ORGANIZATION OF AMERICAN STATES

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

IACHR

OEA/Ser/L/V/II.131
Doc. 1
19 February 2008
Original: Spanish

PRINCIPAL GUIDELINES FOR A COMPREHENSIVE REPARATIONS POLICY

Approved by the Commission on February 19, 2008

GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES, WASHINGTON, D.C. 20006
Internet: http://www.cidh.org

Principal Guidelines for a Comprehensive Reparations Policy

The IACHR appreciates the fact that the recommendation it issued in its *"Report on the Implementation of the Justice and Peace Law"* on the definition of a ''public policy on reparations to redress the harm caused by paramilitary violence'' has been taken into account by Your Excellency's Government and is being implemented through the creation of an administrative reparations program.

In response to the Colombian Government's request for advisory assistance, and in fulfillment of its mandate, established in Article 41 (e) of its Rules of Procedure and Article 18 (e) of its Statute, the IACHR presents to the Government of Colombia a document containing the principal guidelines that should be included in a comprehensive reparations policy.

1. In its *Statement of the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia,* August 2006, and its *Report on the Implementation of the Justice and Peace Law,* of October 2007, the IACHR observed that in a number of cases, the jurisprudence of the inter-American system has held that victims of serious violations perpetrated during armed conflict are entitled to adequate compensation for the harm caused, compensation that should materialize in the form of individual measures calculated to constitute restitution, compensation and rehabilitation for the victim, as well as general measures of satisfaction and guarantees of non repetition.[1] The Inter-American Court of Human Rights has written that "in cases of human rights violations the duty to provide reparations lies with the State, and consequently while victims and their relatives must also have ample opportunities to seek fair compensation under domestic law, this duty cannot rest solely on their initiative and their private ability to provide evidence."[2] Reparations should consist of measures that tend to make the effects of the violations committed disappear. Their nature and amount will depend on the damage caused both at the pecuniary and non-pecuniary levels. Reparations cannot involve enrichment or impoverishment of the victim or his or her heirs.[3]

2. The IACHR considers that, beyond the established legal system, the State has a key role and a primary responsibility to guarantee that victims of gross violations of international human rights law and serious violations of international humanitarian law[4] have equal and effective access to measures of reparation, consistent with international human rights legal standards. Access to reparations for victims of crimes against humanity must never be subject exclusively to

---

[1] See I/A Court H.R. *Case of Mack Chang,* Judgment of November 25, 2003, paragraphs 236-237; *Case of the Caracazo, Reparations* (Article 63(1) American Convention on Human Rights), Judgment of August 29, 2002, Series C No. 95, paragraphs 77-78; *Blake Case, Reparations* (Article 63(1) American Convention on Human Rights), Judgment of January 22, 1999, Series C No. 48, paragraphs 31-32; *Suárez Rosero Case*, *Reparations* (Article 63(1) American Convention on Human Rights), Judgment of January 20, 1999, Series C No. 44, paragraphs 41; *Castillo Páez Case*, *Reparations* (Article 63(1) American Convention on Human Rights), Judgment of November 27, 1998, Series C No 43, paragraph 53. See also IACHR, Statement of the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia, , OEA/Ser. L/V/II 125 doc. 15, August 1, 2006 - par. 48.

[2] IACHR. Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings. OEA/Ser. L/V/II 129 doc. 6, October 2, 2007 – par. 97. See also I/A Court H.R. *Case of the La Rochela Massacre,* Judgment on the Merits and Reparations, May 11, 2007. Series C No. 163, paragraph 220.

[3] IACHR. Statement of the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia, OEA/Ser. L/V/II 125 doc. 15, August 1, 2006 - par. 48.

