

IDENTIFICATION OF SKELETAL REMAINS OF PEOPLE DETAINED-DISAPPEARED AND PERSONS EXECUTED FOR POLITICAL REASONS, AND PERSONAL INTEGRITY OF THE RELATIVES

ROCÍO NORAMBUENA AVILÉS*

Abstract

Failure to identify the skeletal remains of people who were executed or detained-disappeared during the dictatorship of Augusto Pinochet prevents relatives from celebrating the funeral rite and living up the grieving process. This violates their right to personal integrity. This conclusion is based on both the recent jurisprudence of the Inter-American Court of Human Rights ('ICHRM') and one relevant judicial decision in Chile. In the light of this finding, it follows that courts should decide actions filed against the State of Chile by the relatives of the victims. Accordingly, the compensation cannot proceed solely on the basis of the State's failure to comply with a statutory duty (*falta de servicio*).

Key Words: *Right to personal integrity, persons executed for political reasons, detained-disappeared, military dictatorship, human rights, funeral rite.*

1. INTRODUCTION

One of the features of the military dictatorship which took place in Chile between 11 September 1973 and 11 March 1990 is the persecution of citizens because of political reasons. In fact, 3,065 persons were executed or detained-disappeared by State agents. In the last twenty-five years, the Forensic Medical Service (*Servicio Médico Legal*) has been able to identify the remains of only 158 persons detained-disappeared. As of now, there are more than 900 cases to be clarified.¹

* Universidad Alberto Hurtado, Santiago, Chile (rocio.nora.aviles@gmail.com). This research has been sponsored by Chile's Museum of Memory and Human Rights (*Museo de la Memoria y los Derechos Humanos*), 2015 thesis competition. I thank, in particular, to Hugo Rojas and Miriam Henríquez for their suggestions, and also to the external referees for their recommendations. Article received on April 4, 2018 and accepted for publication on July 10, 2018. Translated by Sebastián Lewis.

Note of the translator: Translation from Spanish to English has sought to be faithful to the literal content of the original document. In some occasions, however, there are some slight departures where attending to the spirit would make the translation more fluent and more consistent with English usage. This is the case, for example, with the expression 'detained-disappeared', which, context allowing, has been simplified in certain occasions to 'victims'. The same happens with the expression 'relatives of victims of human rights violations', which, context allowing, is reduced sometimes as 'relatives'. Technical expressions like *falta de servicio*, or the name of institutions and legal instruments such as *Servicio Médico Legal* or *Decreto Ley*, have been translated to English keeping the original term in parenthesis in the central text.

1 LIRA (2015), p. 10.

For the relatives of the victims, this failure to identify skeletal remains entails a series of consequences directly associated with the well-being of those who compose the family. These repercussions derive from unfulfilled expectations and from the family burden caused by the constant search of the cherished. As it happened in Chile, this failure is aggravated when it is the State who negligently performs the process of identification, because the relatives experience a further violation of their right to personal integrity.

This article aims to analyse the violation of the right to personal integrity caused by the impossibility of carrying out the funeral rite owed to the victims. In the light of the importance that this funeral has for human beings, inability to perform it violates the right to personal integrity of the relatives because it prevents them from living up the grieving process. This upshot is however rectified by rightly identifying the skeletal remains of the victims and handing them over to the relatives. The ICHR has ruled that the activities of locating, delivering and exhuming mortal remains constitute one form of compensation owed to the relatives,² because a violation exists to their right to personal integrity—in particular, they are relatives of victims whose bodies have not been found. The absence of mortal remains prevents family members from celebrating a process which is typical of human cultures: the funeral rite.³ As we shall see, this is a sequential problem: 1) Failure to identify the mortal remains constitutes an obstacle for relatives to receive the bodies of their cherished; 2) Inability to access these remains prevents relatives from celebrating the funeral rite; 3) Insofar as the funeral rite is a vital ceremony, the impossibility of performing it violates the right to personal integrity of the relatives. Because of the relation existing between, on the one hand, a failure to identify the skeletal remains of the victims, and on the other, the right to personal integrity of the relatives, adopting measures aimed at correctly identifying victims through DNA tests would contribute to restoring the right to personal integrity of the family members.

2. THE RIGHT TO PERSONAL INTEGRITY OF THE RELATIVES

2.1 The concept of the right to personal integrity

Following María Isabel Afanador, the right to personal integrity can be understood as “the set of mental, physical and moral conditions that allow human beings their existence, without suffering any type of impairment in any of these three dimensions”.⁴ Similarly, Claudio Nash maintains that “this right relates not only to

2 *Humberto Sánchez vs. Honduras* (2003); *Goiburú y otros vs. Paraguay* (2006).

3 According to anthropologist Donald E. Brown, author of *Human Universals*, the rites of passage are cultural universals and among these we find funeral or mortuary rites. The concept of ‘cultural universals’ refers to an observable phenomenon present in all persons, cultures and human societies throughout history. Accordingly, to the extent that the mortuary rites are cultural universals, they are present in all cultures and societies, being essential for human beings.

