

From a Duty to Remember to an Obligation to Memory? Memory as Reparation in the Jurisprudence of the Inter-American Court of Human Rights

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From a Duty to Remember to an Obligation to Memory? Memory as Reparation in the Jurisprudence of the Inter-American Court of Human Rights

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Commemorations and reparations are central elements of the transitional justice agenda. The inclusion of memory-related measures among the steps that states are expected to take along the transitional process has been progressively translated from the transitional justice domain to the language of international law. Judicial and quasi-judicial human rights instances have required states to make and undertake memorials, commemorations and public acts of remembrance, both as an instrument of reparation for the individual victim and as a mechanism to warn against the repetition of the same abuses in the future. As a result of this trend, memory-related measures have progressively become part of the state obligation to provide reparations to victims. The inclusion of memory-related measures in the scope of the international obligation to repair, however, raises some thorny issues. This review of the jurisprudence of the Inter-American Court of Human Rights in relation to memory-related orders and analysis of the case of the memorial *El Ojo que Lloro* in Peru critically assesses the emerging trend of using memory-related initiatives as measures of reparation determined by judicial organs.

Acts of reparation in response to the suffering of people whose human rights have been abused are essential in processes of democratic transition and reconstruction as states emerge from situations of pervasive and systematic violence. In cases of the most serious and large-scale abuses of human dignity, however, the very concept of reparation is problematic. The classical system of reparations under international law focuses on instruments of restitution and monetary compensation. However, scholars and practitioners in the transitional justice field agree that these forms of reparations are both unsustainable and insufficient to redress the unspeakable suffering that victims of massive human rights abuses experience (Antkowiak 2008, 355; De Greiff 2006, 452 ff.; Shelton 2005, 389–91). In response, models and theories of

transitional justice have suggested alternative forms of redress that have progressively entered into human rights fora.

This article sheds light on the use of commemoration and memorialisation initiatives as reparatory practices under international human rights law in contexts of transition from internal conflicts and authoritarian regimes. In these contexts, memory-related measures have been used both as an instrument to provide satisfaction to victims and as a means for the responsible government to assure the injured society and the international community of its commitment to preventing similar atrocities from happening again.¹ I argue in the article that these measures, directed to preserving the memory of the past, may serve the task of meeting

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¹ Throughout the paper the term “memory-related measures” is used to refer to material and symbolic acts or processes of memorialisation and commemoration.

the victims' needs of redress more accurately when taken together with the other forms of reparations. The adoption of these measures by judicial and quasi-judicial bodies, hence, can be viewed as an attempt to adjust the human rights framework to provide better forms of redress for human suffering. Furthermore, to include memory-related initiatives in the framework of reparations suggests that, in the aftermath of massive violence, any viable construction of the future has to pass through a thorough recognition and knowledge of the past. In this way, reparative memorial practices progressively move from the transitional justice field to find a place within the system of reparation for human rights violations. Practices of memory become components of the international legal obligation to repair.

This paper sets out to elucidate aspects of this dialogue between instruments of human rights law and those of transitional justice. First, it sketches the legal regime of the state's obligation to provide victims with reparations under international human rights law. From this perspective, the paper shows the need for the classical framework of reparations to adjust to situations of massive and systematic violations of human rights and introduces the role of memory-related initiatives in such a renovated system. The second section critically analyses how memory-related initiatives have been concretely interpreted and adopted as remedial measures in the case law of the Inter-American Court of Human Rights (IACtHR or the Court). In the final section, the paper presents the Peruvian case study of the memorial "El Ojo que Lloro", in Lima, in order to reflect upon possible implications and problems of including memory-related initiatives in reparation orders issued by supranational bodies.

Aware of the complex issues that this analysis raises, the paper offers an example of the broader processes of sub-

suming transitional justice forms into legal institutions. At the same time, however, the contribution identifies the problems involved, pointing out hurdles and risks of using memory-related initiatives in legal settings, especially when the mediation of supranational institutions with binding powers on states comes to interfere with the sensitive and often painful process of social negotiation and interpretation of the past.

1. Memory-related Initiatives as Instruments of Reparation

1.1. Rethinking the Framework of Reparations under International Human Rights Law

The right to reparation for victims of human rights abuses is now a well-established principle of law. Most of the international and regional instruments of human rights protection expect states to provide reparations in the case of violations committed by their agents against individuals, and establish secondary norms that include both substantial and procedural remedies.² While these instruments rarely name specific measures and actions that states should undertake in order to fulfil their obligation to provide redress, they require remedies to be "effective" (Antkowiak 2008, 356). Human rights bodies have also contributed to the establishment of the victims' right to reparation and clarified its content and features. The Human Rights Committee, for instance, has on many occasions acknowledged that reparations are a central element of the system of human rights protection and pointed out that – "where appropriate" – the obligation to repair may involve a broad set of measures other than compensation, including measures of satisfaction, such as public apologies, public memorials or guarantees of non-repetition.³ In general, however, these bodies let states decide which kind of reparation measures to adopt, while establishing general parameters of adequacy and effectiveness.⁴

2 Within the human rights discourse, the right to reparation is often understood as incorporating the substantial dimension of the right to a remedy. As Dinah Shelton argues, the right to a remedy includes "both the procedural right of effective access to a fair hearing and the substantive right to a remedy" (2005, 114). The latter expresses itself in the obligation to provide victims with reparation.