[4] Based on the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.* Resolution 60/147, approved by the United Nations General Assembly December 16, 2005. E/CN.4/Sub.2/1996/17.

determination of the criminal liability of the perpetrators, or the prior disposal of their personal goods, licit or illicit.[5]

3. When drafting public policy on reparations, one of the State's objectives must be to redress the harm caused by paramilitary violence, applying the standards of international human rights law with a view to providing low-cost, streamlined administrative avenues by which to access economic reparations programs. This should be without prejudice to any other kinds of non-pecuniary reparations, collective reparations, and social programs and services that might be established for the population affected during the conflict.[6] That policy should be implemented according to the reparations criteria singled out by the National Commission for Reparations and Reconciliation.[7]

4. The administrative reparations program that the State is to implement should reflect the outcome of an open and transparent process of dialogue and consultation with civil society and the state institutions involved. That process will lend legitimacy to the policy and ensure its continuity, irreversibility and institutionalization. The IACHR considers that the comprehensive reparations program must function as State policy to give it stability and to enable it to sustain itself over the course of time. Implementation of a comprehensive reparations program such as the one proposed will require a commitment on the part of Colombian society to the victims of the conflict, the kind of commitment that broad and in-depth preliminary consultations will enable.

5. The State must play a primary, rather than secondary, role in guaranteeing victims' effective access to reparations, in accordance with the standards of international law.[8] In the Commission's view, the adoption of an administrative reparations program ought not to preclude other judicial avenues to access comprehensive reparations, and victims should be able to choose the avenue that they consider best to ensure, in the end, that they receive reparations. The Commission is of the view that the State could establish and put into operation the proper institutional mechanisms to observe victims' right to have recourse to various avenues of reparations.

6. Should the comprehensive reparations program offer an administrative avenue as an option to the judicial proceeding allowed under the Justice and Peace Law, the two options should not be mutually exclusive; instead, the administrative avenue should complement the judicial reparations proceeding, since the object of the administrative reparations would be different from that of the judicial reparations proceeding. This proceeding, established under the Justice and Peace Law, makes it possible to bring an action seeking reparations first from the immediate perpetrator and, as appropriate, from a paramilitary group, and only secondarily from the State – through the reparations fund- and then only in cases where sufficient assets to pay damages are lacking. The fact that the victim retains the right to claim reparations from the perpetrator is unrelated to the victim's allege of administrative reparations from the Colombian State, as these are separate claims, with different aims, involving different parties. For the Commission, then,

---

[5] IACHR. Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings, OEA/Ser. L/V/II 129 doc. 6, October 2, 2007 – par. 98.

[6] *Ibid*, par. 99. Special social benefits given in a reparative sense, as in the case of the reparations pensions given in Chile, educational benefits for children of the disappeared, health services through the Reparations Programs and full health and mental health care through incorporation into PRAIS and human rights programs. ICTJ. *The Handbook of Reparations*. *The Reparations Policy for Human Rights Violations in Chile* by Elizabeth Lira, Chapter II, 2006, pp. 60-64.

[7] National Commission for Reparations and Reconciliation: *Recomendación de criterios de reparación y de proporcionalidad restaurativa [Recommended criteria for reparations and reparative proportionality],* Article 52(6), Law 975 of 2005, and Article 16 of 2006 Decree 3391. Bogotá, 2007.

[8] IACHR. Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings. OEA/Ser. L/V/II 129 doc. 6, October 2, 2007 – IACHR Recommendation No. 6.

dismissal of the action seeking reparations via a judicial proceeding should not be a requisite for seeking reparations via the administrative avenue. The Commission believes that both actions should complement each other; in a judicial proceeding, the State would always retain the authority to pay the victim the compensation awarded under the administrative reparations program. In the Commission's view, therefore, there is no dual reparations cost to the State. Implementation of an administrative program might also serve to reduce litigation of cases seeking reparations.

7. The IACHR has been told that when implementing an administrative reparations program for victims of certain violations, the State would not be acknowledging legal liability for the actions claimed; instead, the State would be expressing a political and humanitarian commitment to the victims of the conflict.[9] The Commission understands that the concept of reparations is based on a principle of liability or legal obligation, by contrast to an *ex gratia* payment. It is the Commission's view, therefore, that the administrative reparations proceeding ought not to preclude a contentious-administrative legal action that seeks to establish the legal responsibility of the State, nor should it involve abandonment of the action for reparations under the Justice and Peace Law. Accordingly, victims' right to bring legal action in the contentious-administrative forum to determine the responsibility of the State for gross violations committed by paramilitary ought to be preserved, as has been the finding in precedents of the Council of State. In addition, the State could always include in the award the compensation it would pay under the administrative reparations program.

