alleged victims in a case before the Court.”⁴⁰

“According to Article 50 of the Convention, the alleged victims must be indicated in the application and in the Commission's report.”⁴¹

Failure to fulfil this rule, the Court can refuse to include additional persons as victims in a later stage and those persons therefore, would not be granted the status of victims. However, this position was not endorsed in the Court earlier jurisprudence.⁴²

⁴⁰ I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148, para. 98., *Case of the Plan de Sánchez Massacre v. Guatemala*. Merits. Judgment of April 29, 2004. Series C No. 105, para.48; *Case of Montero Aranguren et. al. (Detention Center of Catia) v. Venezuela*. Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, para. 33

⁴¹ I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148, para. 91.

⁴² I/A Court H.R., *Case of Bámaca-Velásquez v. Guatemala*. Reparations and Costs. Judgment of February 22, 2002. Series C No. 91, para. 36; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001. Series C No. 79 where the court granted reparation to the “community” without further individualization of its members; *Case of Barrios Altos v. Peru*, Judgment of November 30, 2001. Series C No. 87, para. 31; *Case*

It is important to note that this interpretation qualifies as “creative” because it is difficult to find in the both article 50 of the American Convention and article 33.1 of the RP any reference neither to the organ responsible nor to the procedural moment of the identification of victims. Nor the Court has ever put forward the foundations of its reasoning.

Article 50 1. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report. 2. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it.3. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit.

Article 33.1. 1. The case shall be presented to the Court through the submission of the report to which article 50 of the Convention refers, which must establish all the facts that allegedly give rise to a violation and identify the alleged victims. In order for the case to be examined, the Court shall receive the following information: a. the names of the Delegates; b. the names, address, telephone number, electronic address, and facsimile number of the representatives of the alleged victims, if applicable; c. the reasons leading the Commission to submit the case before the Court and its observations on the answer of the respondent State to the recommendations of the report to which Article 50 of the Convention refers; d. a copy of the entire case file before the Commission, including all communications following the issue of the report to which Article 50 of the Convention refers; e. the evidence received, including the audio and the transcription, with an indication of the alleged facts and arguments on which they bear. The Commission shall indicate whether the evidence was rendered in an adversarial proceeding; f. when the Inter-American public order of human rights is affected in a significant manner, the possible appointment of expert

of the Caracazo v. Venezuela, Judgment of August 29, 2002. Series C No. 95, para.73.

witnesses, the object of their statements, and their *curricula vitae*; g. the claims, including those relating to reparations.⁴³

Notwithstanding the interpretation of the Court, in cases of multiple victims, such as cases involving indigenous communities or massacres, the Court has granted both the inclusion of victims in later stage and collective reparations to persons who could not be identified in the proceeding but were *identifiable*.

‘In the instant case, some of the next of kin displaced [...] have been identified in the proceeding before this Court. In this regard, the Court decided in this Judgment that non-identification of all the next of kin of the victims is due to the very circumstances of the massacre and to the deep fear they have suffered [...].’⁴⁴

The Court, on the one hand, has ruled that the alleged victims must be indicated in the application and in the Commission’s report, but on the other hand, has been flexible in the application of its own interpretation.

However, owing to the particularities of each case this has not always been so, and the Court has therefore considered as alleged victims persons who were not alleged as such in the application, provided that the right to defense of the parties has been respected and that the alleged victims have some connection with the facts described in the application and the evidence provided to the Court.⁴⁵

These two exceptions to the rule find their grounds with on the complexity of specific cases. In cases related to indigenous people,

⁴³ This article was amended in the New Rules of the Court of 2009 and the entire text is currently found in article 35.

⁴⁴ I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, par. 183.

⁴⁵ I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148, para. 91.

the Court deals with violations suffered by specific groups whose entire members sometimes cannot be individually identified because these communities usually “have obstacles to register their births, deaths, and changes in their civil status, as well as to obtain any other identification document.”⁴⁶ In cases of massacres, the Court has decided that “non-identification of all the next of kin of the victims is due to the very circumstances of the massacre and to the deep fear they have suffered.”⁴⁷ It is also important to note that in cases with a large number of victims, the Court has also ordered, for instance, that such victims must be identified after the judgment is delivered by documentation presented to competent authorities within a fixed period of time.⁴⁸

These two exceptions to the rule seem fair. However, the problem arises in cases that are not related to indigenous people or massacres. If the Commission does not identify all victims in its application and its report, the Court can simply refuse the addition of more victims to the original application.

It is appropriate mentioning that under the IASH, only the Commission and States parties to the American Convention may refer cases to the Court. After receipt of an individual application, the Commission examines and assesses it and seeks for a friendly settlement. If no agreement between the parties is reached, the

⁴⁶ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para.73.

⁴⁷ I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, para. 183.

⁴⁸ I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134 , para. 257, *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148, para.358; *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations and Costs. Judgment of November 19, 2004. Series C No. 116, *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations and Costs. Judgment of November 19, 2004. Series C No. 116, para. 67.

Commission may refer the case to the Court. During the first years of existence of this system, the Commission represented victims in the Court's proceedings. This is not longer the case as the procedural rules have changed, and the victims were given a limited position before the Court. Although, victims or their representatives have no *locus standi* before the Court, they are afforded the right to "present their pleadings, motions and evidence autonomously."⁴⁹ In those briefs the representative can assert the existence of more victims that of the mentioned in the application.