3 HRC, General comment no. 31 [80], The nature of the general legal obligation imposed on states

parties to the covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 16, <http://www.unhcr.org/refworld/docid/478b26ae2.html>. See also the UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 16, Article 3. The equal right of men and women to the enjoyment of all economic, social and cultural rights, E/C.12/2005/3, 13 May 2005, paras 21, 27.

4 The Committee on the Elimination of Discrimination against Women (CEDAW), for example,

emphasized in a number of documents the state duty to "take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including [...]": (i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence [...]. CEDAW, General Recommendation no. 19, 11th session, 1992, para. 24 (t; t(i)).

International law principles governing the responsibility of states for violations of international obligations also contribute to regulating the matter of reparations.⁵ In the aftermath of gross and systematic human rights violations, however, when huge numbers of victims seek reparations from governments often in precarious economic and administrative conditions, these principles – based on monetary compensation and restitution – prove inadequate (Shelton 2005, 389–90; Mégret 2010, 10–13; Rombouts, Sardaro and Vandeginste 2005, 352–54).⁶ In such cases, in fact, it is not possible to expect states – as those principles do – to restore the pre-existing state of affairs before the violation was committed, simply because it is impossible to return life, health or family ties to victims. At the same time, it is not possible to provide full redress for this kind of harm through monetary compensation. Not least, because the physical and moral damage refuses financial quantification. Monetary compensation, in fact, may even be interpreted by victims as an attempt to buy their silence and, as such, be perceived as a further moral injury (Brandon 2000, 220; Roht-Arriaza 2004, 180). Furthermore, monetary compensation may fail to consider the collective dimension of massive violence. It may eventually result in isolated and limited initiatives adopted in favour of specific victims or discrete categories of victims, therefore generating tensions among victims and exacerbating divisions within the society (De Greiff 2006, 456–59). The complexity of the harm caused to individuals by serious transgressions of fundamental rights and the specificities of the contexts in which those abuses take place therefore require a different – and careful – assessment of victims’ needs.

In order to address this inadequacy in the traditional reparation system, both human rights scholars and judicial and quasi-judicial human rights institutions have embraced a more generous understanding of the obli-

gation to provide reparations to victims of grave and widespread violations. There is a broad literature about the scope and content of this obligation. Research has been conducted from within the perspectives of human rights (Van Boven 2009; Shelton 2005; Du Plexis 2007), transitional justice (De Greiff 2006; Díaz Gómez, Camilo Sánchez and Uprimny Yepes 2009), social and political studies (Guembe 2006), anthropology and psychology (Danieli 2009). These analyses all agree on the need for a complex and holistic approach to victims’ healing, which takes into consideration the specificities of the contexts of massive violence and the gravity of the abuses. As a result, new forms of reparations, mostly borrowed from the transitional justice field, have been developed.

1.2. UN Principles on the Right to a Remedy for Victims of Gross Violations of Human Rights

The first legal instrument at the international level that set out to conceptualise the new approach to reparations in cases of massive violence was the Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereafter Basic Principles). Adopted by consensus in Resolution 60/147 of the UN General Assembly in December 2005 (United Nations General Assembly 2006), the Basic Principles are the result of the long process of collection, study, analysis and revision of practices of and provisions on the issue of reparations for victims of massive violence, led by two UN Special Rapporteurs, Theo van Boven and M. Cherif Bassiouni (United Nations Commission on Human Rights 1993, 2000). As General Assembly resolutions generally do not impose legally binding obligations upon states, the Basic Principles, as appropriately pointed out in the text, “do not entail new international or domestic legal obligations but identify mechanisms, modalities, pro-

5 Restitution of the *status quo ante* and compensation are the two typical forms of reparations under classical international law. According to the general principles governing the responsibility of states for the violations of international obligations, in fact, the international obligation to repair is a consequence that automatically arises from the violation of international rules. The content of such obligation is defined by the principle of full repar-

ation, which implies that any damage, either moral or material, is to be fully made good. This parameter has been generally regarded as a principle of customary international law and interpreted as the state obligation “to wipe out all the consequence of the illegal act” (PCIJ, 1928), either by restoring the pre-existing state of affairs before the breach was committed, or providing full redress of the harms through monetary compensation. The principles

governing the Law of State Responsibility have been codified by the International Law Commission in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

6 For an empirical study on the problematic role of monetary compensation in compensating victims for massive and systematic violence, see Guembe 2006, 37–38.

cedures and methods for the implementation of existing legal obligations” (United Nations General Assembly 2006, Preamble, 7). Despite this non-binding status, the Basic Principles have quite strongly influenced trends and behaviours of national and international bodies, including the Inter-American Court of Human Rights. While a detailed review of the Basic Principles is beyond the scope of this article, the following section provides a brief overview of the aspects that are most relevant for the present discussion. This will enable the reader to gain better insight into the reparatory system put forward by this instrument and to understand the role that memory-related measures can play within it.

