

**INTER-AMERICAN HUMAN RIGHTS  
MOOT COURT COMPETITION**

**BOLT ET AL**

(Victims)

V

**THE CARDENAL REPUBLIC**

(Respondent)

**MEMORIAL FOR THE VICTIMS**

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## STATEMENT OF FACTS

### ***Factual Background***

The Cardenal Republic (hereafter; ‘the State’ or ‘Cardenal’) is a State undergoing transitional justice as they move away from the repressive regime of Armando Ferreira’s military dictatorship<sup>1</sup> towards a more domestic society under the new administration of Gabrielle Nunes. Grave human rights atrocities are documented to have taken place during the regime of Ferreira and were tolerated by the Nunes administration.<sup>2</sup> The Boneca Indigenous People are a recognized ethnic minority which has experienced significant grievous human rights violations<sup>3</sup> at the hands of the state officials and agents of the military.<sup>4</sup>

Ricardo Bolt, a member of the Bonecas, was forcefully disappeared and was allegedly tortured and is presumed dead at the hands of the state of Cardenal.<sup>5</sup> He was accused by Cardenal of being a member of the guerilla force of the Boneca Freedom Revolutionary Movement (hereafter MRLB)<sup>6</sup> and was tried *in absentia*, convicted and sentenced to life imprisonment.<sup>7</sup> Lucrecia Rossi, a female Cardenal national, was discovered (dismembered) in the public square dead. Her body showed signs torture and sexual abuse.<sup>8</sup> She was also accused by the state of

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<sup>1</sup> Hypothetical para. 2

<sup>2</sup> Hypothetical para. 11

<sup>3</sup> Hypothetical para. 2, 36

<sup>4</sup> Hypothetical para. 36

<sup>5</sup> Hypothetical para. 42

<sup>6</sup> MRLB – Movimiento Revolucionario Libertad Boneca; an armed group aimed at the overthrow of the government of Cardenal and the liberation of the Boneca Indigenous persons

<sup>7</sup> Hypothetical para. 38

<sup>8</sup> Hypothetical para. 37

Cardenal of involvement with the military forces of the *MRLB*. Anibal Lopez, a child, was kidnapped by members of the *MRLB* and died as a result of an altercation between the armed forces of Cardenal and the *MRLB*.<sup>9</sup> Cardenal denies responsibility for the disappearance, torture, deaths and any other human rights violations of the victims.<sup>10</sup> However, eyewitness accounts of Paulo Mukundi<sup>11</sup> and the findings of the Historical Truth Commission established by the State blames Cardenal for Ricardo Bolt's forced disappearance, torture and subsequent death. General Joao Otavio Pires, a former member of the Cardenal military confessed to personal and institutional responsibility for Lucrecia Rossi's torture and murder, thus implicating Cardenal.<sup>12</sup> Lupita Lopez filed a petition alleging the impunity in the case of the death of her son and demanded adequate reparations be served. This request mirrored that of the surviving relatives of Ricardo Bolt and Lucrecia Rossi.

The Right to Life of the three victims were breached as was the Rights to a Fair trial, Judicial Protection, Juridical Personality, Humane Treatment, Personal Liberty, and Equal Protection under the repressive regime in Cardenal. The period of transitional justice revealed mass human rights atrocities.<sup>13</sup> Interestingly, the facts indicate that Cardenal had a record of repeatedly persecuting any person suspected to be of a different persuasion than the majority.<sup>14</sup> Thus, there is actually no evidence provided in the facts to indicate that the accusations levelled against the victims were substantiated by truth or facts.

During the military dictatorship of Armanda Ferreira, many thousands of innocent indigenous people died. The methods employed by Cardenal for the investigation of the persons

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<sup>9</sup> Hypothetical para. 33, 54

<sup>10</sup> Hypothetical para. 37, 41, 56, and 58

<sup>11</sup> Hypothetical para.37

<sup>12</sup> Hypothetical para. 42.

<sup>13</sup> Hypothetical para.3, 5

<sup>14</sup> Hypothetical para. 9

guilty of human rights breaches included a military tribunal and truth commission. The truth commission found evidence in favour of the victims' claims of abuse and remedy claims but the military tribunal and other local courts failed to conduct incisive investigation and thorough prosecution of the accused persons who committed the human Rights violations. The atmosphere of impunity and disregard for the rights of citizens in Cardenal was evidenced by the hasty prosecution and conviction of the victims such as Ricardo Bolt and other Bonecas, and the slow, inefficient and unfruitful prosecution of the actual perpetrators of grave human Rights abrogations from the military. The relatives of the victims Ricardo Bolt, Lucrecia Rossi, and Anibal Lopez have brought claims against the state of Cardenal for the impunity with which Cardenal handled the investigation and seek remedies including the prosecution of the perpetrators of Human rights violations.

## LEGAL ANALYSIS

### 1 – ADMISSIBILITY

#### ***1.1 - STATEMENT OF JURISDICTION***

As a founding Member of the Organization of American States ('OAS') the Cardenal Republic ratified the OAS Charter on April 30 1948 and the American Convention of Human Rights (hereafter 'ACHR' or 'American Convention' or 'Convention') on August 10, 1990.<sup>15</sup> The State of Cardenal accepted the contentious jurisdiction of The Court on August 21, 1990.<sup>16</sup> In accordance with Article 62(1) of the Convention, The Cardenal Republic has agreed to submit the present dispute to the Inter-American Court for final resolution.

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<sup>15</sup> Clarification Questions (CQ) 28

<sup>16</sup> CQ 28

### ***1.2- Waiver of Right to object by The Republic of Cardenal***

The state of Cardenal did not raise their preliminary objections in the appropriate admissibility phase of the proceedings and thus waived their right to do so and are effectively estopped by the general principles of International Law.<sup>17</sup>

A state may waive their entitlement to raise the preliminary objections of non-exhaustion of domestic remedies.<sup>18</sup> The Inter-American Court has established clear criteria that must be observed by states seeking to raise the preliminary objection of failure to exhaust domestic remedies. First, generally recognized principles of International Law to which the rule regarding exhaustion of domestic remedies makes reference, the respondent State may, either expressly or implicitly, waive the right to raise this objection. Second, for the objection of failure to exhaust domestic remedies to be held timely, it must be raised at the admissibility stage of the proceedings before the Commission; that is, before any consideration on the merits of the case; otherwise, the State is presumed to have implicitly waived its right to avail itself of it. The State of Cardenal never challenged the admissibility of the claims during the appropriate procedural opportunity. Cardenal tacitly waived its right to object to noncompliance with such requirements as exhaustion of domestic remedies under Article 46 (1) of the Convention<sup>19</sup>, and is now estopped from objecting in this regard.<sup>20</sup> By failure to respond to the allegations presented by the victims and the Historical Truth Commission at the appropriate procedural opportunity, the state of Cardenal tacitly waived its right to raise the preliminary objection of non-exhaustion of domestic remedies as there is a requirement that the preliminary objections must be raised in the early stages of an action. As such, the State of Cardenal should be estopped

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<sup>17</sup> *Ximines-Lopes v. Brazil* (Preliminary Objection) [2006] (I/A Court H.R)

<sup>18</sup> *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua* [2000] 66 C, para. 53, (I/A Court H.R); *Case of Loayza-Tamayo* [1996] 25 C para.40 (I/A Court H.R); *Case of Castillo-Páez*, [1996] 24 C, para. 40 (I/A Court H.R)

<sup>19</sup> American Convention on Human Rights 1978 Article 46

<sup>20</sup> *Moiwana Village v. Suriname* [2005] 124 C Para 46 (I/A Court H.R)

from invoking Art. 46 (1) of the American Convention on Human Rights (HEREAFTER ‘ACHR’)<sup>21</sup>.