8. The establishment of an administrative reparations program should not in any way alter the policy established in the Justice and Peace Law regarding paramilitary perpetrators who make reparations with their own assets, legal and otherwise, particularly given the Constitutional Court's ruling on the question of the constitutionality of the Justice and Peace Law.[10] Implementation of a comprehensive reparations program must be matched by an active strategy, practiced by the Government and the Attorney General's Office, aimed at recouping legal and illegal property and money belonging to paramilitary groups. The idea here is to recoup the fiscal cost invested in a reparations program such as the one proposed by those directly in charge, in keeping with the spirit of the Justice and Peace Law.

9. The Commission considers that the procedures to be implemented under the comprehensive reparations program must be respectful of the rights and guarantees established in articles 8 and 25 of the American Convention. Those procedures must guarantee minimum standards for observance of the right to due process. The Inter-American Court has had occasion to underscore the fact that the guarantee established in Article 8 of the American Convention is fully applicable and has written the following with regard to administrative due process:

> The right to obtain all the guarantees through which it may be possible to arrive at fair decisions is a human right, and the administration is not exempt from its duty to comply with it. The minimum guarantees must be observed in the administrative process and in any other procedure whose decisions may affect the rights of persons...[11].

10. The IACHR has singled out the following elements of due process of law in administrative proceedings: the guarantee of a hearing for a determination of one's rights; the right to legal representation; prior notification of charges; the right to a reasoned judgment; the right to

---

[9] Information received by the IACHR during its November 2007 visit.

[10] Constitutional Court Judgment C 370-2006 of May 18, 2006.

[11] For more information, see IACHR, Report on Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights. OEA/Ser.L/V/II.129. Doc. 4, 7 September 2007, par. 104.

public administrative proceedings; the right to a decision within a reasonable time period and the right to judicial review of administrative decisions.[12]

11. These proceedings must be accessible, flexible, transparent and public, except in the case of information that could put the victims at risk. Given the nature of these administrative proceedings, the facts for which reparations are sought, and the circumstances of many victims of the Colombian conflict, the Commission is of the view that the evidentiary system should be a liberal one, where the State plays an active role in producing and compiling relevant information to test the veracity of the facts denounced. Some thought might be given to admitting circumstantial evidence, the testimony of the victims and their next of kin, an elaboration of the individual facts with details about the social context and patterns of violations and acts attributed in cases heard by the Colombian courts, the IACHR and the Inter-American Court. The Commission has also pointed out that the State has an obligation to provide *pro bono* legal assistance.[13]

12. In the Commission's view, in order to implement a comprehensive reparations program of this kind, the State will need to pursue an active strategy of disseminating information and reaching victims. That strategy ought to include broad information campaigns and administrative decentralization of the work done by the offices that register the requests, while keeping the decision-making centralized so as to ensure accessibility and equality before the law.

13. The IACHR has written that when investigating and punishing acts of violence and discrimination, the State must respect the rights of groups whose human rights are most at risk, such as women, children, indigenous peoples, Afro-Colombian communities, social leaders and human rights defenders,[14] and the right to adequate reparation for the harm caused, through individual measures of restitution, compensation and rehabilitation.[15] The Commission has also written that the State must create opportunities for victims to participate in the decisions regarding implementation of mechanisms and policies on reparation.[16] To that end, the process of consultation being suggested could provide a good opportunity for victims and their representatives to explain their views and inform the State of their specific needs. This would make the reparations policies more relevant and rational, and prevent measures that could be discriminatory.

14. Inasmuch as the majority of the victims to whom reparations are owed are women,[17] the IACHR believes that the administrative reparations program should make provision for specific mechanisms designed to fully redress acts of violence and discrimination that women have

---

[12] IACHR, Report on Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights. OEA/Ser.L/V/II.129. Doc. 4, 7 September 2007, pp. 35-45.

[13] IACHR, Report on Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights. OEA/Ser.L/V/II.129. Doc. 4, 7 September 2007, par. 51. I/A Court H.R., Advisory Opinion No. 11/90.