In the final text, the state obligation to provide reparations is included in the broader state duty to provide victims with effective remedies, itself a part of the general obligation to respect and protect human rights (United Nations General Assembly 2006, principle 3). After drawing a parallel between the obligation to grant remedies and the corresponding right of victims to obtain “adequate, effective and prompt reparation” for losses suffered (principle 11b), the Basic Principles provide general guidance for reparation programs. In the text, the scope and content of the state obligation to repair appears broad and multifaceted (Van Boven 2009, 38). Resolution 60/147 indicates a rich set of measures that further specify the components of the victims’ right to reparation. These measures are classified into five remedial categories: *restitutio in integrum* (restitution), compensation, rehabilitation, satisfaction and guarantees of non-repetition (United Nations General Assembly 2006, principle 18). In comparison with the classical reparatory framework, thus, the Basic Principles keep the traditional measures of *restitutio in integrum* and compensation, while introducing new forms of redress – rehabilitation and guarantees of non-repetition – within the scope of the obligation to repair. Notably, among these categories, satisfaction plays a crucial role and gains a new relevance in the whole system of reparations. The category of satisfaction, in fact, becomes a box containing a variety of reparative measures – including memory-related initiatives. According to principle 18, measures of satisfaction include: (a) actions aimed at putting an end to the violations; (b) the establishment of inquiries and truth seeking

mechanisms; (c) the search and identification of the disappeared and reburial of bodies; (d) official recognition of and (e) public apologies for the violations; (f) punishment of those responsible; (g) commemorations and tributes to the victims; and (h) publicity concerning the events constituting the violations in education training and programs.

The Basic Principles, overall, seem to support the idea that when a wrongful act affects deeply personal and intimate aspects of human dignity, effective restoration of the status quo ante is unrealistic (and, under certain conditions, even undesirable), and that monetary compensation alone is an inadequate form of redress. The different forms of reparation embraced by the Basic Principles, when taken together, aim to address better the complexity of the harm in those situations of widespread and gross human rights abuses. As Dinah Shelton (2005, 149) rightly notes, their combination, together with the criterion of proportionality suggested by the text, allows (quasi-)judicial instances the necessary discretion to tailor appropriate forms of redress to specific cases. This multi-dimensional approach offers a model for shaping national reparation programs, making them more effective and accurate in responding to victims’ harm. The central role given to satisfaction, together with the inclusion of rehabilitation and guarantees of non-repetition in the list of victims’ remedies, eventually seems to suggest new standards of adequacy, which shift the traditional understanding of reparation and embrace a more casuistic and victim-oriented approach.

The formal inclusion of memory-related measures in the list of measures of satisfaction is meaningful. Frédéric Mégret (2010), in an article on the possibility and feasibility of the International Criminal Court recommending the construction of “sites of conscience”, offers an in-depth analysis of the effects of commemorative measures as transitional justice tools and, in particular, of the different functions that these initiatives can serve in the healing process for victims. Mégret highlights the expansive role which monuments – broadly understood – can play in reparation schemes aimed at addressing the aftermath of mass violence. Their functions range from the restoration “of the good name of the victims” to providing a forum of

mourning, discussion and reflection about the past; offering a path for social reconciliation; and warning future generations against the repetition of similar atrocities.

Indeed, from a theoretical point of view, memory-related measures that have an impact on individual as well as collective processes of dealing with the past and are strictly linked to the very concepts of time and identity, appear uniquely suitable to thoroughly rethink the concept of reparation. The inclusion of memory-related measures in the realm of remedies broadens the principle of full reparation so that it no longer coincides with the obligation “to wipe out all the consequences” of the violence. In the aftermath of mass atrocities, nothing can or has to be wiped out, but rather the harm must be acknowledged, brought to light and commemorated, both to restore victims’ dignity in suffering and to convey a warning to future generations.⁷ Reparation, in this way, loses its meaning of closure and opens up a new relation among past, present and future. The inclusion of memory, as the presence of the past, in the dynamics of reparation may allow the idea of reparation to move from meaning a closure with the past, to the idea of reparation as a means of “transformative justice”, in the sense of development, progress, advancement (Mani 2005, 78–80).⁸ Although these theoretical developments have not been fully explored yet, there is a trend in the practice of reparations for victims of massive and systematic violence clearly moving in that direction.

2. The Jurisprudence of the Inter-American Court of Human Rights

2.1. Principles of Reparation in the Jurisprudence of the Inter-American Court of Human Rights

A considerable part of the evolution of international human rights law in the field of reparation to individuals is due to the progressive jurisprudence of the Inter-American Court of Human Rights. Since its establishment, the Court

has greatly strengthened the regional system of human rights protection in the Americas, adopting a victim-friendly approach in its case law.⁹ On the issue of reparations, since the landmark *Velásquez-Rodríguez* case, the Court has progressively moved from rigidly applying the international law principles of reparation to a more flexible approach.¹⁰ Following the traditional system, the concept of reparation was initially understood by the Court mainly as monetary compensation that would provide redress for a single individual. However, in the *Aloeboetoe v. Suriname* case in 1993, the limits of this system were revealed and the Court acknowledged for the first time the intrinsic insufficiency of the pure compensatory model. The case concerned acts of violence perpetrated by soldiers against a group of young Maroons in Suriname in 1987. After the state’s recognition of its responsibility for those violations, including the extra-judicial execution of seven men of the group, the Court ordered Suriname “as an act of reparation” to reopen the school in the village of origin of the victims and to create the conditions to enable it to function.¹¹ After that decision, in the subsequent case law, in addition to compensations the Court has ordered non-pecuniary measures as part of the reparative scheme.