The state of Cardenal failed to raise the preliminary objection in the admissibility stages of the claim before the commission. In its Admissibility Report No.26/00, The Inter-American Commission on Human Rights considered the State’s (Suriname’s) silence to be an implicit waiver of its right to argue non-exhaustion of domestic remedies; this point was reiterated in the case of *Moiwana Village v. Suriname*.<sup>22</sup> In any event, the state of Cardenal failed to indicate the 'domestic remedies' available to the petitioners and provide evidence of their effectiveness as the rule discussed in paragraph 49 of the *Moiwana* case illustrates.<sup>23</sup>

As a consequence of not challenging the issue of non-exhaustion of domestic remedies in a timely manner, the Court ought to conclude that the State of Cardenal tacitly waived its right to object in this regard and therefore dismiss the instant preliminary objection.

### ***1.3 – Exhaustion of Domestic Remedies***

The state of Cardenal has raised the preliminary objection that the petitioners failed to exhaust domestic remedies as required by the American Convention and the Inter-American Commission’s Rules of Procedure.<sup>24</sup>

Article 46 of the ACHR<sup>25</sup> states that admission by the commission of a petition or communication shall be subject to the provisions of Article 46 (1) a., which states that “the remedies under domestic law have been pursued and exhausted in accordance with generally

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<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> *Moiwana Village v. Suriname* [2005] 124 C Para 49 (I/A Court H.R

<sup>24</sup> Hypothetical Para. 56

<sup>25</sup> American Convention on Human Rights 1978 Article 46

recognized principles of international law”.<sup>26</sup> Further, Article 46 (2) a. - c. provides exceptions to the general rule<sup>27</sup> where they state; ‘the provisions of paragraph 1 a. are not applicable where the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated’;<sup>28</sup> ‘the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them’<sup>29</sup> and ‘ there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.’<sup>30</sup>

The preliminary objection of Inadmissibility due to non-exhaustion of domestic remedies raised by the state of Cardenal with regard to the submissions of the victims on the breaches to their human rights<sup>31</sup> lacks merit as International Law places no obligation on a petitioner or victim to pursue an ineffective remedy<sup>32</sup>. It was discussed by the IACHR that any remedy provided by a state must not merely exist or be available, but must also be effective; that is, capable of producing the result for which it was designed.<sup>33</sup> An effective remedy as defined by the IACHR does not mean that a domestic remedy must produce a result favourable to the petitioner, as an unfavourable result does not in and of itself demonstrate the inexistence or exhaustion of all effective domestic remedies.<sup>34</sup> An unfavourable result may simply indicate that the petitioner has not invoked the appropriate remedy in a timely manner<sup>35</sup>

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<sup>26</sup> Ibid (1) a.

<sup>27</sup> Ibid (2) a.,b.,c.

<sup>28</sup> Ibid

<sup>29</sup> Ibid

<sup>30</sup> Ibid

<sup>31</sup> Hypothetical para 56

<sup>32</sup> *Case of Velásquez-Rodríguez v. Honduras* [1989] 4 C, para 177 (I/A Court H.R

<sup>33</sup> *Case of Velásquez-Rodríguez v. Honduras* [1989] 4 C, para 65-68 (I/A Court H.R

<sup>34</sup> Ibid para. 177

<sup>35</sup> Ibid para. 66

Procedural requirements can render domestic remedies ineffective, for instance where the facts reveal that the domestic remedies provided by the State of Cardenal were unable to impel the authorities to act appropriately and were impartially applied due to the special privileges and protections provided for the military<sup>36</sup>. Against such a canopy, the principle that where it is not possible for claimants to exhaust such remedies as a matter of fact or law, the requirement is “consequently and necessarily excused” must necessarily be applied.<sup>37</sup>

The delay and denial of justice in this case, where Anika Bolt was denied the truth and the opportunity to have a prompt and convenient recourse, demonstrates that domestic remedies provided by Cardenal are neither available nor effective for the victims of the Cardenal’s repressive regime atrocities.<sup>38</sup> The exceptions of Article 46(2)<sup>39</sup> would be fully applicable in the instant case, as resorting to the local Cardenal remedies was a senseless formality<sup>40</sup> and these facts discharge the onus placed on the victims to exhaust domestic remedies since they cannot fulfil their objective.

Thus, The Republic of Cardenal has no basis on which to substantiate its assertion that the present action before the IACHR ought to be held inadmissible due to the non-exhaustion of domestic remedies given that the State did not respond to the civilian requests for information and legal recourse via the conventional local avenues of recourse.

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<sup>36</sup> Hypothetical Paragraph 10

<sup>37</sup>Case of Moiwana Village v Suriname [2005] Para. 46 D (I/A Court H.R.)

<sup>38</sup> Hypothetical Para. 47; Case of Moiwana Village v Suriname [2005] Para. 46 I (I/A Court H.R.)**Error! Bookmark not defined.**

<sup>39</sup> American Convention on Human Rights 1978 Article 46

<sup>40</sup> *Case of Velasquez Rodriguez v Honduras* [1988] 4 C Para 177 (I/A Court H.R.)

## 2 – ARGUMENTS ON THE MERITS

### ***2.1 - THE STATE VIOLATED THE RIGHT TO LIFE OF THE ALLEGED VICTIMS***

A State party to the ACHR<sup>41</sup> is liable for violations of any of the rights protected in that treaty where the conduct of its agents in their official capacity constitute violations attributable to the State and or where the State fails to effectively prevent, investigate and prosecute human rights violations.<sup>42</sup>

In accordance with the general duty of the state identified above, dispositions that impede the investigation and punishment for grave violations are inadmissible and punishments which the State assigns to the perpetrator of illicit conduct should be proportional to the rights violated as a function of the nature and gravity of the events.<sup>43</sup>

### ***2.2- VIOLATION OF ANIBAL LOPEZ'S RIGHT TO LIFE***

The duties stated above were violated as the facts highlight the disproportionate punishments in light of the vulnerable nature of the victims.<sup>44</sup> (Where Guadamuz and Mukundi were convicted of crimes relating to the kidnapping and murder of children including Anibal Lopez and were allowed to perform political work to promote the new political party the M.R.L.B had become in the case of Guadamuz and released with time spent where he received only an additional penalty of community service of 180 days)

The kidnapped children were non-combatants and therefore protected under Common Article 3 of the Geneva Conventions<sup>45</sup>, therefore, assuming International Humanitarian Law

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<sup>41</sup> American Convention on Human Rights 1978

<sup>42</sup> *Case of Velasquez Rodriguez v Honduras* [1988] 4 C Para 165-174 (I/A Court H.R); *Ibsen Cardenas and Ibsen Pena v Bolivia* [2012] para 62 (I/A Court H.R)

<sup>43</sup> *Rochela Massacre v Columbia* [2007] 163 C paras 193-197 (I/A Court H.R)

