# BENCH MEMO

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### 2015 INTER-AMERICAN HUMAN RIGHTSMOOT COURT COMPETITION

Case of Bolt et al. v. the Cardenal Republic

Bench Memorandum

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#### Introduction

This case was written with the idea of encouraging a discussion on the relationship between inter-American standards on the protection of rights and contexts of mass violence where policies are implemented within the paradigm of transitional justice. Although there has been ample experience in the Americas on how to design policies to address mass atrocities, there are still many doubts regarding the legal and institutional challenges faced in such a task. Similarly, even though the case law of the Court has been held up as a major influence in the development of the legal standards for transitional justice, the Inter-American Court has made little reference to that concept.

There are multiple challenges and concerns about what is allowed and what the content and scope of transitional justice measures should be. This case is written based on the premise that an honest effort at transitional justice is being made by a State that is emerging from an armed conflict through a negotiated peace settlement. Given this reality and its inherent limitations, a solution is reached through a holistic approach to justice that seeks to take account of the victims ; however, because of the nature of the circumstances, it does not satisfy the standards that would be required for the full establishment and acknowledgement of the truth, exhaustive and strict justice, and maximalist comprehensive reparations. Under those specific circumstances, then, the case invites debate on the following issues: What are the available options under the inter-American legal framework, and how should those legal standards be interpreted in light of the factual limitations created by this type of situation? Do rights have minimum contents? What are they, what should they be, and how should they be set? Other general issues that we hope will be raised in the discussion include how to understand the content and scope of the obligation to investigate,

I. Admissibility and jurisdiction

consideration of the Court, must be applied even when the case is filed by the State. This is contradictory because, if the State submits the case, should it not decide the reason for its submission? However, this could encourage the practice of States filing cases in order to preclude the filing of a comprehensive case to the Court. This could be an interesting line of debate between the teams.

In addition, under the Rules of Procedure in effect since 2009, the most important role the IACHR plays before the Court is to submit cases and present them at hearings before the Court. Should this scenario arise in cases submitted by States? Should the role of the IACHR simply be to appear at the proceedings and request to take part in the case if necessary in its capacity as an advocate for the inter-American public interest? Would this type of case allow for the Court to receive written pleadings from the IACHR in defense of its report? Would it be admissible for the IACHR to offer evidence or expert testimony in the case, and if so, at what time during the proceedings should such requests be handled?

The exhaustion of domestic remedies

One of the issues that competition participants tend most

Victims: Lucrecia Rossi (para.

## Kidnapping and Murder

2000- An urban column of the MRLB hijacked a school bus carrying 23 children from the Ángeles del Saber School, one of the most expensive private schools in the capital of the Republic. They were held captive for more than 90 days.

2000- On March 28, a joint army-police anti-kidnapping commando conducted an operation in a slum in the capital city where it was thought the kidnapped children were being held. The anti-kidnapping commando unit asked the captors to free the children and surrender peacefully, in exchange for which their lives would be respected. This situation led to the confrontation with the captors. The official police report stated that a loud noise (like that of a grenade) was heard inside the house. The joint commando unit, on the direct orders of President Ferreira, opened fire with long-range weapons and grenades in order to gain access to the structure. After a brief confrontation. members of law enforcement were able to gain access. Of the seven individuals presumed to be the captors, two bodies were found that were later identified as MRLB militants, none were Bonecas.

2009- Lupita López filed a complaint before the IACHR alleging impunity in the death of her son Aníbal López, a child from the Ángeles del Saber School.

- II. Merits
- Complementarity, transitional justice measures and the violation of substantive ACHR rights

One of the central points of the case is to establish, according to the principles of subsidiarity and complementarity that govern the system, whether the State has incurred international responsibility. In this regard, current internationalist doctrine states that in order for there to be an international breach, there must be an act attributable to the State that is a violation of an international obligation. Asserting State responsibility thus requires demonstrating not only that the violation occurred but also that it is internationally attributable to the State. In order establish this link of attribution under international human rights law, it is necessary to consider that the international mechanisms are complementary to the national systems, and to this extent they act based on criteria of subsidiarity. The international bodies only act when the national justice systems are ineffective. The State is first given the opportunity to serve justice, and the parties may avail themselves of the international bodies only if it is demonstrated that the national process was not conducted independently and impartially in accordance with the quarantees of international law.