4 AFANADOR (2002), p. 147.

physical integrity but includes other aspects as well, such as the mental and moral integrity”.⁵ With regards to the physical dimension, Afanador thinks that “physical integrity refers to the corporeal fullness of the agent. It follows that every person has the right to be protected against attacks affecting or injuring his or her body—i.e., either which destroy it or cause physical pain or damage to his or her health”.⁶ As to the mental side, the same author affirms that the “mental and moral integrity is fleshed out through the fullness of moral, intellectual and emotional faculties”.⁷ The right to mental integrity is the right of all people not to be subjected to treatments affecting their emotional and moral sphere. In the topic we are analysing, the main violation is produced precisely in the psycho-emotional sphere, because the “disappearance of the victims creates suffering and anguish, together with a feeling of unsafety, frustration, and impotence—in the light of the omission of public authorities to investigate the facts”.⁸ The ICHR has defended a comprehensive view of personal integrity, as it is possible to note from its decision *Familia Barrios vs. Venezuela*:

The violation of the right to physical and mental integrity is a type of infringement which has various connotations of degree and which ranges from torture to other types of humiliations or cruel, inhuman or degrading treatments. The physical and mental consequences of this type of violation vary in intensity according to the endogenous and exogenous factors which must be proved in each specific situation. That is, the personal characteristics of a supposed victim of torture or cruel, inhuman or degrading treatments must be taken into account when determining whether the personal integrity was violated—the-fore increasing the suffering and the sense of humiliation when subjected to certain treatments. Similarly, the Court has held that any use of force which is not strictly necessary in the light of the behaviour of the detained person constitutes an attack on human dignity—which violates Article 5 of the American Convention.⁹

2.2. The recognition of the right to personal integrity

The right to personal integrity is protected by Article 5 of the American Convention on Human Rights (also known as the Pact of San José of Costa Rica; “the Convention”). Paragraph two of Article 5 of the Convention states that ‘Every person has the right to have his physical, mental, and moral integrity respected’.¹⁰ In 1969, the Government of Chile subscribed to the Convention, but it was only in 1990

5 NASH (2014), p. 135.

6 AFANADOR (2002), p. 147.

7 AFANADOR (2002), p. 148.

8 *Blake vs. Guatemala* (1998), paragraph 114.

9 *Familia Barrios vs. Venezuela* (2011), paragraph 52.

10 American Convention on Human Rights (1969).

when the corresponding instrument of ratification was deposited before the General Secretariat of the Organization of American States (“OAS”). The Decree No. 873 of the Ministry of Foreign Affairs approved the Convention in the following terms:

a) The Government of Chile declares that it recognises the competence of the Inter-American Commission on Human Rights, for an indefinite period and under conditions of reciprocity, to receive and examine communications in which one State Party alleges that another State Party has committed violations of human rights protected by the American Convention on Human Rights, in the terms set forth in Article 45 of the aforementioned Convention.

b) The Government of Chile declares that it recognises as legally binding the jurisdiction of the Inter-American Court of Human Rights regarding cases concerning the interpretation and application of this Convention under the provisions of Article 62 of the Convention.¹¹

Consequently, the State of Chile has expressly recognised the competence of the Inter-American Commission on Human Rights to investigate possible violations of human rights. Additionally, the same State has accepted as legally binding the jurisdiction of the ICHR to hear allegations against human rights violations—which includes the power to apply and interpret the Convention when necessary. Furthermore, it should be noted that paragraph two of Article 5 of the Chilean Constitution states the following: “The exercise of sovereignty recognizes as a limitation the respect for the essential rights originating from human nature. It is the duty of the State to respect and promote such rights, protected by this Constitution as well as by those international treaties ratified by Chile which are in force”. As we can see, our Constitution expressly recognises as fundamental rights limiting the exercise of sovereignty those rights protected by international treaties ratified by Chile. Such is the case of the Convention. Therefore, the right to personal integrity protected by the Convention is part of the catalogue of rights in force in Chile’s legal system as well.¹²

On the other hand, Chapter III of our Constitution assures every person the right to mental and physical integrity. According to Article 19 of the Chilean Constitution, every person is guaranteed the following: “1°. The right to life and to the physical and mental integrity of the individual”. Some scholars have maintained that such a right includes the ‘sphere of immunity and abstention, which entails a prohibition on the State and private parties to exercise unlawful interventions on the body and the psyche of the individual’.¹³ Concerning the right to mental integrity, this right is understood in terms of the power which every person has to avoid emotional harm, distress or moral injury caused by third parties.

11 Decree No. 873 (1991).

12 Regarding the relation between domestic and international law, I follow Professor Humberto Nogueira’s idea of the constitutional bloc. NOGUEIRA (2007).