<sup>44</sup> Hypothetical 38,44 and 45

<sup>45</sup> Geneva Convention 1949 Common Article 3(1)

applies, their kidnapping and murder would be considered war crimes.<sup>46</sup> The offense would also violate International Human Rights Law, namely the right to personal liberty and right to life.<sup>47</sup>

An important consideration with respect to the gravity of the offense would be vulnerability. The Court has linked vulnerability to children, highlighting the need for special measures to protect them as a consequence.<sup>48</sup>

Therefore, as violations of right to life and personal liberty are particularly serious where they involve children, actions which in effect impede effective sanctioning of that conduct is a breach of the duty of The State to impose appropriate punishment upon perpetrators of human rights violations in furtherance of its duty under Article 1.1 and 2 to effectively promote the full and free exercise of human rights.<sup>49</sup>

### ***2.3 RICARDO BOLT'S RIGHT TO LIFE WAS VIOLATED BY HIM BEING FORCEFULLY DISAPPEARED BY STATE AGENTS***

#### *A - Primary Submission*

The Inter-American Court has identified that circumstantial or presumptive evidence of state involvement or tolerance of the forced disappearance of a particular individual with evidence of a context of a systematic and selective practice of forced disappearance tolerated or assisted by the state, the Court will find the evidence sufficient to prove for its purposes forced disappearance. Especially where the circumstantial evidence is self-consistent and not refuted by clear evidence.<sup>50</sup>

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<sup>46</sup> Ibid

<sup>47</sup> Suarez-Romero v Ecuador Judgement 1997 (I/A Court H.R)

<sup>48</sup> *The Legal Status and Human rights of the Child* [2002] 17 A Para. 3 (I/A Court H.R)

<sup>49</sup> American Convention on Human Rights 1978 Article 1.1; Article 2

<sup>50</sup> *Case of Velasquez Rodriguez v Honduras* [1988] 4 C Para 126-139 (I/A Court H.R);

The existence of a systematic and selective policy of forced disappearance supported by the state in acts or omissions is evident through a practice of some state agents to engage in forced disappearance<sup>51</sup> which the truth commission set up by the state<sup>52</sup> of Cardenal Republic linked to Ricardo Bolt<sup>53</sup>. General Pires was also convicted of forcefully disappearing guerrillas and opposition leaders.<sup>54</sup> This fact also supports the selective nature of the policy, as perceived enemies of the State regime such as members of the Boneca community or alleged sympathizers were focused upon for harassment, torture, assassination and imprisonment<sup>55</sup>.

There is also circumstantial or presumptive evidence linking Ricardo Bolt's disappearance to the this systematic policy as Paulo Mukundi affirmed that he was unlawfully detained by State agents along with Ricardo Bolt.<sup>56</sup> Although the State denied this claim at the time, the Truth Commission set up by the State later supported this version of events and is not contradicted by any of the known facts. Neither was any evidence presented prior to this hearing purporting to effectively refute the testimony of Mr. Mukundi. Therefore, Cardenal has not satisfied their burden of proof concerning Ricardo Bolt's forced disappearance by the State agents.

#### *B - Alternative Submission*

The State was not directly involved in the disappearance of Ricardo Bolt, the mere existence of reasonable grounds for believing that Ricardo Bolt may have been forcibly disappeared obligated the State to not only effectively investigate the incident but to effectively

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<sup>51</sup> Hypothetical paragraph 42

<sup>52</sup> Hypothetical paragraph 21

<sup>53</sup> Hypothetical paragraph 42

<sup>54</sup> Hypothetical paragraph 46

<sup>55</sup> Hypothetical paragraphs 2,3,6,9 and 39

<sup>56</sup> Hypothetical paragraph 37

punish those responsible.<sup>57</sup> However, due to the post-conflict legislation passed by the Nunes Administration<sup>58</sup>, which aimed to effectively punish only those "most responsible", and the decision by the Specialized Transitional Tribunal to not lift the waiver of prosecution of the commissioned and non-commissioned officers named by General Pires as the masterminds of the events<sup>59</sup>, the State did not impose appropriate penalties on Human Rights violators which renders it liable for the Human rights violation.<sup>60</sup>

This submission holds that the legal duty of the State goes beyond simply having legal institutions that make it possible for rights to be protected and vindicated. It (the Legal Duty of the State) also involves the government having a duty to effectively ensure the full and free exercise of the human rights of its citizens including the Right to Life.

In conclusion, as forced disappearance involves among other violations, a violation of the right to life, it is likely that one will be killed particularly where the State is directly involved in the forced disappearance or has not fulfilled its obligation to not just prevent and investigate human rights violations, but to appropriately punish the violators.

## 2.4 THE STATE VIOLATED THE RIGHTS OF RICARDO BOLT CONTAINED IN ARTICLES, 3, 5 AND 7 READ IN CONJUNCTION WITH ARTICLES 1.1 AND 2

The right to juridical personality involves having legal recognition and protection of the fact that you have rights as a citizen.<sup>61</sup> This right is therefore violated within the context of

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<sup>57</sup> *Rochela Massacre v Columbia* [2007] 163 C paras 193 (I/A Court H.R)

<sup>58</sup> HYPOTHETICAL Para. 18-19

<sup>59</sup> HYPOTHETICAL Para. 47

<sup>60</sup> Navanethem Pillay, UN High Commissioner on Human Rights, 'Rule of Law Tools for Post Conflict State Amnesties ' [2009] , 9,11 and 19

<sup>61</sup> *Gudiel Alvarez et al v Guatemala* [2012] para 209 (I/A Court H.R)

involuntary forced disappearance through the removal of the person from the basic protection of the law which precludes recognition of the fact of legal personality and all that follows from it.<sup>62</sup>

The facts indicate a lack of acknowledgement of the whereabouts of Ricardo Bolt or direct responsibility in his disappearance and an inability or unwillingness to effectively investigate and punish those responsible. Hence, upon this basis, the State is responsible for violating Bolt's Right to Juridical Personality which is based on the aforementioned submission concerning the existence of forced disappearance.

## ***2.5 – The State Violated Bolt's Right to Humane Treatment (Article 5) read in conjunction with Article 1.1 and 2***

In the instance of forced disappearance, where an individual is subjected to a prolonged detention and is unable to communicate, there is a violation of the Right to Humane treatment.<sup>63</sup>

The disappearance of Ricardo Bolt was first officially reported before the year 2008 indicating prolonged disappearance and an inability to communicate within this time.<sup>64</sup> It is therefore submitted that the right to humane treatment was violated due to the forced disappearance of Bolt by State agents, and alternatively, through the inability or unwillingness of the State to investigate and punish those responsible.

### ***2.5.1 – The State Violated the Right to Humane Treatment of the relatives or next of kin of Ricardo Bolt.***

The suffering caused to relatives or next to kin from not knowing of what has happened to their relatives or the presumption of feelings of loss, abandonment, intense fear, uncertainty,

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<sup>62</sup> Case of Rio Negro Massacres v Guatemala [2012] para 119 (I/A Court H.R); Anzualdo Castro v Peru [2009] paras 87-101 (I/A Court H.R)

<sup>63</sup> *Case of Velasquez Rodriguez v Honduras* [1988] 4 C Para 156 (I/A Court H.R); *Chitay Nech et al v Guatemala* [2010] para 94 (I/A Court H.R)

<sup>64</sup> HYPOTHETICAL para. 37 and 40

anguish and pain that comes from having a disappeared relative constitutes the violation of the Right to Humane Treatment of relatives.<sup>65</sup>

It is therefore due to the forced disappearance of Ricardo Bolt and the failure to effectively investigate and prosecute those responsible on the part of the State that the State is responsible for violating the right to humane treatment of the relatives or next of kin of Ricardo Bolt.

