

**CONCURRING VOTE OF JUDGE
SERGIO GARCÍA-RAMÍREZ
IN THE JUDGMENT ON REPARATIONS ENTERED BY
THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

IN THE CASTILLO PÁEZ CASE

1. In the Judgment on the merits in the Castillo Páez case, invoked in this Judgment on reparations, the Inter-American Court of Human Rights established that the Peru "is obliged to investigate the events that produced them [the violations of the American Convention]" and that even assuming "that internal difficulties might prevent the identification of the individuals responsible for crimes of this kind, the victim's family still have the right to know what happened to him and [...] where his remains are located."

The Court further held that in addition to this duty to investigate "there is also the duty to prevent the commission of forced disappearances and to sanction those responsible for them." The Judgment also held that "These obligations on Peru shall remain in force until such time as they have been fully performed" (*Castillo Páez Case*, Judgment of November 3, 1997. Series C No. 34, para. 90).

2. In the present Judgment on reparations, the Court held that "effective investigation and punishment of those responsible for the events that prompted the instant case, as ordered by this Court is one reparation measure that those next-of-kin are due" (para. 70). It also reconfirmed its finding in the Judgment on the merits and stated that "the Amnesty Law enacted by Peru (Law No. 26.479) is one of the 'internal difficulties that might prevent the identification of the individuals responsible for crimes of this kind', since it obstructs investigation and access to the courts and prevents the victim's next-of-kin from knowing the truth and receiving the reparations to which they are entitled." (para. 105). To arrive at this finding, the Court analyzed Peru's arguments concerning the amnesty laws issued in that country with respect to persons who participated in the fight against terrorism.

In the same reparations judgment, after examining the applicability of articles 1(1) and 25 of the Convention on this matter, the Court reiterated that the State "has a duty to investigate the human rights violations and prosecute those responsible and thus avoid impunity." (para. 107) which this Court had previously defined as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention," a situation that the State must combat by all legal means at its disposal (*Paniagua Morales et al. Case*, Judgment of March 8, 1998, Series C No. 37, para. 133).

Therefore, by a unanimous vote of its members, the Court decided that the State must investigate the facts and punish those responsible for them (operative paragraph 2).

3. The duty to investigate human rights violations and punish those responsible for them derives from the American Convention. The latter also provides that States have a duty not to enact laws or adopt measures that could be contrary to the terms of that Convention. Peru signed and ratified that Convention in exercise of its sovereignty, thereby undertaking the same obligation to observe its provisions to which the other States Party to the Convention pledged themselves.

4. This concurring vote will not repeat what the Court has already held; nor will it examine and describe Peru's specific ordinances of Peru. Instead, its purpose is to analyze in general terms -but always by reference to the Judgment on reparations- the scope that the Judgment might have in the matter under discussion here, and the ideas and concerns that, in the undersigned's opinion, could have informed it.

5. In exercise of its advisory functions, the Court has previously issued opinions on laws that could have been in conflict with provisions of the Convention, since under articles 1 and 2 of the Convention, the States Parties have a duty to respect the rights and freedoms contained in that international instrument, ensure their free and full exercise and adopt the measures necessary to make them effective. Accordingly, it is the duty of those States to refrain from adopting provisions that do not

conform to the object and purpose of the Convention (cf. *Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)*, Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 26; and *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, paragraphs 32, 33, 50 and 58.1). These observations are, of course, refers to the legal effects of laws under international law, not the domestic legal effects of local laws within the State concerned (cf. OC-14/94, para. 34).

6. In my opinion, the Court's Judgment does not dismiss the advisability and need of amnesty provisions that serve to restore peace, under conditions of freedom and justice, in the wake of the internal conflicts that such measures and others are intended to help to resolve. Quite the contrary, it is plausible for an effort of this nature to be carried out under the aegis of the relevant principles of international and domestic law, with the sectors involved participating and within the framework of democratic institutions.

7. The question of amnesty laws has been examined at length in the recent literature on human rights. By their very nature, such laws imply that conduct prior to their promulgation will go unpunished. Those who have studied this issue, which is drawing increasing interest, attempt to balance the exigencies of peace and reconciliation with the duty to protect human rights and punish those who violate them, particularly when the violations are extraordinarily egregious -in other words, crimes of *lese humanité* such as genocide, extra-judicial execution, torture or forced disappearance-, while invoking the supposed demands posed by the struggle against subversion.