13 GARCÍA and CONTRERAS (2014), p. 293.

When linked with other fundamental rights, our courts have widely recognised the right to mental integrity. The Constitutional Court has upheld this view when deciding the constitutionality of a paternity claim in which the right to honour of the family was connected with the right to mental integrity.¹⁴ In family law, in the context of cases of domestic violence, courts have ruled that the psychological violence exercised by one of the spouses against the other violates the mental integrity of the latter.¹⁵ Similarly, courts in Chile have said that harassment is also a form of violation of the right to mental integrity.¹⁶ In the area of education, the takeover of an educational establishment entails an infringement on the right to personal integrity, because it prevents students from attending classes.¹⁷ Finally, in labour law, courts have likewise upheld this fundamental right ruling that unfair dismissals, mobbing, and abuse at the workplace constitute violations of the mental integrity of the employee.¹⁸

In sum, the right to personal integrity is protected by Article 5 of the Convention and by Articles 5 and 19 of the Chilean Constitution. Courts have also protected this right. Although the concept of “personal integrity” (i.e., that belonging to international human rights law) is more comprehensive than that of ‘mental and physical integrity’ (i.e., the one used by the Chilean Constitution), by virtue of paragraph two of Article 5 of the Chilean Constitution, the former is incorporated to the Chilean legal system as well.

2.3 Personal integrity and relatives of victims of human rights violations

In several instances, the ICHR has judged that the relatives of victims of human rights violations can be victims as well.¹⁹ This is a significant finding which follows from an inclusive understanding of personal integrity—i.e., the one defended by the ICHR. Furthermore, the ICHR has expanded the scope of this right to the effect of considering as human rights violations infringements on the person of the relatives of the victims. While this is the *ratio* supporting *Aloeboetoe vs. Surinam*,²⁰ it is also the view which ought to inform the treatment which the State should give to the relatives of victims of serious human rights violations. For example, in instances of forced disappearance of persons, relatives are considered direct victims of a violation of their right to personal integrity.²¹ As we can see, it is essential for the ICHR the way in which the relatives of disappeared persons are treated.

14 *Muñoz c/ Muñoz* (2009).

15 *Villegas Paillán c/ Georgia Diaz* (2010).

16 *Caicheo Barrientos c/ Pérez Santana* (2012).

17 *Llaquel Figueroa y otros c/ Ilustre Municipalidad de Santiago y otros* (2014).

18 See, for example, *Žapata con Taleb* (2015); *Gómez con Universidad de la República* (2009); *Rivera con Vida Tres* (2010).

19 *Blake vs. Guatemala*, (1998); *Villagrán Morales y otros vs. Guatemala* (1999); *Castillo Páez vs. Perú*, (1997).

20 *Aloeboetoe y otros vs. Surinam* (1993).

21 *Kawas Fernández vs. Honduras* (2009); NASH (2014), p. 135.

The decision *Kawas Fernández vs. Honduras* is a valuable contribution to the concept of personal integrity. In this decision, the ICHR ruled that depending on the treatment given by the State to the relatives of victims of human rights violations, it may be the case that these relatives may be considered direct victims of a violation of their right to personal integrity. That is to say, to the extent that such a treatment violates the personal integrity of the family members, these can be direct victims of a human right violation as well. This would happen, for instance, in situations where the relatives report the forced disappearance of a person—the latter being the direct victim because of a violation on his or her right to freedom of movement—and yet the State omits or ignores such an allegation. This conclusion is reached because the absence of the missing ones brings agony and fear to the relatives, which entails a violation of the mental and moral side of their personal integrity.

In *Kawas Fernández vs. Honduras*, the ICHR distinguished two kinds of persons to the effect of determining whether they can be considered victims of a violation of their right to personal integrity. On the one hand, direct relatives of the victims, and on the other, those who have a significant bond with the victim. Concerning the former, the ICHR held the following:

In several instances, the Interamerican Court has confirmed the violation of the right to personal integrity of the relatives of victims of human rights violations—or of other persons who have tight bonds with these victims. Thus, in *Valle Jaramillo y otros vs. Colombia*, this Court ruled that subject to the specific features of the case it is possible to uphold a violation to the right of mental and moral integrity of the direct relatives of the victims of specific human rights violations. This conclusion is reached by applying an *iuris tantum* presumption regarding mothers, fathers, daughters, sons, spouses and permanent partners (hereafter “direct relatives”). In these cases, that is, of direct relatives, the State has the burden of disproving such a presumption.²²

Regarding the second category, the ICHR ruled as follows:

In all other hypotheses, the Court must analyse whether from the evidence of the record it follows a violation of the personal integrity of the alleged victim—regardless of whether he or she is a relative of one of the victims of the case. Concerning those persons who are not direct relatives of the victims (i.e., people regarding whom no violation of the right to personal integrity will be presumed), the Court will assess whether e.g., a tight bond exists with the victims, such that it allows the Court to declare that their personal integrity has been violated. The Court may also assess whether the alleged victims have taken part in seeking justice to this particular case, or whether they have suffered because of the facts of the case, or because of the acts or omissions of State agents when dealing with the same facts.²³

22 *Kawas Fernández vs. Honduras* (2009).

23 *Kawas Fernández vs. Honduras* (2009).

