

# THE LAW OF REMEDIES AND THE CLEAN HANDS DOCTRINE: EXCLUSIONARY REPARATION POLICIES IN PERU'S POLITICAL TRANSITION

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## INTRODUCTION

As the recognition of the right to reparation grows, so do the legal issues pertaining to its practical application. Certainly, in the realm of international human rights law, new cases offer opportunities to continue defining the parameters of this right, as noted in an ever-growing jurisprudence with respect to remedies law.<sup>1</sup> Some issues, due to their potential to generate new forms of harm and even new rights violations, beg further discussion and clarification. Such is the case with the equity doctrine of “clean hands” (the “Clean Hands Doctrine”) which dictates that an injured party’s wrongdoing may limit his or her claim to reparations.<sup>2</sup> However, this doctrine, when applied in cases where victims of human rights violations seek relief, conflicts directly with the well-established legal principle of non-discrimination.

This Article explores the applicability of the Cleans Hand Doctrine in human rights cases. In essence, this article questions whether a person’s innocence or guilt factors into whether he or she

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1. See generally DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 22-37 (2d ed. 2005) (highlighting cases from the European, Inter-American, and African human rights systems and explaining how those bodies have applied the right to remedies in these cases).

2. See BLACK’S LAW DICTIONARY 268 (8th ed. 2004) (defining the doctrine as the “principle that a party cannot seek equitable relief or assert an equitable defense if that party has violated an equitable principle”).

deserves to be repaired. Moreover, this article explores what actions, allegiances and beliefs constitute a basis for exclusion, as well as what the standard is for determining wrongdoing—such as a firm criminal conviction or mere allegations. This issue has particular salience in cases in which victims of human rights abuses are alleged to have connections to “subversive” and “terrorist” organizations (“illegally armed groups”).

To explore these issues, this article begins with a general overview of reparations law, with specific analysis of its relevance to the transitional justice paradigm that produces administrative reparations plans. It then explores the concept of the Clean Hands Doctrine in international law, and examines the existing, albeit limited and inconsistent, jurisprudence on the issue. While consensus still does not exist on the doctrine’s applicability and relevance in international law, it is possible to argue that in relation to human rights law, the Clean Hands Doctrine does not, and should not, apply. In support of this assertion, this article discusses the position assumed by the organs of the Inter-American System of Human Rights, including the Inter-American Commission on Human Rights (“Inter-American Commission”) and the Inter-American Court of Human Rights (“Inter-American Court”).<sup>3</sup> While neither of these international human rights bodies has ruled directly on the issue, their decisions suggest that they do not consider the character or status of the victim as relevant factors in determining reparations.<sup>4</sup> In effect, this reading supports the general rejection of the Clean Hands Doctrine in relation to reparations for human rights violations.

Yet, in practice, nations confronting politically divisive transitions from repressive regimes and internal armed conflict do not necessarily assume this general rejection of the Clean Hands Doctrine. This Article illustrates this phenomenon through the case study of Peru, which after twenty years of internal armed conflict between the State and illegally armed groups, embarked on a transitional justice project by forming its Truth and Reconciliation

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3. See Thomas Buergenthal, Centennial Essay, *The Evolving International Human Rights System*, 100 AM. J. INT’L L. 783, 794-97 (2006) (describing the evolution of the Inter-American Human Rights System from a nascent system with no enforcement mechanism to its current system, which includes the Inter-American Commission and the Inter-American Court).

4. See *infra* note 76.

Commission (“TRC”) in 2001.<sup>5</sup> After two years of investigation, the TRC presented its Final Report in 2003, including recommendations for a *Plan Integral de Reparaciones* (Integral Plan of Reparations) (“PIR”), which adopts a partial rejection of the Clean Hands Doctrine.<sup>6</sup> Yet, as the Peruvian government now attempts to implement the PIR, it confronts the controversial and divisive issues related to how it can, and must, approach victims of state abuse who allegedly have, or had, ties to illegally armed groups.<sup>7</sup> Due to political pressure, the national legal norms codifying the PIR thus far contain exclusionary clauses that reflect a full adoption of the Clean Hands Doctrine. This policy has generated much tension in the implementation of the law.<sup>8</sup> This Article discusses how this difficult context became more tense as a result of the recent decision of the Inter-American Court in *Miguel Castro Castro Prison v. Peru* (“*Castro Castro Prison*”), in which it ordered reparations for survivors and the families of victims who were killed and harmed in 1992 during a state lock down of a prison where they were being detained for terrorism. This Article concludes with a discussion of how the local tension produced by the practical repercussions of the Clean Hands Doctrine presents serious political challenges for emerging democracies attempting to build the rule of law and respect for human rights.

## I. THE INTERNATIONAL RIGHT TO REPARATIONS

The right to a remedy and reparations forms one of the pillars of international human rights law.<sup>9</sup> Major human rights instruments,

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5. See Juan Forero, *Peru Report Says 69,000 Died in 20 Years of Rebel War*, N.Y. TIMES, Aug. 28, 2003, at A3.

6. See Truth and Reconciliation Commission (Peru), Informe Final [Final Report], Plan Integral de Reparaciones [Integral Plan on Reparations], <http://www.cverdad.org.pe/ifinal/pdf/TOMO%20IX/2.2.%20PIR.pdf> [hereinafter PIR].