## ***2.6 – THE STATE VIOLATE RICARDO BOLT’S RIGHT TO PERSONAL LIBERTY THROUGH HIS FORCED DISAPPEARANCE BY STATE AGENTS***

Cardenal violated Ricardo Bolt's Right to Personal Liberty<sup>66</sup> and alternatively, through a failure to effectively investigate and prosecute those responsible. Among the number of rights violated through forced disappearance<sup>67</sup> the Right to Personal Liberty is present.

The right to personal liberty involves a detention that is inconsistent with the previously established constitution or involves a detention for whatever reason that is not duly recorded. That indicates clearly; the reasons for the detention, who executed it, the time of detention and release as well as a record that the competent judicial officer was properly informed.<sup>68</sup>

The facts do not indicate any measure of the sort, which is required, to ensure the non-arbitrary nature of the detention. Hence, as noted by the Court,<sup>69</sup> the right to personal liberty is violated. Therefore, in accordance with earlier submissions on the existence of a forced disappearance of Ricardo Bolt by State Agents, and alternatively, of a failure of the State to

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<sup>65</sup> *Contrearras et al v El Salvador* [2011] Para 123 (I/A Court H.R.); *Gudiel Alvarez et al v Guatemala* [2012] Para 286 (I/A Court H.R.)

<sup>66</sup> American Convention on Human Rights 1978 Article 7

<sup>67</sup> *Case of Velasquez Rodriguez v Honduras* [1988] 4 C Para 155 - 158 (I/A Court H.R.)

<sup>68</sup> *Gudiel Alvarez et al v Guatemala* [2012] Para 193 – 197 (I/A Court H.R.)

<sup>69</sup> *Ibd*

effectively investigate and punish those responsible, the Right to Personal Liberty<sup>70</sup> of Ricardo Bolt was violated by the State.

### ***2.6.1 – THE STATE VIOLATED LUCRECIA ROSSI’S RIGHT TO LIFE THROUGH THE CONDUCT OF ITS STATE AGENTS.***

Direct evidence in the testimonials, if challenged, should be refuted by those making the challenge,<sup>71</sup> and testimony from State Agents made before official organs which refers to conduct that does not favour the State to which the agent belongs, should be attached probative value and should be deemed as an admission by the State.<sup>72</sup>

General Pires, before the Truth Commission set up by The State, accepted personal and institutional responsibility for the deliberate killing and torture of Lucrecia Rossi.<sup>73</sup> In his testimony, he explained that some of the unlawful conduct of State agents were due to pressure to acquire results<sup>74</sup>; which supports the view that the conduct occurred in his official capacity.

The general rule, as confirmed by the Court, is that acts or omissions of any public authority in its official capacity that is attributable under International Law to the State is grounds for holding the State directly responsible for that conduct<sup>75</sup>. The testimony of General Pires before the Truth Commission should be regarded as an admission of responsibility by The State. Unless or until The State refutes General Pires’ testimony, significant weight should be attached to the testimony, as it involves a former state agent asserting an unfavourable view of the conduct of The State for which he was aligned to

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<sup>70</sup> American Convention on Human Rights 1978 Article 7

<sup>71</sup> *Case of Velasquez Rodriguez v Honduras* [1988] 4 C Para 141 (I/A Court H.R)

<sup>72</sup> *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* [1986] Para 64 (I.C.J)

<sup>73</sup> HYPOTHETICAL paragraph 42

<sup>74</sup> *Ibd*

<sup>75</sup> *Case of Velasquez Rodriguez v Honduras* [1988] 4 C Para 164 (I/A Court H.R)

Therefore, accepting the content of the testimony,<sup>76</sup> the Court should find the State directly responsible for death of Lucrecia Rossi with respect to her right to life.

If Cardenal is not directly responsible for the violation of Rossi's Right to Life, then the State failed to effectively carry out its duty to promote the right under the Convention for Human Rights<sup>77</sup> by not adequately punishing those responsible for human rights violations. In particular; by not imposing punishment on General Pires for his role in the death of Rossi, or alternatively, not imposing adequate punishment for his role in the death of Lucrecia Rossi.

The facts are not clear as to whether General Pires was convicted for his crimes against Rossi, however, it is clear that he was subsequently given community service for the crimes for which he was convicted.<sup>78</sup> Given the situation that he was not convicted nor punished for his actions against Rossi; this constitutes a breach of the duty to punish, as part of the general aim to deter future instances of human rights abuses, and to vindicate the rights of the victims concerned.<sup>79</sup>

In the situation that he was convicted of crimes against Lucrecia Rossi however, and only sentenced to community service, the gravity of the offense would make this punishment inadequate. The State is required to punish in accordance with the gravity of the offense.<sup>80</sup>

The crime against Rossi falls within the meaning of Crimes against Humanity as defined in the Rome statute of the International Criminal Court<sup>81</sup>, to which the State of Cardenal has

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<sup>76</sup> HYPOTHETICAL paragraph 42

<sup>77</sup> American Convention on Human Rights 1978 Article 4

<sup>78</sup> HYPOTHETICAL para 45

<sup>79</sup> *Bamaca Velasquez v Guatemala* [2000] para 129 (I/A Court H.R.); *Rochela Massacre v Columbia* [2007] para 193-197 (I/A Court H.R.)

<sup>80</sup> *Ibd*

<sup>81</sup> Rome Statute of the International Criminal Court [2002] Article 7

ratified<sup>82</sup>, meaning murder when committed as part of a widespread or systematic attack against any civilian population. Widespread is defined as resulting in a large number of civilian victims over a broad geographical area.<sup>83</sup> Systematic relates to following a regular pattern of behaviour within the context of an organizational policy.<sup>84</sup>

The facts indicate repeated attacks on the civilian population of the Boneca community and perceived sympathizers, which included Lucrecia Rossi. Therefore, this is indicative of a regular pattern of behaviour done normally in furtherance of clear objectives; such as acquiring land or deterring complaints or political opposition<sup>85</sup> and also indicates a context of an organizational policy.

If International Humanitarian Law applies, it was violated as Common Article 3 of the Geneva conventions,<sup>86</sup> which the State of Cardenal has ratified<sup>87</sup>, prohibits violence to Life and Person where the person is taking no active part in the hostilities. This includes members of armed forces who have laid down their arms and those placed hors de combat by any case such as sickness or detention.<sup>88</sup> There is no evidence, neither direct nor indirect, that the victim Rossi was actively engaged in armed hostilities when she suffered death nor was she a part of any armed group that engaged in hostilities against the State. There is however, circumstantial evidence of sexual violence and direct evidence of torture which supports the presumption that she was detained in some form while being subjected to the violence and cruel treatment<sup>89</sup> which

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<sup>82</sup> CQ 28

<sup>83</sup> *Prosecutor v Bosco Ntaganda Pre-trial Chamber II* [2014] Para 22-30 (I.C.C)

<sup>84</sup> *Ibd*

<sup>85</sup> HYPOTHETICAL para. 2,3,6,9 and 36

<sup>86</sup> Geneva Convention 1949 Common Article 3(1)

<sup>87</sup> CQ 28

<sup>88</sup> Geneva Convention 1949 Common Article 3(1)

<sup>89</sup> HYPOTHETICAL Para. 37

leaves her protected under Common Article 3<sup>90</sup> even if she was a member of a subversive armed group such as the MRLB.