The Court’s case law has therefore progressively broadened the content of the state obligation to provide reparations beyond compensation and the Court has eventually embraced the reparative model set forth by the Basic Principles. In line with them, today it understands reparation to include the five components mentioned above: *restitutio in integrum*, compensation, rehabilitation, satisfaction and preventive measures.¹² Because of the concern that the Court has shown for non-monetary damages, it has paid particular attention to satisfaction among these categories. The category of satisfaction has been used by the Court to create a rich and flexible set of secondary obligations,

⁷ For a discussion of the role of recognition and acknowledgment in healing victims of gross human rights violations see, inter alia, Schotsman 2005, 109–20 and Rombouts, Sardaro and Vandeginste 2005, 465–66.

⁸ The same idea was developed further by Mani in *The Aesthetics and Ethics of Repairing Historical Injustice*, keynote speech delivered during the His-

torical Justice and Memory Conference, Melbourne, 16 February 2012.

⁹ For an analysis of the Inter-American system of reparations for human rights violations see, among others, Pasqualucci 2013 and Shelton 2005.

¹⁰ Case of *Velásquez-Rodríguez v. Honduras*. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7.

¹¹ Case of *Aloeboetoe et al. v. Suriname*. Reparations and Costs. Judgment of September 10, 1993. Series C No. 15, para. 96.

¹² The Court referred to the Basic Principles on several occasions. See, for instance, the case of *Loayza Tamayo V. Perú*. Reparations and Costs. Judgment of November 27, 1998, Series C No. 42, para.85.

which it imposes on responsible states as a consequence of their obligation to repair. On many occasions the Court has ordered responsible states to integrate direct payment of compensation with non-pecuniary measures. States have been asked to pay for medical and psychological care and rehabilitation; to cover costs for education; and to locate human remains and to return them to families. In other cases the Court has called for preventive measures to ensure the non-repetition of further abuses, such as training programs and courses on human rights for the armed forces and the general population, as well as structural changes to domestic law.

2.2. The Role of Memory in the Jurisprudence of the Inter-American Court

What role do memory-related measures play in the IACTHR system of reparations? In a series of judgments issued since the end of the 1990s, the Court has ordered states to adopt memory-related initiatives as an element of reparation in the aftermath of internal conflicts or internal violence, where states severely violated the most fundamental of their citizens' rights. While prescriptions connected with preserving the remembrance of the past were initially rather sporadic and limited to naming buildings in the victims' honour, in the latest developments their application has been more frequent and they have taken more sophisticated forms.¹³ The use of memory-related initiatives as form of reparation has resulted in different measures such as naming schools, streets and squares after victims;¹⁴ erecting memorials;¹⁵ installing plaques in places where the vic-

tims were killed;¹⁶ publishing accounts of the violations in official gazettes or newspapers.¹⁷ These measures all foster the construction and protection of a certain consciousness of the past. Setting to one side, however, this common final aim: what is the rationale on which the Court bases its memory-related orders? The legal bases used by the Court to order such measures appear quite ambiguous and the juridical argument behind them is not always explicit. However, a close reading of the Court's case law suggests two patterns. First, the Court generally distinguishes between cases where reparation is aimed at compensating a single individual and cases where the measure has to provide redress for a whole community or group. Second, from a technical point of view, the memory-related measures decided by the Court differ from each other according to the category of reparation in which they are classified; that is, some of them are issued as an instrument of satisfaction for victims, others as measures of prevention.

These two different criteria of distinction – beneficiaries and legal categories – intertwine and seem to suggest a line of reasoning in the Court's judgments. First, when memory-related initiatives are ordered as a means to provide satisfaction to the specific victim, the Court mostly relies on the right of the family or the next of kin to preserve their beloved's memory, whose legal justification is primarily linked to the right to know the truth. Some other interesting lines of reasoning have also been put forward to justify these measures. Judge Cançado Trindade, for

13 In *Radilla Pacheco*, for instance, accepting the initiative of the State, the Court ordered the publication of "a bibliographical sketch of the life of [the victim], accompanied either by the reproduction of official documents regarding this case (admissibility reports, orders, expert reports) or with oral testimonies on his trajectory [sic], gathered *in situ*, for which the State would hire an investigator." Case of *Radilla-Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209, para. 355. Similar measures were ordered also in other cases, such as in *Myrna Mack Chang v. Guatemala*, where the Court asked the State to publicly honour the memory of the police investigator who was killed while investigating the case. Case of *Myrna Mack-Chang v. Guatemala*. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101, para. 278.

14 Case of the "Street Children" (*Villagrán-Morales et al.*) v. Guatemala. Reparations and Costs. Judgment of May 26, 2001. Series C No. 77; Case of *Trujillo-Oroza v. Bolivia*. Reparations and Costs. Judgment of February 27, 2002. Series C No. 92; Case of *Servellón-García et al. v. Honduras*. Merits, Reparations and Costs. Judgment of September 21, 2006. Series C No. 152; Case of *Molina-Theissen v. Guatemala*. Reparations and Costs. Judgment of July 3, 2004. Series C No. 108; Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Series C No. 112; Case of *Vargas-Areco v. Paraguay*. Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 155.