Another important case is *Blake vs. Guatemala*, where the ICHR judged the following:

The issue submitted by the Commission can only be examined in connection with the relatives of Mr. Nicholas Blake, as the violation of the mental and moral integrity of those relatives is a direct consequence of the forced disappearance of Mr. Blake. The circumstances surrounding such disappearance generate suffering and anguish, together with a feeling of unsafety, frustration, and impotence—in the light of the omission of public authorities to investigate the facts.²⁴

Similarly, the European Court of Human Rights has ruled that when a violation exists on the fundamental right of a person—such as the right to life or physical integrity—the relatives of the victims may be considered victims as well. That is, by extending the scope of the concept, such court held that among the factors to be considered to this effect are the followings: 1) The proximity of the family bond—i.e., whether they are sons, fathers, brothers of the victims and the like; 2) The specific features of the relationship with the victim; 3) The degree to which the relative witnessed the events related to the disappearance; 4) The way in which the relative tried to gather information about the disappearance of the victim; and 5) The answer provided by the State to the proceedings initiated.²⁵

From the jurisprudence of the ICHR, in connection with the body of decisions of the European Court of Human Rights, it follows that violations of the fundamental rights of persons also affect the personal integrity of their relatives. This is particularly relevant in cases of forced disappearance of persons, in which the violation of the mental and moral integrity caused by the worry and fear for the missing ones is evident.

3. PERSONAL INTEGRITY, ABSENCE OF THE BODY AND FUNERAL RITE

3.1. Grief, funeral rite and personal integrity

The grieving process, and its outward expression through the mourning, are fundamental phenomena present in all societies. It is normal for people to feel nostalgia for their cherished, who, either because death or disappearance, no longer accompany them. Also, the grief can be a collective matter, as when a social group or a given community loses one of its members. If we start from the presupposition that the grief is a natural and necessary process in the life of human beings, then the impossibility of living up such an experience entails a violation of the right to personal integrity of the agent. The death of an individual can be analysed from two angles:

24 *Blake vs. Guatemala* (1998), paragraph 114.

25 *Timurtas v. Turkey*, (2000); *Çakıcı v. Turkey* (1999).

referring, on the one hand, to the person who has died, and from the perspective, on the other, of the relatives—i.e., those who survive death but who suffer the absence of the perished. Death is the factor which triggers the transformation of relatives—sons, parents, spouse—into bereaved, that is, people who experience the grief.

Several authors agree that the grief is the “psychological process necessarily elaborated and lived up by the bereaved after experiencing the death of a close person, aimed at transforming the suffering into a sweet longing”.²⁶ In *Los Ritos de Paso* (1909), Van Gennep defines the grief as the “marginal state for those who survived death, in which through rites of separation and rites of reintegration they enter to and exit from the society”.²⁷ Consequently, the death of a loved person makes relatives enter into a grieving process, which is publicly manifested through the mourning, and from which they exit through rites of reintegration to society. Together with the grief and the mourning, we also find funeral rites—i.e., phenomena related to the death of a person. These rites occur since ancient times in every culture. According to Louis-Vincent Thomas, these rituals may be performed in relation with the *air* element—e.g., towers of silence, leaving the bodies on trees or lying on the ground. They may be offered in connection with the *earth* element—burying the body—or with the *water* element—like those sailors who in past times threw the bodies to the sea, or as it is the custom in India, i.e., of immersing the body in the Ganges river. Finally, these rites may occur regarding the *fire* element—for example, by cremating the body.²⁸ In western societies, the most common rites are burial and cremation. From its origins as a discipline in the early twentieth century, anthropology has taught that all pre-modern cultures have practiced the funeral rite through various ways. Accordingly, it is possible to maintain that the funeral rite is a vital ceremony for human beings.²⁹ Philippe Ariés has highlighted the importance that graves have in western culture as follows: “[The] graves became the symbol of their presence beyond death. [...] this presence was a response to the affection of the survivors and their emerging repugnance to accept the disappearance of the loved one. People hold on to the remains”.³⁰

It is possible to affirm that the grief, the mourning, and the funeral rite are interdependent phenomena. The celebration of the funeral rite initiates the grieving, whose outward expression is the mourning. The possibility of carrying out the funeral rite, either by burial, cremation, immersion in the water and the like, allows the individual to begin the grieving process. This person then appeals to the symbolism of the mourning to inform the rest of the community that he or she is grieving. Parallel to that, the same individual calms in part the suffering and ma-

26 SUÁREZ (2011), p. 53.

27 VAN GENNEP (2008), p. 205.

28 THOMAS (1985).

29 See *supra* note 3, remarks on Donald E Brown. In the same vein, Philippe Ariés and Louis-Vincent Thomas.

30 ARIÉS (2000), p. 74.

nages to achieve social reintegration. This interdependence shows us how vital it is for relatives to celebrate the funeral rite. To the extent that this rite is a constitutive part of the grieving and the mourning, the impossibility of celebrating it prevents relatives from accepting the loss of the cherished, which bears on their psychological and emotional well-being.

There exists a relation between the possibility of grieving someone under normal conditions and the right to personal integrity. As noted above, the grieving process allows relatives healing the wounds of the loss by transforming the suffering into a sweet longing. Whenever someone obstructs the funeral rite and the grieving process owed to a family member, the right to personal integrity of the relatives is affected. In the case of the relatives of people detained-disappeared—i.e., relatives who have not yet received the remains of their cherished—it is possible to state the following: 1) Because these relatives have not yet received such remains, they cannot celebrate any mortuary rite whatsoever; 2) This prevents relatives from living up a normal grieving process; 3) Such situation brings psychological harm, which violates the personal integrity of the relatives.