The gravity of the offense against Lucrecia Rossi, outweighs significantly the penalty of community service imposed on General Pires. The State, under these circumstances, would not have fulfilled its duty to effectively protect and promote the right to life<sup>91</sup> of Lucrecia Rossi.

3- The State Violated Ricardo Bolt's Right to Equal Protection under the Law<sup>92</sup> read in conjunction with Articles 1.1 and 2 of the ACHR<sup>93</sup> primarily due to his status as a member of the Boneca Community.

The systematic attack on the civilian population of the Bonecas which involved murder, torture and forced disappearance on a widespread basis by State agents. This State policy placed members of the Boneca community and its perceived sympathizers, especially perceived resistance fighters, in a state of vulnerability concerning effective protection by the state of their human rights as recognized in the American Convention on Human Rights.<sup>94</sup>

This vulnerability was also heightened by the fact that the Boneca Community was an indigenous group which can be presumed to have suffered from colonialism and continued to be in a state of vulnerability like many other indigenous peoples in the Americas simply from being indigenous.<sup>95</sup>

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<sup>90</sup> Geneva Convention 1949 Common Article 3(1)

<sup>91</sup> American Convention on Human Rights 1978 Article 1.1 & 2

<sup>92</sup> American Convention on Human Rights 1978 Article 24

<sup>93</sup> American Convention on Human Rights 1978 Articles 1.1 and 2

<sup>94</sup> HYPOTHETICAL 2,3,6,9,36 and 46

<sup>95</sup> C. M. Agalo, 'Inter American Commission report on the Human Rights Situation of the Indigenous peoples in the Americas ' [2000] , para 10-11- Special Rapporteur on Indigenous peoples 1996-1999)

The Inter American Charter of Human Rights states that prohibits discrimination.<sup>96</sup> The Inter-American Court has identified that discrimination should be distinguished from mere difference in treatment. Discrimination is defined as any exclusion, restriction or privilege that is not objective and reasonable and which adversely affects human rights.<sup>97</sup> The Court also noted that a difference in treatment may be an instrument for the legitimate purpose of helping the vulnerable and therefore would not be discriminatory as a consequence.<sup>98</sup>

#### 4 – THE STATE BREACHED THE RIGHT TO A FAIR TRIAL BY FAILURE TO INVESTIGATE AND PROSECUTE

The ACHR outlines that “Every person has the right to a hearing...by a competent, independent, and impartial tribunal...in the substantiation of any accusation of a criminal nature...”<sup>99</sup> The Convention further states that the accused has a right to defend himself personally or to be assisted by legal counsel of his choosing and to communicate freely and privately with his counsel.<sup>100</sup>

The facts indicate that Ricardo Bolt was not heard before a ‘competent, independent and impartial tribunal’ as the ACHR stipulates.<sup>101</sup> The facts state that the military court that presided over Ricardo Bolt’s trial operated under laws which prevented accused persons from retaining

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<sup>96</sup> American Convention on Human Rights 1978 Article 24

<sup>97</sup> Judicial Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter Am Court, Series A, No.18 2003 para 84).

<sup>98</sup> *Ibid* para 89; *The Legal Status and Human rights of the Child* [2002] 17 A Para. 47 (I/A Court H.R.)

<sup>99</sup> American Convention on Human Rights 1978 Article 8(1)

<sup>100</sup> American Convention on Human Rights 1978 Article 8(2)c

<sup>101</sup> American Convention on Human Rights 1978 Article 8

private counsel in their defence.<sup>102</sup> Further, this military tribunal enjoyed ‘special privileges’ which included immunity from investigation without both houses of congress agreeing to it<sup>103</sup>

The Inter-American Convention on the Forced Disappearance of Persons<sup>104</sup> indicates that Cardenal was not authorized to allow the Military to undertake, in the territory of another State Party such as the legally instituted judiciary, the exercise of jurisdiction or the performance of functions that are placed within the exclusive purview of the judiciary by its domestic law, such as the oversight of trials and sentencing for criminal offences. Additionally, the argument that due to the condition of transitional justice (the state ought not be held to the regular high standards of Human Rights on the mistreatment of persons and the breaches of their human rights) is undermined based on the convention’s Article X<sup>105</sup> which states that there is no excusable situation wherein a state is justified in condoning enforced disappearances whether at the hands of state actors/agents or by illegal gangs or military organizations. As detailed in the Convention<sup>106</sup>; in no case may exceptional circumstances such as a state of war, the threat of war, internal political instability, or any other public emergency be invoked to justify the forced disappearance of persons in the event that Cardenal abducted Ricardo Bolt personally. In such cases, the right to expeditious and effective judicial procedures and recourse as outlined in the ACHR<sup>107</sup> ought to have been retained as a means of determining the whereabouts or state of health of a person who was deprived of freedom, or of identifying the official who ordered or

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<sup>102</sup> Hypothetical para 38

<sup>103</sup> Hypothetical para 10

<sup>104</sup> Inter-American Convention on Forced Disappearance of Persons 1994 Article 4

<sup>105</sup> Inter-American Convention on Forced Disappearance of Persons 1994 Article 10

<sup>106</sup> Ibid

<sup>107</sup> American Convention on Human Rights 1978 Art. 25

carried out such deprivation of freedom as was found to be the case of Bolt by the Historical Truth Commission.<sup>108</sup>

The failure of the state of Cardenal to keep an up-to-date, current log of their detainees and their locations for investigations to be conducted easily to locate criminals and those responsible of the severe human rights violations which occurred, such as those which were meted out to Ricardo Bolt, and Lucrecia Rossi and ensure the safety of the innocent undermined the victims' right to judicial protection as the state had no registry or detention log which accurately recorded whether or not Ricardo Bolt was detained by the state or not, such a record would eradicate considerable doubt and provide the relatives who sought the truth.<sup>109</sup> This fundamental and obvious deficiency in the domestic law of Cardenal infringed upon the overlapping rights to Freedom of Expression<sup>110</sup> which states that the right to freedom of expressions includes necessarily the right to seek information of any kind. This right was breached where the facts indicate a failure by Cardenal to answer specifically the requests of the victims regardless of repeated attempts to make enquiries.<sup>111</sup>

The clear rule against the use of military tribunals for cases of civilian trials found in the Inter-American Convention on Forced Disappearance of Persons strictly proscribes Cardenal's use of a military tribunal to oversee Ricardo Bolt's trial proceedings.<sup>112</sup> The rule is clear in Article IX<sup>113</sup> that all persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each State, to the exclusion of all other special jurisdictions, particularly military jurisdictions.