15 *Myrna Mack-Chang v. Guatemala* (2003); Case of the *Plan de Sánchez Massacre v. Guatemala*. Reparations and Costs. Judgment of November 19, 2004. Series C No. 116; Case of the *Moiwana Com-*

munity v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124; Case of the *Mapiripán Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134; Case of the *Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140.

16 Case of the *Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148.

17 Case of the *Miguel Castro-Castro Prison v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160; Case of the *Rochela Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163.

instance, in a number of separate opinions to the Court's judgments, developed the idea of a moral obligation to remember, arguing from the corresponding moral (but certainly non-legal) right of the dead victim to be remembered. In his separate opinion to the *Moiwana Community v. Suriname* judgment, he wrote: "It is incumbent upon all of us, the still living, to resist and combat oblivion, so commonplace in our post-modern, ephemeral times. The dead need our faithfulness; they are entirely dependent upon it. The duties of the living towards them [...] encompass perennial remembrance [...]"¹⁸ In spite of the strong moral force of this argument, however, the remedial function of memory-related measures is the prevailing rationale in the legal reasoning of the Court in individual cases. Second, memory-related measures have also often been ordered with a preventive function, as instruments to prevent similar abuses from occurring again in the future. When this occurs, especially in cases involving whole communities, memory-related initiatives aimed at perpetuating the remembrance of the horrific violations throughout time, are seen alongside – reparation to individuals – as instruments for conveying a lesson to future generations. As such, they become components of the state's general obligation to protect human rights.¹⁹

These two different perspectives seem to imply the adoption of different forms of memorialisation. In fact, when the case related to one victim or a limited number of victims, the Court has ordered *ad hoc* prescriptions aimed at restoring the victim's memory as due satisfaction. For instance, in *Radilla Pacheco v. Mexico*, concerning the forced disappearance of a Mexican citizen at the hands of Mexican Army agents in 1974 and the subsequent lack of investigation by the judiciary, the Court ordered the state

to hold a public act of acknowledgment and to place a commemorative plaque to the victim's name in the city where the crime occurred. The Court stated that those measures were due "in satisfaction of the memory of [the victim]" and "with the objective of preserving the memory of [the victim] within the community". In addition, the Court ordered the publication of a bibliographical sketch of the life of the victim to honour his memory.

On the other hand, however, when a large number of people or a whole community was affected by the violence, the memory-related orders issued by the Court have consisted of broader memory-related projects, such as building monuments and creating sites of memory, often in addition to other preventive tools for non-repetition. These measures have frequently been ordered in cases involving massacres and violations of the rights of indigenous communities.²⁰ The *Plan de Sánchez Massacre* case offers a good example. It relates to a massacre of more than 250 persons perpetrated by a unit of the Guatemalan army in the village of Plan de Sanchez on 18 July 1982. Most of the victims, who suffered atrocious abuses before being killed, were indigenous Maya-Achì people. In the decision on reparations the Court, after requiring the state to "honour publicly the memory of those executed" during a public act of recognition, ordered Guatemala to fund maintenance and improvements to the chapel where the Maya community commemorate the victims of the Plan de Sánchez massacre. According to the Court, "this would help raise public awareness to avoid repetition of events [...] and keep alive the memory of those who died".²¹

The Court applied this reasoning again when, in another case of forced disappearance – the *Anzualdo Castro* case – it

18 *Moiwana Community v. Suriname* (2005). Separate Opinion of Judge A. A. Cançado Trindade. Such a fascinating interpretation had already been put forth by Cançado in his Separate Opinion to the *Street Children* case (2001). See also *Castilla del Pino* (2006). It has to be noted, however, that the individuals who are entitled to obtain reparation are only those who suffered a prejudice to their right. Where victims of abuses are dead, their next-of-kin are entitled to obtain redress for the harm they suffered for the loss.

19 *Radilla-Pacheco v. Mexico* (2009), paras. 353–56.

20 See *Moiwana Community v. Suriname* (2005), para. 218: "For those very reasons – to memorialize the events of November 29, 1986, as well as to prevent the recurrence of such dreadful actions in the future – the State shall build a monument and place it in a suitable public location." *Mapiripán Massacre v. Colombia* (2005), para. 315: "The State must build an appropriate and dignified monument in remembrance of the facts in the Mapiripán Massacre, as a

measure to prevent such grave events happening in the future." The same wording appears in *Pueblo Bello Massacre v. Colombia* (2006), para. 278. Likewise in *Ituango Massacres v. Colombia* (2006), para. 408: "In addition, the State must erect a plaque in an appropriate public place in La Granja and in El Aro, so that the new generations are aware of the events that took place in this case."

21 *Plan de Sánchez Massacre v. Guatemala* (2004), paras. 100 and 104.

rejected Peru's offer to comply with its duty to provide satisfaction to the victim by, among other things, realising the project of a "Museum of Memory".²² However, whilst in the previous cases the Court had limited itself to issuing memory-related orders without further elaborating on their foundation, in *Anzualdo* it seems to highlight the rationale behind these measures. After affirming the importance of vindicating the name and dignity of the victim and his next-of-kin, the Court argued that the construction of a memorial museum could not constitute an "adequate individual measure of satisfaction", however important this would be to restore and rehabilitate the "historical memory of the society". Based on this consideration, both as a measure of individual satisfaction "in order to preserve the memory of [the victim] and as a guarantee of non-repetition", in accordance with the claims of the victims' representatives, the Court instead required the state to place a commemorative plaque in the name of the victim.