The issue then arises of how to evaluate the adequacy of the domestic response in order to determine whether international responsibility can be attributed. The evaluation of State actions is now more complex in the Inter-American System than it used to be. Decades ago, the States either did nothing to address the violations, or

accept the position of the State that it duly investigated [in order] to find that the State has not violated the Convention. <sup>2</sup> Accordingly, the Court dismissed the preliminary objection to its jurisdiction over the case.

In contrast, the team representing the interests of the State will find the recent decision in the Case of Tarazona Arrieta et al. v. Peru very useful. In that case, the Court called to mind that State responsibility under the Convention can only be attributed at the international level after the State has had the opportunity to establish, if appropriate, that a right has been violated, and to redress the The Court maintained that this rule follows from the principle of complementarity (or subsidiarity) that informs the breadth of

The duty to prosecute is understood to have been satisfied so long as the State conducts criminal proceedings designed to shed light on what happened and to determine the responsibility of both the masterminds and the direct perpetrators of the acts. This obligation cannot be replaced by mechanisms such as truth commissions. Nevertheless, debates persist regarding the content of this obligation in contexts of negotiated peace settlements between States and non-State armed groups seeking a transition to peace especially with respect to potential agreements to grant partial and conditional amnesties. We will address this debate in the section on the scope of the obligation.

With regard to punishment, there is no clear-cut interpretation of what characteristics it should have in order for the obligation to be deemed to have been met that is, whether the obligation to

of crimes against humanity as a norm of *jus cogens*. It further held that there is a duty under the standards of the Convention to investigate, prosecute, and punish these kinds of acts. The Court underscored:

El Salvador, which were conditioned upon the effective participation of the alleged perpetrators in the Truth Commission.

In that judgment, the Inter-American Court maintained its position on the inadmissibility of general amnesties, but qualified it because the case concerned a negotiated peace settlement. In this regard, although the Court upheld the effects of the General Amnesty Law, it called attention to the application of the law, finding it incompatible with the duty to investigate and punish serious violations. The argument of the Court is notable, as it demarcated the scope of action that States in transition from

in order for the trials to be held within a short period of time.<sup>37</sup> This initial approach was brought to an end with the enactment of the Full Stop Law [Ley de Punto Final]. Only with the reopening of the investigations were case management strategies readapted, this time based not on selection—as the aim was to prosecute all perpetrators of serious human rights violations—but rather on criteria of priority centered mainly on the status of progress in the case and the sufficiency of the evidence,<sup>38</sup> bearing in mind that nearly 30 had passed since the crimes were committed. In Chile, the ordinary justice system has prioritized cases using criteria to concentrate prosecution on the criminal phenomena that had the greatest impact, focusing the work and caseloads of the prosecutors on acts such as murder.<sup>39</sup>

In situations of transition to peace, Colombia has provided the clearest example of applying prioritization criteria to cases in the transitional and ordinary justice systems. After the United Self-Defense Forces of Colombia and some guerrilla groups demobilized and surrendered to the justice system, a transitional legal structure was established under the well-known Peace and Justice Law to allow for the imposition of alternative sentences in lieu of ordinary penalties in exchange for the to truth, justice, and reparation. With the implementation of that law the Office of the Prosecutor General of Colombia has addressed the

implementation of that law, the Office of the Prosecutor General of Colombia has addressed the difficulties inherent in the prosecution of enormous numbers of human rights violations.