3.2 International cases

The purpose of the previous subsection was to familiarise the reader with the funeral rite, describing its concept, the ways to celebrate it, and the fundamental role it plays for different cultures. Having argued for the importance of this rite, we shall now analyse the treatment which mortuary rites and the personal integrity of the relatives have received by the ICHR. The only prevention is that, in the cases to follow, the ICHR did not explicitly refer to the absence of a funeral rite. However, from the treatment which this court gave to the bond existing between an honourable burial and the personal integrity of the relatives, we can make valuable inferences. The ICHR has ruled that the impossibility of grieving someone undermines the personal integrity of the agent because it aggravates the suffering produced by the disappearance of the cherished.

In *Niños de la Calle (Villagrán Morales y otros vs. Guatemala)*, the ICHR heard the case of five young men who lived in the streets of Guatemala. These were Henry Giovanni Contreras, Federico Clemente Figueroa Túnchez, Julio Roberto Caal Sandoval, Jovito Josué Juárez Cifuentes and Anstrum Aman Villagrán Morales. On 15 June 1990, these young men were kidnapped by armed men and placed into a vehicle. Later, their bodies were found in the Woods of San Nicolás (*Bosques de San Nicolás*) with plain evidence of having suffered mistreatment and with bullet marks in their skulls. Their relatives requested help from the authorities, but they received threats instead. Once the investigation was concluded, it was determined that the teens died because of the actions of agents of the State security forces. The ICHR, in a decision of 19 November 1999, determined that the immediate relatives of the young men were victims as well. That is, the disappearance and further finding of the bodies violated the right to personal integrity of the relatives. In reasoning No. 173, the ICHR maintained the following:

[...] the authorities did not make adequate efforts to locate the immediate relatives of the victims, notify them of the death of the victims, give them the corpses and provide them with information about the progress of the investigations. This set of omissions postponed and, in some cases, denied the relatives the opportunity to give the young people a burial according to their traditions, values or beliefs, which intensified the suffering. To this it is added the feeling of insecurity and impotence caused to these relatives by the abstention of the public authorities in thoroughly investigating the crimes and punishing the responsible.³¹

Then, in reasoning No. 174, the ICHR pointed out that the inappropriate treatment given to the mortal remains of the victims violated the rights of the relatives:

The Court must single out among the actions of the state agents who intervened in the facts of the case and who produced an impact on the relatives the treatment given to the remains of the young people whose bodies appeared in the Woods of San Nicolás. These people were not only victims of extreme violence—i.e., the one corresponding to their physical elimination—but also their bodies were abandoned in an uninhabited area, where they were exposed to the harshness of the weather and to the action of animals. Such bodies could have remained under these conditions for several years had they not been found fortuitously. In the present case, it is evident that the treatment given to the remains of the victims, which were sacred to their relatives—in particular to their mothers—constituted a cruel and inhuman treatment.³²

Another example is *Blake versus Guatemala*. In 1985, the American journalist Nicholas Blake was detained by the Civil Patrol of *El Llano*, under the direct orders of the personnel of the *Las Majadas* garrison of the Guatemalan Army. As in the previous case, the ICHR determined that the relatives of the victims of human rights violations may be victims as well. “[T]he violation of the mental and moral integrity of the relatives is a direct consequence of the forced disappearance [of the victims]. The circumstances surrounding such disappearance generate suffering and anguish, together with a feeling of unsafety, frustration, and impotence—in the light of the omission of public authorities to investigate the facts”.³³

Whenever relatives cannot receive the body of the victim they cannot perform the funeral rite. The remains of Nicholas Blake were incinerated by State agents to make it impossible to locate and recognise the body. Regarding this point, the ICHR determined that

31 *Villagrán Morales y otros vs. Guatemala* (1999).

32 *Villagrán Morales y otros vs. Guatemala* (1999).

33 *Blake vs. Guatemala* (1998), paragraph 115.

[...] the incineration of the mortal remains of Mr. Nicholas Blake, to destroy any trace that might reveal his whereabouts, undermines the cultural values existing in Guatemalan society—values transmitted from generation to generation, and which are related to the respect due to the perished. This action intensified the suffering of the relatives of Mr. Nicholas Blake.³⁴

Finally, in *Bámaca Velásquez vs. Guatemala*, the ICHR ruled that whenever the disappearance of a beloved person brings anguish, or it is not possible to give the victim an honourable burial, there exists a violation of the right to personal integrity of the relatives:

[...] the State violated the right to personal integrity of the family of Bámaca Velásquez as a result of “the anguish and suffering they went through after the forced disappearance of Efraín Bámaca Velásquez”. The uncertainty generated by the absence of effectiveness of the resources of the domestic jurisdiction constituted a cruel treatment. Also, the importance of giving an honorable burial to the remains of Bámaca Velásquez has profound repercussions on the Mayan culture—to which he belonged. This is so “because of the central role which the active bond uniting the living and the dead plays for them. The absence of a sacred place to visit and honour this bond constitutes a profound concern revealed by the testimonies of many Mayan communities”.³⁵

In these cases, the ICHR believes that the impossibility of celebrating the rite intensifies the suffering of the relatives. This means that the State breaches its international obligations when it does not contribute to the search and further delivery of the bodies—because the State violates the right to personal integrity, protected by Article 5 of the Convention.