Amnesty implies disremembering and remaining silent about acts that, in principle, are criminal in nature. However, this disremembrance and silence cannot be permitted to cover up the most severe human rights violations, violations that constitute an utter disregard for the dignity of the human being and are repugnant to the conscience of humanity.

8. The impunity that amnesty laws imply should be limited as much as possible, so that they are able to achieve their legitimate objectives without this diminishing or undermining respect for human rights, whose violation cannot be regarded as a legitimate recourse in civil strife. Amnesty laws have to strike a complex and delicate balance between the struggle against impunity and the goal of promoting national reconciliation (cf. Progress report on the question of the impunity of perpetrators of human rights violations, prepared by Mr. Guissé and Mr. Joinet, pursuant to Sub-Commission resolution 1992/23. E/CN.4/Sub.2/1993/6, para. 1).

Recent studies on the subject have found that international law does not allow criminal exoneration when grievous human rights violations are involved (cf. Ambos, Kai, *Impunidad y Derecho penal internacional*. Trad. Marcela Anzola Gil. Biblioteca Jurídica Diké, Medellín, Colombia, 1997, p. 284).

The Vienna Declaration and Programme of Action, approved by the Second World Conference on Human Rights on July 25, 1993, pointed out that the Conference viewed "with concern the issue of the impunity of perpetrators of human rights violations" and therefore supported "the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue" (*Vienna Declaration and Programme of Action*, A/CONF:157/23, para. 91), one of which is analysis of the various modalities or categories that can be established in body of amnesty laws promulgated in recent years.

9. Amnesty laws are frequently portrayed, generically, as measures to help restore peace or ease the transition to peace. To shed light on this issue, distinctions can and should be made among amnesty laws taking the following relevant factors into account: the circumstances under which they were promulgated, the means by which they were adopted, and their efficacy. Accordingly, a distinction must be made between the so-called "self-amnesty laws" promulgated by and for those in power, and amnesties that are the result of a peace process, with a democratic base and reasonable in scope, that preclude prosecution for acts or behaviors

of members of rival factions but leave open the possibility of punishment for the kind of very egregious acts that no faction either approves or views as appropriate. Self-amnesty laws have been severely criticized (cf. for example, Norris, Robert E., *Leyes de impunidad y los derechos humanos en las Américas. Una respuesta legal*, in "Revista IIDH", No. 15, January-June 1992, esp. pp. 109 et seq.)

10. In the principles proposed in the annex to the *Revised Final Report on the question of the impunity of perpetrators of human rights violations (civil and political rights)*, which Mr. Louis Joinet prepared on instructions from the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations Commission on Human Rights, the following is stated: "Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within ... limits." One such limit is the following: "The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations" that it has "to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished (...)" (E/CN/Sub.2/1997/20/Rev.1, Annex II, principles 18 and 25).

Mr. Joinet notes that the proposed principles do not constitute "an obstacle to national reconciliation", but rather "guiding principles intended not to thwart reconciliation but to avoid distortions in certain reconciliation policies so that, once beyond the first stage, which is more concerned with 'conciliation' than reconciliation, the foundations of a 'just and lasting reconciliation' may be laid" (para. 49).

11. An important commentary on this subject that might be helpful to reflect upon here, appears in official communication 917-719, sent by then Chilean President Patricio Aylwin, to the President of the Supreme Court of Chile, on March 4, 1991, wherein he addresses the matter that concerns us here. Mr. Aylwin wrote the following: "I am convinced that for the national community it is important that justice be done in these cases (grave human rights violation), with each branch of government

performing its own functions, which I am the first to respect. Accordingly, my conscience would not rest easy if I failed to convey to the Honorable Court my view that the amnesty now in effect, which the government respects, must not and cannot be an obstacle to judicial inquiry and to ascertaining where the responsibilities lie, especially in the case of the disappeared."

The letter goes on to add the following: "Under Article 5 of the Constitution (of Chile), it is the duty of the branches of government to respect and promote the rights guaranteed by the Constitution and by the international treaties that Chile has ratified and that are currently in effect. One of those rights is the right to justice."

12. In summation, in my opinion the Court's judgment in the instant case does not take issue with the efforts that sectors of the national community are making for domestic peace and reconciliation, although it does, of course, take into account the characteristics that international law and recent case law and doctrine consider essential if that goal is to be achieved in a manner compatible with respect for human rights, which is the common cause of the States Parties to the American Convention.



Manuel E. Ventura-Robles
Secretary



Sergio García-Ramírez
Judge