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<sup>108</sup> HYPOTHETICAL para. 42

<sup>109</sup> HYPOTHETICAL para. 40; Inter-American Convention on Forced Disappearance of Persons 1994 Article XI

<sup>110</sup> American Convention on Human Rights 1978 Article 13(1) and (3)

<sup>111</sup> HYPOTHETICAL para.40

<sup>112</sup> Inter-American Convention on The Forced Disappearance of Persons 1994 Article 9

<sup>113</sup> Ibid

The state of Cardenal is clearly in breach of this rule by allowing the military tribunals to try Ricardo Bolt, and by doing so, investigate their own officers and the military persons accused of the human rights violations. This is a derogation from the rule, that Cardenal is a signatory to, and thus a legally bound state, therefore amounting to a breach of Ricardo Bolt's right to fair trial by a competent, independent and impartial tribunal as required in the ACHR Article 8.<sup>114</sup>

## 5 – BREACH OF RIGHT TO JUDICIAL PROTECTION BY FAILURE TO INVESTIGATE, PROSECUTE AND PUNISH.

The state of Cardenal owes a duty to its nationals and other citizens of its jurisdiction to ensure the protection of the rights enshrined in the ACHR<sup>115</sup> by providing domestic recourse and effective, simple and prompt avenues for justice and the service of Judicial protection for victims of Human rights violations.<sup>116</sup>

### *5.1 Customary international law guides that Amnesty laws are incompatible with the ACHR.*<sup>117</sup>

Additional proof that the rule that the provision of amnesties for grave human rights violations are incompatible with international law is to be found in the state practice of many regional human rights systems where their supreme courts, including several members of the Organization of American States, have incorporated this jurisprudence into their own case law, thereby observing in good faith their international obligation to investigate, prosecute and punish all responsible parties in the commission of human rights atrocities.<sup>118</sup>

<sup>114</sup> American Convention on Human Right 1978 Article 8

<sup>115</sup> American Convention on Human Rights 1978 Art. 1 & 2

<sup>116</sup> American Convention on Human Rights 1978 Art.25

<sup>117</sup> The Inter-American Commission, Special Rapporteurship; 'The Right to Truth in the Americas' [2014] 7, 205; *Case of Barrios Altos v. Peru*. Merits. [2001] Series C No. 75, para 43 and 44 (I/A Court H.R)

<sup>118</sup> *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. [2010] 219 C, para 161-164 (I/A Court H.R); *Case of Gelman v Uruguay. Merits and Reparations*. Judgment [2011] 221 C, para. 195-224 (I/A Court H.R)

The Inter-American Court has held that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by International Human rights law.”<sup>119</sup> Thus, the “unconditional amnesty provided to all combatants” by Cardenal<sup>120</sup> breached Ricardo Bolt’s, Lucrecia Rossi’s and Anibal Lopez’s right to judicial protection with regard to the provision of effective recourse. The Human Rights violations documented to have occurred in Cardenal amount to crimes against humanity as the preamble of the 1994 Inter-American Convention on the Forced Disappearance of Persons pronounced that the “forced disappearance of persons is an affront to the conscience of the Hemisphere and a grave and abominable offence against the inherent dignity of the human being”.<sup>121</sup> The Convention also states: “forced disappearance of persons violates numerous non-derogable and essential human rights” and reaffirms that the systematic practice of disappearance “constitutes a crime against humanity”.<sup>122</sup> The Inter-American Court has written that “the duty to investigate and eventually conduct trials and impose sanctions, becomes particularly compelling and important in view of the seriousness of the crimes committed and the nature of the rights wronged.”<sup>123</sup> Thus, the obligation owed by Cardenal to thoroughly investigate, prosecute and punish the violators and those found to have facilitated and supported the breaches to the human rights of the victims is commensurate to the gravity of

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<sup>119</sup> *Case of Barrios Altos v. Peru*. Merits. [2001] 75 C, para. 41 (I/A Court H.R)

<sup>120</sup> Hypothetical para. 20

<sup>121</sup> Inter-American Convention on the Forced Disappearance of Persons 1994, PREAMBLE

<sup>122</sup> *Ibd*

<sup>123</sup> *Case of La Cantuta v. Peru*. [2006] 162 C, para. 157 (I/A Court H.R)

the offences which took place. Arguably, the depth of the human rights violations in Cardenal, imposed an irrefutable burden to conduct the necessary investigation into those responsible for the breaches and seek their trial and punishment. It is evident that the torture and extrajudicial execution of Lucrecia Rossi<sup>124</sup> and the forced disappearance of Ricardo Bolt committed during the Ferreira regime constitute crimes against humanity that must be punished.<sup>125</sup>

Given that the state of Cardenal has adopted laws whose effect was to provide amnesties for those held responsible for the grievous human rights violations<sup>126</sup> and deny judicial protection and exercise of the right to a simple and prompt recourse, they are in violation of Articles 8<sup>127</sup> and 25<sup>128</sup> of the American Convention, in combination with articles 1(1)<sup>129</sup> and 2<sup>130</sup> thereof, as evidenced by the acquittal and reduced sentences of Mukundi, Guadamuz and General Pires in the facts<sup>131</sup>, the application of amnesty laws such as those measures introduced by the Cardenal ACRL laws lead to the defenselessness of victims, precludes the identification of the individuals who are responsible for human rights violations and perpetuate impunity and the recurrence of the violations. Thus, considering that the amnesty laws of Cardenal are manifestly incompatible with the American Convention, they lack legal effect and must not obstruct the investigation of serious human rights violations and the identification and punishment of those responsible<sup>132</sup>.

The submission by the state that the referendum held in Cardenal legitimizes the introduction of the amnesty laws is refuted on the basis that the Inter-American Court has held

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<sup>124</sup> HYPOTHETICAL Para. 37

<sup>125</sup> HYPOTHETICAL Para. 42

<sup>126</sup> HYPOTHETICAL para. 20, 24

<sup>127</sup> American Convention on Human Rights 1978 Article 8

<sup>128</sup> American Convention on Human Rights 1978 Article 25

<sup>129</sup> American Convention on Human Rights 1978 Article 1(1)

<sup>130</sup> American Convention on Human Rights 1978 Article 2

<sup>131</sup> HYPOTHETICAL para. 44, 45, 46

<sup>132</sup> *Case of Barrios Altos v. Peru*. Merits. [2001] 75 C, para. 43 and 44

that the mere fact that an amnesty law has been upheld in a popular referendum does not make it legitimate under international law as they reasoned that “the protection of human rights constitutes an insurmountable limitation to majority rule, that is to say, to the sphere of things that are “susceptible to being decided” by a majority in the context of democratic initiatives” Thus, the referendum held by Cardenal by no means justifies the amnesties available to the violators held responsible for Ricardo Bolt’s enforced disappearance, Lucrecia Rossi’s torture and extrajudicial execution and Anibal Lopez’s kidnapping and execution.

## 6 – BREACH OF THE RIGHT TO TRUTH AND CONSEQUENT BREACH OF THE RIGHT TO FAIR TRIAL AND JUDICIAL PROTECTION

The State of Cardenal breached the victims’ rights to fair trial and judicial protection where they failed to discharge the right to truth under Customary International Law and thus undermined the prerequisite component of the right to fair trial and Judicial Protection as outlined in the American Convention.