The Court, however, has been inconclusive as to whether the inclusion of victims by the representatives retrieves the Commission's omission and therefore determines that these victims are to be included in the original application. In some cases, the Court has accepted the request of including victims not mentioned in the report and application of the Commission, by the representatives:

'the Court takes into account that such persons were mentioned by the representatives in their brief of requests and arguments, before the State filed its answer to the application and admission, that is to say, they were included in such admission. Consequently, this Court shall consider them as next of kin of the alleged victims'.⁵⁰

Yet, in other cases, the Court has observed that if the Commission did not mention all the victims in its application and report, the representatives could not correct this omission:

'Commission did not declare [the victim's brothers and sisters] as victims of any violation whatsoever in its Report on Merits and that in the application it identified Mrs. Reverón Trujillo as the only beneficiary of the

⁴⁹ Art 23 of the Court's rules.

⁵⁰ I/A Court H.R., *Case of Montero-Aranguren et al.* (Detention Center of Catia) v. *Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, para. 36.

reparations. Therefore, the Tribunal, pursuant with its jurisprudence, will not consider the next of kin of the victim as an injured party.⁵¹

Hitherto, we have found that the IACtHR has ruled that the procedural moment to identify victims is in the application and report sent to the Court by the Commission and therefore, the latter bears such responsibility. However, there are exceptions to the rule: (i) *indigenous people cases*; (ii) *massacres cases*; (iii) *when the respondent State does not object a Commission's request of including victims, and (iv) "sometimes" when the representative of the victims, in the brief of request and arguments, assert the existence of more victims than of the mentioned in the application to the Court.*

The unclear standard as to when the representatives of victims could include more victims to the original application seems to be in contradiction to the main purpose of the IASHR, the respect of human rights protected by the Convention and to the *pro homine* principle.⁵²

Furthermore, the Court has the discretion to review whether a victim mentioned in the application is entitled to reparations or not. If there is no evidence to prove that a person was a victims of some violation of a right enshrined in the American Convention, the Court can rule that such person is not be nominated "injured party" and thereby is not entitled to reparations.⁵³ This calls for the question why the Court has not the discretion to review whether all victims are mentioned in the application and Commission's report. Perhaps, the answer can be found in the workload that this step would be for

⁵¹ I/A Court H.R., *Case of Reverón-Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, para. 158.

⁵² Article 29 of the American Convention.

⁵³ I/A Court H.R., *Case of Tristán-Donoso v. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, para.180.

the Court and its imminent financial cost. Notwithstanding this, the Court is supposed to ensure the protection of the rights enshrined in the Convention equally to everyone and not only to some ones. While it is understandable that some procedural rules need to be implemented in order to provide certainty as to how proceedings are carried out in the system, the Court should also take account of the interests of the victims. The Court certainly can correct the omissions made by the Commission, this could present an extra financial cost to the Court, but this could prevent the re-victimization of some of the people who have paid the consequences of conflict.

Significantly, the Court leaves a door open for including victims in a later stage. The Court accepts, ‘pursuant to Article 43 of the Rules of Procedure, the evidence submitted by the parties with regard to supervening events occurring after the application had been filed’.⁵⁴ The addition of more victims to the original application, thus, could be done through the proof of supervening facts. Nevertheless, there has not been any practice on it.⁵⁵

4. CONCLUSION

Pursuant article 63 of the American Convention, the Court shall grant reparations to the injured party, which implies the identification of the victims during the contentious process. If a victim is not duly identified, they cannot be nominated injured party and consequently nor can they be guaranteed the enjoyment of his right or freedom violated and awarded reparations.

In the absence of a specific rule regarding the procedural time to identify victims, the Court has ruled that, pursuant the Convention and its Rules of Procedure, the alleged victims must be indicated in

⁵⁴ I/A Court H.R., *Case of the “Five Pensioners” v. Peru*. Merits, Reparations and Costs. Judgment of February 28, 2003. Series C No. 98, para. 84.

⁵⁵ I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para 69. See the case in Spanish as the translation contradicts the original wording.

the application and in the Commission's report. Notwithstanding this, the Court has been flexible in cases of multiple victims due to their complexity, and "sometimes" when the omission of victims in the application is corrected by the victim's representatives.

Unfortunately, the jurisprudence of the IACtHR does not provide a coherent approach in this matter. It rather shows that an omission from the Commission, which does not have the role of representing victims, can cause an avoidable evident injustice. This seems to be in completely contradiction of the most commendable goal of the IACtHR and the principle *pro homine*.

On the one hand, international law establishes that "all victims of human rights are entitled to receive reparations," but the case of the IACtHR clearly shows that this is not entirely true. It is hope that further jurisprudence of the IACtHR acknowledge the need of the Court of having discretion when reviewing both whether victims mentioned in the application are to be injured party and whether all victims of a given case are included in the application. This could have a great positive impact to all judicial and non-judicial mechanisms that have mirror the reparation approach of the IASHR.

My suggestion is that the Court creates a specific body to deal with the identification of all victims in order to provide justice equally. Should the Court refuse to do so, it could at least acknowledge victims who are identified after the report of the Commission is submitted to the Court by the legal representatives without making a distinction to the nature of the case. For many victims in the region, justice at the national level is still much of an illusion due to juridical obstacles at the domestic level. In this light, the Court has always been there to uphold the highest standards of victims' protection in the region. It is now just a matter of doing this equally.