The two purposes of memory-related initiatives – satisfaction and prevention – can therefore overlap. Indeed most of these measures are ordered by the Court in order to accomplish both. In the *Radilla-Pacheco* case, for instance, it was ruled that the restoration of the victim's name was important in order to prevent future violations and that memory-recuperation initiatives serve "both for the preservation of the memory and satisfaction of the victims, and recovery and reestablishment of historical memory within a democratic society".²³ Thus, in the realm of reparations, the use of memory-related initiatives by the Court becomes a means to address both the individual and collective need for redress within the society. As a result, the double function of these measures reflects and adapts to the dual nature of memory, in its collective and individual dimensions.

What the Court does not seem to consider, however, are the possible tensions that may arise between these two dimensions and between the goal of commemoration and other transitional justice aims, such as reconciliation.

Admittedly, in some of the memory-related orders, the Court required the specific implementation of the memory-related initiatives to be decided by the state after consultation and in agreement with the parties involved in the case (i.e. the victims and their relatives).²⁴ However, especially in cases involving civil wars, ethnic conflict or the abuse of minority groups, the victims are in general just one of the parties involved in the pattern of violence. Judicial decisions have a limited scope, as the effects they produce are generally legally binding only for the legal parties to the case. As a consequence, ad hoc forms of commemoration ordered by judicial decision and focussed on a single victim or a specific group can leave out a number of victims and create a ranking of legitimacy among victims' narratives and memories. Moreover, the right of the victim to have his or her own individual narrative publicly commemorated, as a form of redress for his or her own suffering, can clash with the broader community's interest in overcoming social conflicts and tensions. The inclusion of memory-related initiatives in reparation schemes demands a thoughtful consideration of extra-legal aspects of the processes of coming to terms with the past.

3. Can the Law Impose Memory?

The IACtHR's jurisprudence has made important advances toward shaping new forms of reparation better suited to redressing the harm and suffering caused by gross and mass atrocities. Nevertheless, as suggested, the inclusion of memory-related actions as a component of a state's obligation to repair raises some thorny issues: To what extent is it desirable that judicial instances, including supranational institutions like the IACtHR, mediate the process of elaboration and reconstruction of the past? What effects do the "judicial truths" established in the decisions on reparations issued by these instances produce in the complex process of negotiation of collective memory within a society? What is the impact of these judgments on the interplay between the individual (recognition) and social (reconstruction) demands placed on memory as an instrument of reparation?

22 Case of Anzualdo Castro Prison v. Peru. Merits, Reparations and Costs. Judgment of September 22, 2009. Series C No. 202, para 200.

23 *Radilla-Pacheco v. Mexico* (2009), para. 356.

24 See *inter alia*, *Moiwana Community v. Suriname* (2006), para. 218; *Case of Goiburú et al. v. Paraguay*. Monitoring Compliance with Judgment, Order of November 19, 2009, para. 45; *Case of La*

Cantuta v. Perú. Monitoring Compliance with Judgment, Order of November 20, 2009, para. 18.

As the above analysis has shown, the decisions of the Inter-American Court seem to interfere with local memory dynamics, bestowing special judicial protection on certain memory practices. The Court imposes on states – and on societies – practices designed to oblige them to remember. Even more significantly, the Court requires states not only to undertake measures to remember, but also prescribes *what* and *how* to remember. However, the Court does so within the limits of its mandate, which requires it to order appropriate reparations for the harms assessed in the specific case. In spite of the advances made in the interpretation of the framework of reparations, the Court does not – and perhaps cannot – also assess these measures with regard to their broader impact on the processes of social reconciliation.

Nevertheless, because the IACtHR is a supranational court, the impact of its judgments goes far beyond individual cases. Measures of redress directed to individuals can have an impact on public policies and, thus, extended effects throughout society. The Court is aware of the external effects of its jurisprudence and has in fact used its influence to instigate reforms and structural changes in many member states of the OAS.²⁵ In the light of this awareness, the Court began to conceive its jurisprudence not only as an instrument to protect and vindicate individuals, but also as a powerful tool to orient government decisions in processes of democratic transition and in the aftermath of human rights crises. This has been the case, for instance, in the fight against impunity. The Court's rulings in cases brought on behalf of individual victims have required states to adopt legislative reforms that adapt the national criminal law systems to human rights standards.²⁶ Similarly, in a series of judgments the Court fought against the widespread practice of self-amnesty laws in cases of mass-

ive human rights abuses,²⁷ with the result that amnesties of this type have been declared unconstitutional by the constitutional courts of several Latin American countries.

These cases suggest that the IACtHR is therefore aware of the potential reach of its decisions. With regard to memory-related orders, however, the Court seems to underestimate the potential impact on the broader socio-political dynamics at the local level. In its decisions, it has limited the assessment of these measures to general statements about the importance of remembering and the relevance of memory-related actions in preventing the repetition of similar brutalities, but has failed to consider thoroughly the specific contexts in which these measures will take place. It seems to neglect the risk of tensions arising between the “memory” imposed by the supranational body and other conflicting memories that also exist in the social fabric. The official sanction of “one memory”, of “one truth”, using the language of one particular set of victims, may have the undesirable result of exacerbating the tension between the victims' demand for reparations and the need for social reconciliation. Moreover, imposing the commemoration of a “judicial truth” established by a supranational instance may alter the complex process of negotiation through which a conflict-riven society achieves a shared view of its common past.