3.3 A distinction worth drawing

The analysis of the previous decisions allows learning the treatment given by the ICHR to the personal integrity of the relatives of victims of human rights violations. In the light of the foregoing remarks, the purpose of this subsection is to qualify such treatment and propose an alternative one.

It is important to note that though the ICHR performs a critical role when linking, on the one hand, the impossibility of giving an honourable burial to the victim with, on the other, a violation of the personal integrity of the relatives, this contribution is however not enough. This is so because when dealing with the harm caused by the impossibility of carrying out the mortuary rites, or with the inappropriate treatment given to mortal remains, the ICHR proceeds only in a secondary

34 *Blake vs. Guatemala* (1998), paragraph 115.

35 *Bámaca Velásquez vs. Guatemala* (2000), paragraph 145.

way. That is, ancillary to the disappearance of the victim, mainly as a factor which increases the harm or anguish of the relatives, without observing however that these are different situations.

One first situation is the violation of the personal integrity of the relatives of people detained-disappeared which is caused by the agony deriving from the forced disappearance of the cherished. A different situation is the violation of the personal integrity of the relatives generated by the impossibility of carrying out the mortuary rites—the purpose of which is to allow the grieving. Both situations entail different harms, which are distinguishable concerning temporality, sources, and means of reparation.

Temporality. The harm produced by the agony brought by the disappearance of a beloved person is triggered as soon as there is knowledge of his or her absence, and it terminates once the relatives receive news about the whereabouts of the missing one. This means that the harm has been generated in the *past*, i.e., upon the occurrence of the act causing the disappearance. By contrast, the impossibility of celebrating the funeral rites which is caused by the absence of the mortal remains generates a current and permanent harm, i.e., one executed in the *present*, which lasts until the body is received or until symbolic rites allowing the grieving are offered.³⁶

Sources. The first kind of harm has its origin in the act itself which generates the disappearance,³⁷ while the cause of the second lies in a failure to deliver the skeletal remains—thereby frustrating the funeral rite.

Mode of terminating the harm and means of reparation.³⁸ The harm produced by the impossibility of celebrating the funeral rite ceases to exist once the mortal remains are given to the relatives, or upon the performance of symbolic rites enabling relatives to conclude by equivalence the grieving. Regarding reparation, this can be done through several means, either aimed at compensating or revealing the historical truth of what happened. On the other hand, the harm produced by the disappearance of the cherished, to the extent that its origin lies in the past, has

36 These symbolic rites may be diverse. There can be burials of specific items owned by the deceased, or acknowledgment and apologies by the authorities, memorials, and the like. Symbolic rites must always be accompanied by the possibility of knowing the real circumstances surrounding the death of the detained-disappeared, because that allows restoring the right to truth.

37 In our context, this was generally due to acts of public violence, such as the case of forced disappearances—usual practice of Latin-American dictatorships.

38 I think that the termination of the harm and its reparation are different situations. The harm is terminated once the act causing it is over. Reparation, on the other hand, is a measure aimed at compensating the harm caused. It is possible to put an end to a harm without repairing it, but it does not seem possible to repair a harm that still exists. In the topic we are analysing, the harm can only be terminated by delivering the corps or by celebrating a symbolic funeral rite. The reparation would proceed once the harm is over, and it may, or may not, suffice itself with the act of delivering the mortal remains. That will depend on each case as there may be persons who demand reparatory measures while others are satisfied with the mere delivery of the bodies—or with carrying out symbolic acts aimed at finding the truth.

ceased to exist, though its reparation is still due. Such reparation is mainly monetary because together with the anguish and the fear of the disappearance there are typically financial losses.³⁹

One important step forward would be that the ICHR adopts the distinction just proposed. As this work argues, a violation to the personal integrity of the relatives of people detained-disappeared arises from the mental and emotional distress triggered by a defective or unfinished grieving process, the latter being a consequence of not celebrating a funeral rite because of the absence of the mortal remains of the victim. Since the harm produced by the disappearance of a family member ceases to exist only after the correct identification and delivery of the mortal remains to the relatives, it follows that this is a specific way of repairing such harm, different from other means of compensation. Alternatively, in the face of an absolute impossibility of giving such remains to the relatives, another option is to perform symbolic rites and assure access to the information relative to the death of the disappeared. This would shed light on the historical truth.

