

# EHRAC

## Bulletin

## What should the European Court learn from the Inter-American Court on reparation?

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For decades the European Court of Human Rights (ECtHR) set the standard to be followed by other courts on the treatment of human rights violations. Certainly, it is the oldest regional human rights court and has contributed greatly to the protection and development of international human rights law. Nevertheless, the last two decades have witnessed important changes in regional human rights adjudication. The Inter-American Court of Human Rights (IACtHR) constitutes an excellent example of what a relatively young court can achieve and of the ways in which such a body can also help in the development of

international human rights law. This is particularly true in relation to the IACtHR's approach to reparation, an area where the ECtHR faces testing legal and practical challenges. This article outlines some principles developed by the IACtHR that could be of relevance to the ECtHR.

### **1. The crafting of principles to award reparation**

Based on Article 63.1 of the American Convention on Human Rights (ACHR), and the crafting of important procedural and substantive principles, the IACtHR has awarded the most ground-breaking reparations for human rights violations worldwide. Indeed, the IACtHR has taken very seriously the tasks of establishing

the legal framework applicable to the award of reparations and of reasoning each and every award it is asked to consider. The IACtHR is fully aware that decisions based on merits can be meaningless if they do not translate into adequate reparation for the harm suffered.

The IACtHR follows international law principles on reparation, ensuring its adequacy and aiming to *restitutio in integrum*; but adapts it to human rights violations. This approach contrasts with that of the ECtHR which does not usually provide proper rea-

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soning to the treatment given to reparations and which fails to follow international law as it applies to reparations.

## **2. Substantive principles**

Various substantive principles have been crafted by the IACtHR, of which three are highlighted here:

### **2.1 Principle of due recognition of victimhood**

The IACtHR has developed a significant understanding of the term 'injured party' according to Art. 63.1 of the ACHR, one which incorporates not only direct victims of human rights violations but also indirect ones such as next of kin (understood broadly and in a culturally sensitive manner), the family unit, dependents and the community if applicable.<sup>1</sup>

### **2.2 Principle of the most favourable conditions**

The IACtHR applies this principle to rectify situations in breach of key human rights principles such as equality and non-discrimination or the right to a dignified life. For example, the IACtHR has applied the minimum wage of the relevant state to cases where victims had a salary lower than the cost of the basic food basket.<sup>2</sup>

### **2.3 Principle of transformative reparations**

In *Cotton Field v Mexico* the IACtHR put forward a significant redefinition of its concept of adequate reparation by highlighting that when the violations occur in a context of structural discrimination, reparation cannot simply return victims to the situation they were in prior to the violation taking place (one of discrimination); rather, reparations should aim to transform or change the pre-existing situation.<sup>3</sup>

## **3. Procedural principles**

Adequate reparation requires the crafting of important procedural prin-

ciples so that a Court is able to gather all relevant information and evidence about the harm allegedly caused and can assess the information correctly. Only three such principles are presented:

### **3.1 The principle of a flexible approach to standard and burden of proof in reparation**

The IACtHR has relied on presumptions and circumstantial evidence "when they lead to consistent conclusions as regards the facts of the case".<sup>4</sup> Thus, for example, in relation to pecuniary damages, the IACtHR is willing to presume that adults who receive an income and have a family spend most of that income providing for the needs of its members, or that the next of kin of a deceased person will cover the funeral costs. As for the standard of proof, for example, the person who alleges the harm has to prove their identity by way of a birth certificate and/or statements before

a notary public. However, the IACtHR is prepared to lower this standard when the person cannot present the required documentation because the State failed to provide the necessary means to identify the person. In such situations the IACtHR allows the person to prove his/her status through other means as established by the Court.<sup>5</sup>

### **3.2 The principle of motu proprio awards**

While the general rule is that the IACtHR awards reparations by taking into account the reparation requests put forward by the victims/legal representatives and the Commission, and considering the views of the State in question, in exceptional cases the IACtHR has awarded reparations not requested by either party to guarantee that reparations are adequate.<sup>6</sup>

### **3.3 The principle of effective victim participation**

The combination of hearings with the appearance in the IACtHR of some of the victims, witnesses and also expert witnesses has been significant in

securing better treatment for harm during the reparation stage. For example, in *Massacre of Plan de Sánchez v Guatemala*, where more than 268 members of the Maya indigenous peoples were massacred in 1982, two expert witnesses that appeared before the IACtHR were crucial in order to understand the collective harm suffered by the indigenous community.<sup>7</sup>

## **Conclusions**

The IACtHR has put together a diverse array of principles, from international law principles to Court crafted principles (procedural and substantive) which guide it in its consideration of reparation awards. This note has simply identified some principles of relevance to the ECHR but has not exhausted their description/application. The ECtHR should look into these and other principles and consider ways to enhance its own approach

to reparation. As principles, they are open to be adapted and shaped to the particular features of European litigation. This is the first lesson the ECtHR should learn from the IACtHR: without the proper identification and application of such principles (substantive and procedural), adequate reparation cannot be achieved.

1 Sandoval, C., 2010. The Concepts of Injured Party and Victim of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations. In C. Ferstman et al eds. *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and systems in the Making*. The Netherlands: Martinus Nijhoff Publishers. p. 243-282.

2 IACtHR, *Amparo v Venezuela*, reparations, 14.09.96, para. 28 and *Street Children v Guatemala*, reparations, 26.05.01, para. 79.

3 IACtHR, *Cotton Field v Mexico*, supra, admissibility, merits and reparations, 16.11.09, para. 450.

4 IACtHR, *Gangaram Panday v Suriname*, merits, 21.01.94, para. 49.

5 IACtHR, *Massacre of Plan de Sánchez v Guatemala*, reparations, 19.11.04, paras. 62 and 67.

6 IACtHR, *Rochela v Colombia*, merits, reparations and costs, 11.05.07, paras. 286-303.

7 Augusto Willemsen-Díaz, expert on indigenous rights and Nieves Gómez, psychologist, appeared before the Court. *Massacre of Plan de Sánchez*, supra, n. 5, para. 38, 84 and 106.