Given this situation, international bodies such as OAS Mission to Support the Peace Process in Colombia (OAS MAPP) and the IACHR urged the Colombian State to improve strategies for prosecuting the acts committed by those unlawful armed groups. In its 2011 report, the IACHR stated:

The IACHR agrees with the MAPP/ OEA that this situation should be eliminated, and [investigative and adjudicatory bodies]

Bench Memorandum Inter-

#### 3. Alternative sentences

There are doubts about the punishment aspect of the duty to investigate, prosecute, and punish. In particular, there are doubts about whether it is possible by virtue of the case law of the Inter-American Court and other international instruments to determine the existence of a State duty to effectively impose a punishment and, if so, whether it would require the actual deprivation of liberty or whether the imposition of alternative sentences may be considered.

Under the conventions that establish the duty of prosecution in the inter-American context, it is not

and the extent to which responsibility is acknowledged and information is provided about what happened. This may give rise to imp and those who performed functions of high command and gave the orders [emphasis added]. 52

In conclusion, the obligation to investigate, prosecute, and punish necessitates imposing a penalty. It follows from the inter-American conventions that expressly contain this duty, and from the Rome Statute as well as from other soft law instruments, that this obligation is met with the imposition of a criminal penalty. According to the Inter-American Court, in the Inter-American System the criminal penalties imposed must also be proportional to the gravity of the crimes prosecuted and, consequently, in cases of serious human rights violations, it is not admissible to impose

contradict the duty to prosecute all perpetrators of serious violations. They can cite the country report issued by the IACHR in 2013, which found that the selection instruments recognized by Colombia in the so
which bears a close resemblance to the LRCR) could violate the obligation to prosecute and punish all perpetrators of serious violations.

Additionally, they can argue that the cases prioritized by the IACHR, both in Admissibility Report 05/12 and in Report 14/98,

obligation to investigate, prosecute, and punish, such as forced disappearance, torture, sexual violence, and extrajudicial executions. They can even argue that in contexts of systematic and widespread violations like the one experienced in the Cardenal Republic these acts can constitute crimes against humanity, thus reinforcing the duty to prosecute them.

Bench Memorandum Inter-

The restoration of the victim to the original situation before the violations occurred, or *restitutio in integrum*, as the Inter-American Court has called it, can include the different forms in which a State might address the international responsibility it has incurred. At this time, there is an international consensus that establishes, for methodological purposes, that the various reparation measures available to victims of violations fall within five specific components: restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition.

Measures of restitution involve the reestablishment, to the extent possible, of the situation that existed before the violation occurred. The Inter-American Court has established that this restitution can include measures such as: (a) the release of unlawfully detained persons; (b) the return of unlawfully seized property; (c) return to the place of residence from which the victim was displaced; (d) reinstatement of employment; (e) the expungement of judicial, administrative, criminal, or police records, and the deletion of the respective entries, and (f) the return, demarcation, and granting of title to the traditional lands of indigenous communities in order to protect their communal property.<sup>56</sup>

Measures of compensation seek to provide redress to the victims for the physical and emotional harm suffered, as well as for the loss of income and opportunities, pecuniary damages (actual damages and lost wages), attacks against their reputation, expenses incurred, and the costs of legal services and medical attention. Compensation may be monetary or in kind. Compensation in kind requires the delivery of a physical asset of the same characteristics and conditions as that of which the victims were deprived. Monetary compensation must be granted in a manner that is appropriate and proportional to the gravity of the violation and according to the circumstances of each case for all of the financial harm resulting from the violations that is subject to assessment.<sup>57</sup>

The purpose of measures of rehabilitation is to reduce the physical and psychological suffering of the victims through measures designed to provide medical, psychological, and psychiatric services, which enable the restoration of the dignity and reputation of the victims, and allow them to receive the legal and social services they require. In order to meet these objectives, service measures, as well as any medications, must be provided to the victims immediately and free of charge.<sup>58</sup>

Measures of satisfaction are designed to provide redress for the non-pecuniary damages (suffering and hardship caused by the violation, such as harm to values that have great significance for the individual and that is not financial in nature). These measures include public ceremonies or projects, such as the broadcasting of an official message repudiating the human rights violations in question, in order to recover the memory of the victims,

Bench Memorandum Inter-