4. ANALYSIS OF THE CHILEAN CASE

The military *coup* of 11 September 1973 put an end to the Government of President Salvador Allende, initiating a dictatorship which lasted until 11 March 1990. Once democracy was recovered, President Patricio Aylwin created the National Commission of Truth and Reconciliation (Rettig),⁴⁰ whose primary purpose was to contribute to clarifying the truth regarding human rights violations occurred during the military dictatorship.⁴¹ The report of this Commission stated that 3,550 allegations of persons executed or disappeared were received. Of these, 2,296 were considered qualified cases. Aimed at filling gaps, in 2003 the National Commission on Political Prison and Torture was created (Valech),⁴² and its report was published on 28 November 2004. In 2009 it was created the Presidential Advisory Commission for the Qualification of Detained-Disappeared, Executed for Political Reasons, and Victims of Political Prison and Torture, and its report was published on 18 August 2011. The State of Chile has officially recognised 40,018 victims of human rights violations, of which 3,065 were cases of people executed or instances of detained-disappeared persons. According to the 2014 report of the Human Rights Program of the Ministry of Interior, the total amount of cases pending in Chile for crimes against humanity during the civil-military dictatorship is of 1,045.⁴³

39 One example would be those cases where the person who disappeared represented the primary economic force of the household, leaving the rest of the family in clear economic disadvantages. This situation is usually compensated in terms of the effective economic loss suffered by the family.

40 Supreme Decree No. 355 (1990).

41 Further information available at http://www.ddhh.gov.cl/ddhh_rettig.html. For a review of the impact of the Commission's Report on Chilean society, see FERRARA (2015).

42 Decree No. 1,040 (2003).

43 Further information available at <http://www.ddhh.gov.cl/filesapp/balanceprensa.pdf>

The State of Chile has promoted various policies for the reparation of the victims, including reparation for the relatives of people detained-disappeared.⁴⁴ Among these we find: a) Reparatory pension, which is an amount of money given on a monthly basis; b) Scholarship for the education of the children (monthly allowance of 1,24 *UTM* throughout the ten academic months of the year); c) Free health care for the family group (through the *PRAIS* Program of the Ministry of Health); d) Exemption from compulsory military service for the children of the victims;⁴⁵ and e) Complementary benefits, such as incorporation in Compensation Funds (*Cajas de Compensación*), benefits of death allowance, debt forgiveness from the University Credit Solidarity Fund (*Fondo Solidario de Crédito Universitario*) and reparation bonus for the children (equivalent to ten million Chilean Pesos).⁴⁶ Despite this, there is no doubt that the central mechanism for repairing the relatives is the identification and delivery of the mortal remains of the victims.

As noted above, it is possible to distinguish the identification and the delivery of the body of the victim from other measures of reparation. While the latter are partial ways of compensating the harm caused to the relatives, the delivery of the mortal remains puts an end to the violation of the personal integrity—which continues to exist until the relatives may adequately grieve the cherished. The identification and delivery of the mortal remains is a doubly reparatory measure. First, it terminates a harm which regularly affected the relatives because it allows them to carry out the funeral rite and live up the grieving. Secondly, it contributes to the recognition of the right to honour, the right to access justice, and the right to know the truth—regarding relatives and the detained-disappeared.

This conclusion is reached despite those situations where the identification of the mortal remains failed. In 2002 the Glasgow Report was published, informing that at least three, out of twenty, identifications of detained-disappeared performed by the Forensic Medical Service were incorrect. In March 2005, judge Sergio Muñoz ordered the exhumation of ninety-six corps buried in Courtyard No. 29 of the General Cemetery, so that experts could examine them using mitochondrial DNA test. The result was dramatic: of the ninety-six victims buried in Courtyard No. 29, forty-eight were wrongly identified; there is no certainty as to the identity of thirty-seven bodies; there are four cases in which there were no results; three corps were not examined because the remains were outside Chile; in three cases there were no DNA samples; and there is one case in which the DNA is not accredited.⁴⁷

This happened because the Forensic Medical Service practiced the firsts identifications using morphological recognition, i.e., by comparing known physical characteristics of the disappeared with corporal marks existing in the skeletons, such as height, complexion, and particular features of the person to be identified. With the

44 Act No. 19,123 (1992) and Act No. 19,980 (2004).

45 Article 40, Act (*Decreto Ley*) No. 2,306 (1978).

46 Further information available at http://www.ddhh.gov.cl/social_beneficios.html.

47 OSORIO (2006).

advancement of technology, a new identification technique was possible: namely, the analysis of mitochondrial DNA. In these cases, samples obtained from the skeletal remains are compared with samples provided by the relatives of the disappeared person.

The State has incurred in two crucial problems when identifying and delivering the remains of detained-disappeared persons. In the first place, the percentage of identification and delivery of the victims is very low—more than ninety percent of the cases are still pending. The identity of a considerable number of skeletons, or the whereabouts of missing persons, is still unknown. Secondly, forty-eight victims were wrongly identified. In these cases, the relatives of the victims celebrated the funeral rite, and yet later they were informed that the identification process was wrongly executed. It was necessary then to exhume the corps, reopening the wounds of the past. One more time the relatives were denied the opportunity to know the truth of the case. They have been able neither to bury their cherished nor to live up the grieving process. This violates their personal integrity again.