3.1. The Case of the Penal Miguel Castro-Castro v. Peru

In November 2006, the Inter-American Court of Human Rights held Peru responsible for violent acts committed by its agents in May 1992 within the maximum security penitentiary Miguel Castro-Castro.²⁸ Since the case provides a useful example of the possible implications of the IACtHR's memory-related jurisprudence, it will be discussed below.

25 Organization of American States, created by the Charter of the Organization of American States, 30 April 1948, available at: <http://www.unhcr.org/refworld/docid/3ae6b3624.html>. The Inter-American Court and the Inter-American Commission are the two organs of this regional system entrusted with the promotion and protection of human rights.

26 See, for instance, Case of Molina-Theissen v. Guatemala. Reparations and Costs. Judgment of July 3, 2004. Series C No. 108, para. 91, where among

other provisions the Court ordered Guatemala to adopt domestic legislative, administrative provisions “to establish: a) an expedite procedure to allow statement of absence and presumption of death due to forced disappearance, for purposes of parentage, inheritance and reparation as well as other related civil effects; and b) a genetic information system to enable establishment and clarification of parentage of missing children and their identification”.

27 Case of Barrios Altos v. Peru. Merits. Judgment March 14, 2001. Series C No. 75, para. 42. In the

Interpretation of the Judgment on the merit of this case, the Court declared that this prohibition is general in nature and applies to all the laws that present the same criteria. Case of Barrios Altos v. Peru. Interpretation of the Judgment on the Merits. Judgment of September 3, 2001. Series C No. 83, para. 18.

28 Case of the Miguel Castro-Castro Prison v. Peru. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160.

The Castro-Castro case occurred against a background of violence and violations of human rights that traumatised Peru for twenty years. During the internal conflict that paralysed the country between 1980 and 2000, about seventy thousand Peruvians were killed and more were disappeared (CVR 2003, introduction). The Peruvian Truth and Reconciliation Commission was established in 2001 by the new democratic government to shed light on violations committed during the years of the conflict. After two years of work and investigation, the Commission presented its Final Report, which was published in 2003. Members of the terrorist group Sendero Luminoso and agents of the state were held responsible for most of the violations (CVR 2003, Annex 2).²⁹ The Commission ascertained that 6,443 acts of torture and abuse had been perpetrated.

With regard to the case, the Truth and Reconciliation Commission reported that about 175 inmates of the Castro-Castro prison – mostly women – were severely abused and about 42 eventually killed in the course of the military operation “Operativo Mudanza 1” ordered by President Fujimori (CVR 2003, vol. 7, chap. 2, 67). Most of the victims were accused of, awaiting trial for or convicted of terrorism or treason offences. They were considered linked to the Partido Comunista del Perú – Sendero Luminoso.³⁰ In the judgment, after ascertaining the facts of the case, the Court accepted the partial acknowledgment of international responsibility made by Peru and ordered the state to undertake both monetary and non-monetary reparation measures. Among the latter, it required the state to carry out a public act of acknowledgment of responsibility for the violations specified in the decision “as any [sic] apology to the victims and for the satisfaction of their next of kin”³¹ and to commemorate all the victims of the case by inscribing their names on the memorial “The Eye that Cries”.³² While commemorative measures had been requested by both the Commission and the victims’ representative, their requests differed from what the Court ordered. The vic-

tims’ representative requested the construction of a specific monument or the creation of a park where the victims’ next of kin could plant trees in memory of the deceased. The state opposed those requests, arguing that “a monument (called the Eye that Cries) [had] already been erected in a public place of the capital of the Republic in favour of *all* the victims of the conflict, and that it [was] the subject of continuous memorial and commemoration acts.”³³ The Court therefore decided on a compromise and required the inscription of the victims’ names on the existing memorial. In doing so, however, the Court misread the history and meaning of the monument and underestimated the potential for its memory-order to evoke deeper tensions.

“The Eye that Cries” is a particularly meaningful monument for Peruvians. It was built in Lima in 2005, thanks to the initiative of Peruvian civil society groups, with the aim of paying tribute to and preserving the memory of all victims, as well as to educate about recent Peruvian history.³⁴ A trickle of water runs incessantly from a large, granite boulder at the centre of the memorial, which is surrounded by a labyrinth of concentric circles made of thirty-two thousand little stones, on which the names of some of the victims are engraved. The memorial represents Pachamama, the Andean Mother Earth, who cries for her children.³⁵

Figure 1: “The Eye that Cries”, Campo de Marte, Lima, Perú.



Photo: Art Dino

²⁹ Sendero Luminoso was deemed responsible for 46 percent of the acts of violence, while state agents were considered responsible for 30 percent.

³⁰ Miguel Castro-Castro Prison v. Peru (2006), para. 197.

³¹ Miguel Castro-Castro Prison v. Peru (2006), operative part of the judgment, point 12. In light of the meaning of the paragraph, the “any” in the quote should be considered a typographical error for “an”. This is also confirmed by the official Spanish version of the judgment.

³² Ibid. para. 463

³³ Ibid. para. 454 (italics added)

³⁴ <http://www.elojoquellora.pe/>

³⁵ Ibid.