[14] The Commission has identified the following as the groups whose human rights are at greatest risk: women, children, indigenous peoples, Afro-descendent communities, social leaders and organizations that defend human rights. IACHR, *Violence and Discrimination against Women during the Armed Conflict in Colombia.* OEA/Ser.L/V/II. Doc. 67, 18 October 2006. par.1.

[15] IACHR, *Violence and Discrimination against Women during the Armed Conflict in Colombia.* OEA/Ser.L/V/II. Doc. 67, 18 October 2006. par. 236.

[16] IACHR, *Violence and Discrimination against Women during the Armed Conflict in Colombia,* OEA/Ser.L/V/II. Doc. 67, 18 October 2006, recommendation 63.

[17] Information that the State supplied to the IACHR's Rapporteur for Colombia at a meeting held with the National Commission for Reparations and Reconciliation, November 28, 2007.

experienced as part of the armed conflict. Similarly, the Convention of Belém do Pará[18] urges the States to establish the judicial and administrative mechanisms necessary to ensure that women victims of violence –physical, psychological and sexual- have effective access to restitution, reparation of the harm done or other just and effective means of compensation.[19]

15. As for reparations for victims from other groups whose human rights are at greater risk of being violated, such as indigenous peoples and Afro-descendent communities, the State must use distinct reparative criteria that include recognition of and respect for their territories, and the participation of their authorities in all decisions that affect them.[20] It is important that the authorities of these communities be included in the consultation process.

16. As for reparations for child victims, the Commission recalls that under the American Convention on Human Rights[21] and the Convention on the Rights of the Child,[22] all measures adopted on a child's behalf must ensure the child's best interest, respect for his or her dignity, the principle of nondiscrimination, the right of children to participate in devising and implementing reparation measures and respect for their opinions. Those measures must be geared toward ensuring the conditions necessary so that child victims may enjoy an adequate standard of living that enables them to attain their full development as human beings.

17. The Commission is also of the view that the administrative reparations program should factor in reparative criteria for victims displaced as a result of the violence perpetrated by illegal armed groups.[23] In this regard, the Inter-American Court of Human Rights has established that, given the complexity of the issue of internal displacement and the broad array of human rights it affects or jeopardizes, and given the especially vulnerable and defenseless status of most displaced persons, they could be deemed to have, *de facto,* no protection. Under the American Convention, this would oblige States to grant them preferential treatment and take active measures to reverse the effects of their weak, vulnerable, and defenseless status[24].

18. As recognized on various occasions, by the Government of Colombia, civil society organizations, and the international community, the internal conflict in Colombia has given rise to severe violations of the rights of millions of Colombians. The Commission values, in this regard, the State's willingness to redress the harm to the victims of violations through a comprehensive reparations program. The Commission is being made available to assist the Government of Colombia in the implementation and follow-up of the program.

---

[18] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará," Art. 7.

[19] United Nations Security Council resolution 1325, S/RES/1325/2000. IACHR, *Violence and Discrimination against Women during the Armed Conflict in Colombia,* OEA/Ser.L/V/II. Doc. 67, 18 October 2006, par. 233.

[20] I/A Court H.R., *Case of the Plan de Sánchez Masacre*. Reparations. Judgment of November 19, 2004. Series C No. 116, paras. 60 - 111. Corte I.D.H., I/A Court H.R. *Case of the Moiwana Community*. Judgment of June 15, 2005. Series C No. 124, paras. 168 - 218. I/A Court H.R., *Case of the Mayagna (Sumo) Awas Tingni Community.* Judgment of August 31, 2001 Series C No. 79, paras. 162 - 172. I/A Court H.R., *Case of theYakye Axa Idigenous Community*. Judgment of June 17, 2005. Series C No. 125, paras. 179 - 227. I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community*. Judgment of March, 2006. Series C No. 146, paras.195 - 247. I/A Court H.R., *Case of the Saramaka Peoples*. Judgment of November 28, 2007. Series C No. 172, pars. 186 - 202.

[21] Article 19.

[22] Articles 2, 3, 6(2), 12, 27(1) and 3, 39.

[23] Based on Principle 29 of the United Nations' Guiding Principles on International Displacements, dated February 11, 1998. E/CN.4/1998/53/Add.2.

[24] I/A Court H.R., *Case of the Ituango Massacres*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148, para. 210.