· The *Dávila García* case⁴⁸

Courts have upheld the responsibility of the State for failure to comply with a statutory duty (*falta de servicio*) in negligently practicing the identification of Mr. Luis Dávila García, a detained-disappeared person. Petitioners—mother and siblings—pointed out that Luis was detained on 15 October 1973, ignoring his whereabouts until 28 October 1998, time in which the relatives received his body from the Forensic Medical Service. This institution determined that one of the bodies exhumed from Courtyard No. 29 of the General Cemetery corresponded to Luis Dávila García. The date of his death was fixed on 26 October 1973. However, on 21 April 2006, the relatives were informed that the mortal remains received from the authority did not correspond to those of Luis Dávila García—who again became a detained-disappeared. This fact produced a considerable moral and psychological harm to the relatives. By decision of 29 August 2012, the Supreme Court held that the State of Chile was responsible for failure to comply with a statutory duty. Further, the Court condemned the State to compensate the mother with an amount of eighty million Chilean Pesos, while each of the siblings received a sum of twenty million Chilean Pesos. Reasoning No. 4 of the decision acknowledges the harm produced to the relatives because of the negligent identification of the body of Luis Dávila García:

[...] the failure to comply with a statutory duty incurred by the Forensic Medical Service meant an obvious detriment or moral harm to the relatives of the deceased Luis Herminio Dávila García. For a long time, these relatives believed that the remains of the victim were, in fact, those received on 28 October 1994—to which it is added the harm produced by knowing the causes of the death, as stated in the

48 This case was selected because of its mediatic relevance. Similarly, this case evidences the negligence in the identification of the remains of detained-disappeared, which demonstrates a real lack of political will to effectively clarify the historical truth.

death certificated of the deceased. Both harm and suffering were re-experienced when the relatives knew that the identification was wrongly performed. For a mother, no doubt this means losing twice the same relative, a family member whose whereabouts is still ignored.⁴⁹

The ruling upheld the responsibility of the State and made special reference to the pain and harm which such a situation brought to the relatives of the victim. It is noteworthy that the Supreme Court did not link the harm caused to the relatives with a violation of their right to personal integrity.⁵⁰

The State has breached its international obligations by failing to adopt all measures at hand in order to rightly identify the mortal remains of found victims and give them to the relatives. According to Article 1 of the Convention, State Parties “undertake to respect the rights and freedoms recognised herein and to ensure to all persons [...] the free and full exercise of those rights and freedoms”. Consequently, where the State of Chile does not give the bodies—rightly identified—of persons detained-disappeared to the relatives, the State incurs in a violation of the personal integrity of such relatives.

5. CONCLUSIONS AND PROPOSAL

This research has sought to show the interdependence existing between funeral rite, the grieving process and the mourning. It has been argued that the impossibility of celebrating the funeral rite prevents relatives from living up the grieving and mourning. Relatives are also victims because the disappearance of the family member undermines their personal integrity. The State must do all that it is under its power to identify the bodies of people detained-disappeared and hand them over to the relatives. Proceeding otherwise would prevent relatives from celebrating the mortuary rite, lingering their suffering and anguish.

Personal integrity is protected by Article 5 of the American Convention on Human Rights. If the State is not active in locating the bodies of people detained-disappeared the State would ignore its international obligations. The State is not only responsible for unlawful actions committed by its agents; the State also violates the rights of the relatives when the remains of the victims are not identified, and likewise when such identification is negligently produced.

As was said above (section III, letter c), the ICHR performs a significant contribution to the field when ruling, first, that the relatives of the victims of human rights violations may be victims as well; and second, that there exists a relation between the personal integrity of the relatives and the treatment owed to the mortal remains of the victims. However, this contribution is not enough, because it fails to

49 *Dávila García con Fisco* (2013).

50 It is precisely for this reason that this research is relevant—that is, because the recognition by the Court of the harm caused should have been in terms of the identification of the right violated. However, that did not occur, and it has not yet happened in the body of decisions of Chilean courts.

capture that there are two different issues at stake. On the one hand, the absence of the disappeared—which brings suffering and anguish to the relatives. And, on the other, the violation of the right to personal integrity of the relatives caused by the impossibility of celebrating the funeral rite—which is a consequence of the failure to identify the skeletal remains (or an identification wrongly produced). Understanding such a distinction would allow comprehending that different problems require diverse solutions. Thus, while in the former case the compensation emerges as a valid measure of reparation, in the latter, by contrast, such compensation does not suffice, because the harm will continue to exist until the adequate identification of the body is performed—allowing relatives to celebrate the funeral or symbolic rite and put an end to the grieving process.

The State should generate public policies aimed at definitely solving the problem of identifying the mortal remains that have been exhumed. The State must recognize the importance for families of burying their beloved ones. Otherwise, their personal integrity is undermined.

Together with strengthening the specialized agencies in the identification of the remains of people detained-disappeared, judicial actions that family members may file against those who have violated their personal integrity should not be ruled out. The way in which we understand this right can make a difference—as the Chilean courts do not expressly recognize this right. This possibility should be considered because, as seen with the *Dávila García* case, courts recognise the harm caused by the incorrect identification of skeletal remains, but they have not linked such harm with a violation of the fundamental right to personal integrity. Likewise, public policies must incorporate this notion, allowing more cases to be subject to protection and reparation measures.

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