The inscription of the names of the victims in the *Castro-Castro* case was potentially capable of conveying a strong symbolic message to Peruvian society and offering public redress to the memory of the victims. Nevertheless, the political proximity of those individuals to terrorist groups and their potential involvement in the civil conflict framed the Court's decision in a different perspective, sparking violent reactions in the country. On the one hand, human rights activists and those who defended the ruling upheld the importance of condemning the acts of violence perpetrated by the Fujimori regime, regardless of the political past of the deceased; on the other hand, the majority of the population felt uneasy about the decision to conflate memorialisation of "innocent victims" of the conflict (that is, of those civilians whose names had been originally inscribed in the memorial), with commemoration of those who were victims according to the Court's decision, yet perceived by the public as "perpetrators". Protests, sit-ins, heated public debates and political declarations against the Court's decision, which went as far as questioning the Court's authority, took place around the country, and the monument was vandalised. These social and political tensions brought to light the reality that the Peruvian past has not yet been dealt with in society.

The Court's judgment brought to light persistent memory conflicts. Yet, in Ciurlizza's words, the decision "pours salt in the open wound". The public opinion received the decision as a "revealed truth", as an "axiom that nullifies any discussion", an insult to the suffering of the society and, paradoxically, a denial of social memory (Ciurlizza 2007). In the attempt to address the dual reparatory functions of memory as satisfaction and prevention, the Court's ruling clashed with the reconciliatory function of another memory that had been negotiated within the Peruvian social fabric and was still struggling to be accepted and accommodated in that social fabric. As a result of this clash, the intrinsic link between memory and identity, which makes memory-related measures crucial for the process of social

reconstruction in the aftermath of traumatic events, was broken, because of the interference of an external actor. This legal construction of memory, decided from above, is viewed as an external imposition and an outside element that can play no role in the social dynamics of making sense of past atrocities. From a symbol of unity and solidarity for all victims, "The Eye that Cries" became a site of contestation and division.³⁶

Figure 2: "The Eye that Cries" memorial following vandalism on 23 September 2007.



Photo: APRODEH archive

4. Conclusion

International human rights law has seen recent advances in the legal regime for reparations in cases of grave abuses of human rights. In particular, traditional mechanisms of the reparation system have been revised in the light of theories and practices developed in the field of transitional justice. This has resulted in the adoption of more complex and flexible reparation schemes by states and human rights bodies that better adapt to the particular features of the

³⁶ The fascinating and complex nature of the memorial – and of the history it tells – led many scholars, mostly from the memory studies field, to engage with its meaning. Especially since 2007, after

it was subjected to acts of vandalism, the monument has been in the centre of the memory debates in Peru. Scholars have used the recent history of "The Eye that Cries" as a starting point to investigate and

analyse the deeper roots and dynamics of the conflicting interpretations of the Peruvian past and memory polemic (Milton 2011; Drinot 2009; Hite 2007).

transition to democracy. This article has drawn attention to the role that memory-related initiatives have come to play in the revised system of redress in post-conflict and post-violence contexts. The Inter-American Court of Human Rights, in particular, through its jurisprudence on reparations, has used those measures as part of reparatory schemes designed to adequately redress situations where there has been widespread abuse. Memory-related measures, in the legal judgment of the Court, contribute to both satisfaction for victims and guarantees of non-repetition. The “obligation to memory”, understood in a narrow sense as the obligation to put in place acts of commemoration and remembrance for past atrocities, has thereby been progressively recognised as a component of the international obligation to provide reparation for victims. As such, according to the general principles on reparation under international law, memory-related measures used as reparation should be commensurate with the specific harms to individual victims and, at the same time, with the collective interest to prevent future abuses.

However, while the incorporation of memory-related initiatives into the framework of reparations may open the latter to their transformative potentiality, it is doubtful whether judicial decisions are the most appropriate tool to establish the specifics of how and when those measures should be used. As the Peruvian case has demonstrated, the impact of legal decisions that make use of memory-related measures may eventually lead to unforeseen and undesired negative results within broader social memory processes. Although in the *Castro-Castro* case the Court tried to strike

a balance between the different requests of the parties, it failed to consider the wider social and collective dimension of the memory-related initiatives. It failed to pay careful attention to the complex nature of memory processes within a society in transition, and instead limited its considerations to an assessment of the impact of memory-related measures on the parties to the case. This failure occurred even though the Court has demonstrated awareness and pursuit of wider social and political effects in other cases.

In spite of this negative assessment, I do believe that there is a role for the law in encouraging the elaboration of a collective memory. To do this effectively, however, courts and tribunals should pay more attention to the wider social impact of legal decisions. They should be aware of the internal struggles for identity and reconstruction within the societies in which their decision will have to be implemented; they should listen to the existing social narratives and understand their inter-relations. In doing so, courts would move from the role of memory-makers, which impose a specific and partial interpretation of the past from above, to the role of memory-facilitators, conscious of the many layers involved in the process of rethinking the past, and therefore providing a *forum* for different voices and narratives to discuss possible representations of the past. This is a difficult challenge. However, if the law wants to venture into the intricate and delicate aspects of individual and social processes of coming to terms with the past, judges and legislators must develop a much deeper level of engagement with the effort to first understand, and then speak the language of memory.

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