It is now an established rule of International Customary Law that the right to truth is a tangible right entitled to all human beings as the combined case law of the IACHR indicates state indicates that the right is now recognized by the tribunal.<sup>133</sup> Article 13 of the ACHR addresses freedom of expression and section (1) speaks to the right of all persons to seek information of any form and the prohibition on the state restricting or censoring this right to seek information.<sup>134</sup>

Forced disappearance is a human rights violation which is noted by the Inter-American court to have a continuing and autonomous nature. The Inter-American Court wrote that “[t]he forced disappearance of human beings is a multiple and continuous violation of many rights

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<sup>133</sup> The Inter-American Commission, Special Rapporteurship; 'The Right to Truth in the Americas' [2014] 7; para3, 4

<sup>134</sup> ACHR Article 13 (3)

under the Convention that the States Parties are obligated to respect and guarantee.”<sup>135</sup> The elements constituting forced disappearance are met on the facts where: a) Cardenal deprived of liberty of Ricardo Bolt ; b) There direct involvement of governmental agents or their acquiescence; and c) refusal to acknowledge the detention of Ricardo Bolt and to disclose his fate and whereabouts.<sup>136</sup> The convention on the forced disappearance of persons Art. X (10) states that under NO circumstances ought enforced disappearance be perpetrated or tolerated by a state. The Inter-American court took it a step further by stating that the acquiescence of a state to forced disappearance being conducted by criminal organizations within their jurisdiction amounts to a more than mere toleration of the acts and graduates to the place of state responsibility in the Velasquez case. The accepted case law agrees that the acts that constitute forced disappearance have a permanent nature and their consequences imply multiple offenses to the rights outlined in the ACHR. Essentially, as long as the whereabouts of the victim or his/her remains is unknown,<sup>137</sup> the offence is perpetuated. Correspondingly, the obligation to investigate and punish forced disappearance of persons is now accepted by the IACHR to be a rule of *jus cogens*.<sup>138</sup> The State of Cardenal’s international responsibility is compounded as the “the forced disappearance forms part of a systematic pattern or practice applied or tolerated by the State”, thus making it “a crime against humanity involving a gross rejection of the essential principles

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<sup>135</sup> *Case of Velásquez Rodríguez v. Honduras*. Merits. [1988] 4 C, para. 155. (I/A Court H.R)

<sup>136</sup> *Case of Gómez Palomino v. Peru*. Merits, Reparations and Costs. [2005] 136 C, para. 97 (I/A Court H.R); *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. [2009] 209 C, para. 139 (I/A Court H.R)

<sup>137</sup> *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. [2009] 209 C, para. 145 (I/A Court H.R)

<sup>138</sup> *Case of Goiburú et al. v. Paraguay*. Merits, Reparations and Costs. [2006] 153 C, para. 84. (I/A Court H.R)

on which the inter-American system is based.<sup>139</sup> In order not to reproduce an atmosphere of impunity, the state of Cardenal must adopt all measures necessary to investigate and punish those responsible<sup>140</sup> for the grave human rights violations. It is the submission of the agents for the victims that the state of Cardenal has not taken all measures possible to stop the grave human rights violations perpetrated within Cardenal and provided full assurance of the non-recurrence of these acts. The IACHR has held that the obligation to undertake an investigation once there are reasonable grounds for the suspicion that a person has been subjected to forced disappearance “exists regardless of the filing of a complaint, since in cases of forced disappearance international law and the general duty to guarantee, impose the obligation to investigate the case *ex officio*, without delay, and in a serious, impartial, and effective manner”.<sup>141</sup> The obligation to investigate persists until the person deprived of liberty or his or her remains have been found. In the case of presumption of death due to forced disappearance, the burden of proof falls upon the State, as it is the State that had the alleged control over the detained person and their fate.<sup>142</sup>

The State of Cardenal is under a duty to use all means available to fight the situation of impunity operative in their society surrounding the instant case, as impunity fosters the

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<sup>139</sup> *Ibd* Para. 88

<sup>140</sup> *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. [2006] 162 C, para. 115 (I/A Court H.R.)

<sup>141</sup> *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. [2009] 209 C, para. 143.

<sup>142</sup> *Ibd* para 147.

chronic repetition of human rights violations and the total defenselessness of the victims and their next of kin,<sup>143</sup> who are entitled to learn the whole truth of the facts.<sup>144</sup>

Upon being acknowledged and enforced in a specific situation, this right to truth becomes a relevant means for redress and creates a fair expectation in the victims that the State is required to satisfy.<sup>145</sup>

## 7 – APPLICATION OF INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW.

Assuming the facts meet the criteria for an internal or non-international armed conflict that International Human Rights law still applies.<sup>146</sup> International Humanitarian Law may and can only be applied as an interpretive tool to aid in knowing how to apply Human Rights Law in cases that are relevant such as internal armed conflict<sup>147</sup> in accordance with Inter-American Jurisprudence

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<sup>143</sup> *Case of La Cantuta v. Peru*. [2006] 162 C, para. 222 (I/A Court H.R); *Case of Goiburú et al. v. Paraguay*. Merits, Reparations and Costs. [2006] 153 C, para. 164 (I/A Court H.R); *Case of the Ituango Massacres (Ituango v Colombia)* [2006] para. 399 (I/A Court H.R); *Case of Baldeón-García v Peru* [2006] para. 195 (I/A Court H.R)

<sup>144</sup> *Ibid*; *Ximenes-Lopes v. Brazil* (Preliminary Objection) [2006 para. 245 (I/A Court H.R); *Case of the Pueblo Bello Massacre v Colombia* [2006] para. 266. (I/A Court H.R)

<sup>145</sup> *Case of Goiburú et al. v. Paraguay*. Merits, Reparations and Costs. [2006] 153 C, para. 164 (I/A Court H.R); *Case of the Pueblo Bello Massacre v Colombia* [2006] para. 266. (I/A Court H.R); *Case of Blanco-Romero et al. v Venezuela* [2005] 138 C para. 95 (I/A Court H.R)

<sup>146</sup> High Commissioner for Human Rights, 'International Legal Protection of Human Rights in Armed Conflict' [2011] 1, 5-6

<sup>147</sup> *Las Palmeras v Colombia* [2000] (I/A Court H.R)

International Human Rights Law should apply solely unless in circumstances where Human Rights Law has little to no detail on an issue can be applied alone even in internal armed conflicts.<sup>148</sup>

It is submitted that the Court should have as its primary consideration the widest reasonable interpretation of the scope of the human rights to be applied as the jurisdiction of the Court is restricted formally to interpreting the ACHR.<sup>149</sup>

The appropriate use of International Human Rights Law taking guidance from European Court of Human Rights would permit a general license to use lethal force in an internal armed conflict by the state however it would be restricted only to attacks against members of subversive armed groups who are directly engaged in armed hostilities and cannot be arrested at the time.<sup>150</sup>

Where Human Rights Law provides greater specific detail it ought to be applied with little to no material input from International Humanitarian Law as it would not be the *Lex specialis* or an effective interpretive tool as cases such as those.

## 8 – INSUFFICIENCY OF REPARATIONS

When an unlawful act imputable to a State occurs, that State becomes responsible in law for violation of an international norm, with the consequent duty to make reparations<sup>151</sup>. Proper

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<sup>148</sup> Louise Doswald Beck, 'International Review of the Red Cross Volume 88 Number 864 December 2006-The Right to Life in Armed Conflict, Does International Humanitarian Law provide all the answers?' [2006] , 3-9; Louise Doswald Beck-Professor at the Graduate Institute for International Relations in Geneva, Director of the University Centre for International Law

<sup>149</sup> J. M Pasqualucci , *The Practice and Procedure of the Inter American Court of Human Rights* (1st, Cambridge University Press First Edition, U.S.A 2003) Page 91-92

<sup>150</sup> *Ergi v Turkey* [1998] para 79 (ECHR); *Isayeva Yusupova and Bazayeva v Russia* [2005] paras 171, 187-189 and 199 (ECHR);

<sup>151</sup> *Factory at Chorzów*, [1927] 9 C, page 21 (P.C.I.J); *Factory at Chorzów*, [1927] 17 A, page 29 (P.C.I.J); *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949], page 184 (I.C.J). This Court has applied this principle (in, among others, the *Neira Alegria et al. Case, Reparations (Art. 63(1) American Convention on Human Rights)* Series C, No. 29, para. 36; *Caballero Delgado and Santana Case*,

Reparations ought to be a nexus of healing, financial compensation and state acknowledgement of wrongdoing<sup>152</sup>. The IACHR<sup>153</sup> has observed that the “jurisprudence of the inter-American system has shown 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.”<sup>154</sup> 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.”<sup>155</sup> Further, the court stated that “Reparations should consist of measures that tend to make the effects of the violations committed disappear. Their nature and

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*Reparations (Art. 63(1) American Convention on Human Rights)*, Judgment of January 29, 1997. Series C No. 31, para. 15; *Garrido and Baigorria Case, Reparations (Art. 63(1) American Convention on Human Rights)*, Judgment of August 27, 1998. Series C No. 39, para. 40).

<sup>152</sup> International Review of the Red Cross, Volume 88 Number 862 June 2006; Yasmin. Sooka – Dealing with the past and transitional justice: building peace through accountability; Yasmin Sooka is executive director of the Foundation for Human Rights in South Africa. She was a member of the Truth and Reconciliation Commission in South Africa and also appointed by the Office of the High Commissioner for Human Rights to be one of the three international commissioners on the Truth and Reconciliation Commission for Sierra Leone

<sup>153</sup> 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

<sup>154</sup> 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, paras. 77-78; Blake Case, Reparations (Article 63(1) American Convention on Human Rights), Judgment of January 22, 1999, Series C No. 48, paras. 31-32; Suárez Romero Case, Reparations (Article 63(1) American Convention on Human Rights), Judgment of January 20, 1999, Series C No. 44, para. 41; Castillo Páez Case, Reparations (Article 63(1) American Convention on Human Rights), Judgment of November 27, 1998, Series C No 43, para. 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 - para. 48.

<sup>155</sup> Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings. 2007 para. 97 (I/A Court H.R.); Case of the La Rochela Massacre [2007] 163 C, para.220 (I/A Court H.R.)

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.”<sup>156</sup>

‘Reparations’ As defined by the IACHR in the Loayza Tamayo case, at paragraph 85, ‘Reparations’ is a generic term that covers the various ways a State may make amends for the international responsibility it has incurred (*restitutio in integrum*, payment of compensation, satisfaction, guarantees of non-repetitions among others). There exists in the Inter-American Jurisprudence a duty to make reparations<sup>157</sup>. In para. 83 of the Loayza Tamayo Case, it was held that Under operative paragraph six of the Judgment of September 17, 1997, the state of Peru was "obliged to pay fair compensation to the victim and her next of kin and to reimburse them for any expenses they may have incurred in their representations before the Peruvian authorities in connection with this process, for which purpose the corresponding proceeding remains open." The ACHR states that where the Court finds that there has been a violation of a right or freedom protected by the Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of r freedom be remedied and that fair compensation be paid to the injured party.<sup>158</sup>

At para 231 of Cantuta v. Peru, the court held that “ The right of the next of kin to know the location of the mortal remains of the victims is in itself a measure of reparation and gives rise to expectations that must be fulfilled by the State. Furthermore, the Court has sustained that mortal remains deserve to be duly respected for the special relevance

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<sup>156</sup> Statement of the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia, 2006 para. 48 (I/A Court H.R.)

<sup>157</sup> Loayza Tamayo Case [1998] series 42 C (I/A Court H.R.)

<sup>158</sup> ACHR 1978 Article 63 (1)

that the victims bear to their next of kin. Thus the state of Cardenal ought to have ensured that all means at the state's disposal were exhausted in pursuing the truth and locating the disappeared victims Ricardo Bolt and Lucrecia Lopez. In the event that Bolt and Lopez were not located upon thorough searched being conducted by Cardenal then full disclosure of the methods employed and the reasons for failure in locating them ought to have been provided for the victims' surviving relatives.<sup>159</sup> Further, the *La Cantuta v Peru* case discussed that in the event that the remains of the victims are found, the State must deliver them without delay to their next of kin, and also bear any burial expenses, as agreed with the victims' next of kin.<sup>160</sup> This duty was not discharged by Cardenal as nowhere in the facts or clarifications suggests that Cardenal sought to comply with the requests of Ricardo Bolt's whereabouts to be resolved<sup>161</sup> or

The state of Cardenal ought to re-evaluate the reparations provided to the victims and provide a more comprehensive scope or compensation involving. This should include non-monetary satisfaction measures aimed at redressing non pecuniary damage, also ordering measures of public import or impact.<sup>162</sup>

## 9 – REQUEST FOR RELIEF

Based on the foregoing submissions, the Petitioner respectfully requests the Court:

- a) Declare the responsibility of the Cardenalese State for the violation of the rights enshrined in Articles 3, 4, 5, 7, 8, 24 and 25 of the American Convention, all read in conjunction with Articles 1(1) and 2, with

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<sup>159</sup> *Case of Goiburú et al. v. Paraguay*. Merits, Reparations and Costs. [2006] 153 C, para. 171. (I/A Court H.R.); *Case of Baldeón-García v Peru* [2006] para. 208 (I/A Court H.R); *Case of Acevedo-Jaramillo et al v Peru*. [2006] para. 315 (I/A Court H.R)

<sup>160</sup> *Case of La Cantuta v. Peru*. [2006] 162 C, para. 232 (I/A Court H.R)

<sup>161</sup> HYPOTHETICAL para. 40

<sup>162</sup> *Case of La Cantuta v. Peru*. [2006] 162 C, para. 221 (I/A Court H.R)

respect to Ricardo Bolt; the rights enshrined in Articles 4, 8, and 25 of the American Convention, all read in conjunction with Articles 1(1) and 2, with respect to Aníbal and Lupita López, and the same articles with respect to Emily and Maximiliano Rossi.

- b)** Order that Cardenal, without delay, abrogate or annul the ACRL law and associated legislation that conceded “an unconditional amnesty” to military, police and civilian personnel for various reasons for certain human rights violations.
- c)** Adjudge and declare the special privileges and use of military tribunals in Cardenal violate Article 8 and 25 of the ACHR.
- d)** Order the state of Cardenal to grant adequate integral reparation for material damage and moral damage to the victims and next of kin of Ricardo Bolt, Anibal Lopez and Lucrecia Rossi.
- e)** Adjudge and declare that Exclutia violated Articles 3, 4, 5, 7, 8, 24, 25 along with Art(s) 1(1) and 2 of the ACHR by failing to investigate the human rights violations perpetrated against the victims Ricardo Bolt, Lucrecia Rossi, and Anibal Lopez
- f)** Order Cardenal to develop and enforce an effective judicial remedy for the proper investigation and adjudication of the persons held responsible for the human rights violations suffered by the aforementioned victims to ensure that the perpetrators are correctly investigated, prosecuted and punished and to remove the culture of impunity and prevent the recurrence of human rights violations.