7. See *infra* Part II.A–D.

8. See Ley Que Crea El Programa Integral de Reparaciones [Law Which Creates the Program on Integral Reparations], Law No. 28592, art. 4, July 29, 2005, available at <http://www.idl.org.pe/educa/PIR/28592.pdf> [hereinafter PIR Law].

9. See, e.g., *Ivcher-Bronstein v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, ¶¶ 3, 4, 135 (Feb. 6, 2001) (emphasizing the importance of an individual’s right

including the Universal Declaration of Human Rights, recognize that when a state violates the human rights of a person under its jurisdiction, it assumes a new obligation to repair the harm caused by its wrongful act or omission.<sup>10</sup> Yet, until now, there exists a relative paucity of academic writing and “sufficient systematic attention” to this legal principle.<sup>11</sup> However, this trend is slowly changing in the process of strengthening and codifying international human rights norms. Certainly, international and national legal decisions, United Nations principles, academic commentary, and national experience all contribute to the increasing recognition of the right to reparations for victims of human rights violations. This process also helps define the acceptable standards and legal parameters for the application of this right.

Most notably, the U.N. General Assembly approved in 2005 the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Survivors of Violations of International Human Rights and Humanitarian Law (“Basic Principles”), a framework predicated on a growing body of jurisprudence arising out of both treaty and customary law and which lays out specific legal contours of the right to reparations.<sup>12</sup> Indeed, the Basic Principles specifically emphasize that they “do not entail new international or domestic

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to legal recourse under the Inter-American system and within democratic society, generally).

10. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, art. 8, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200, art. 3, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); International Convention on the Elimination of All Forms of Racial Discrimination (CERD), G.A. Res. 2106, Annex, art. 6, U.N. Doc. A/6014 (Dec. 21, 1965); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, art. 14, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984); Convention on the Rights of the Child (CRC), G.A. Res. 44/25, art. 39, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989).

11. See Pablo de Greiff, *Introduction: Repairing the Past: Compensation for Victims of Human Rights Violations*, in *THE HANDBOOK OF REPARATIONS* 1, 3, 13 (Pablo de Greiff ed., 2006) (presenting case studies of different states that have implemented reparation programs and assessing the challenges that these states have faced).

12. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Survivors of Violations of International Human Rights and Humanitarian Law, G.A. Res. 60/147, pmb., Sec. IX, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norm.”<sup>13</sup>

Despite the sudden novelty of reparations, the law of remedies certainly is a legal principle that dates back to antiquity.<sup>14</sup> In effect, centuries of legal tradition view reparations as central to justice, embodying the fundamental maxim of law *ubi ius, ibi remedium* (where there is a right, there is a remedy).<sup>15</sup> For example, Dinah Shelton writes, “the most common principle in all legal systems is that a wrongdoer has an obligation to make good the injury caused, reflecting the aim of compensatory justice.”<sup>16</sup> Hence, most national jurisdictions contemplate some form of civil remedy, such as in contract and tort law, which establishes standards for “righting” wrongs between private parties.<sup>17</sup>

Upon its inception, the human rights legal framework borrows these legal guidelines to inform its own evolving jurisprudence on reparations.<sup>18</sup> Indeed, international tribunals have already contributed

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13. *See id.*

14. *See* SHELTON, *supra* note 1, at 58-59 (characterizing the last 200 years of state jurisprudence on remedies as the precursor to the current body of international human rights law because those cases involved a state’s duty to protect an individual’s rights).

15. *See* Naomi Roht-Arriaza, *Punishment, Redress, and Pardon: Theoretical and Psychological Approaches*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 13, 13-23 (Naomi Roht-Arriaza ed., 1995) (giving an explanation of the different theories of punishment in the context of criminal justice and arguing that in the context of international human rights violations, the theories that are most appropriate are those focused on how the violations affected the victim and society as a whole).

16. *See* SHELTON, *supra* note 1, at 60.

17. *See* DONALD HARRIS, REMEDIES IN CONTRACT AND TORT 21-24, 338-42 (2002) (providing an overview of contract and tort law, as well as the remedies that a party may receive in each type of case). When a party breaches a contract the available remedies are compensatory damages, restitution, exemplary damages, and literal enforcement, while in torts the remedies are usually only compensatory damages. *Id.* at 21, 338.

18. *See* Jo M. Pasqualucci, *Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure*, 18 MICH. J. INT’L L. 1, 4-5 (1996) (explaining that human rights conventions often require ratifying states to remedy human rights violations by making reparations to the injured party when ordered to do so by a tribunal).

a substantial number of decisions setting important precedents for reparations in human rights cases. This can most readily be seen in the decisions issued by the Inter-American Court, which serves as the enforcement body of the American Convention on Human Rights.<sup>19</sup> The jurisprudence developed in remedies law tends to be focused on individualized cases of measurable damages where restitution is not possible or practicable.<sup>20</sup> Thus, the *restitutio in integrum* approach to reparations contemplates a variety of modalities to approximate “making a victim whole” and restoring the “status quo ante,” such as through restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>21</sup>

#### A. REPARATIONS AS PART OF THE TRANSITIONAL JUSTICE PARADIGM

Traditionally, reparations follow some form of legal proceeding, whether civil or criminal, that entails assessment of personal harm that the injured party (“the victim”) suffered in order to calculate damages.<sup>22</sup> However, a recent trend indicates the development of administrative reparations plans in the aftermath of repressive

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19. See Lisa J. Laplante, *Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention*, 22 NETH. Q. HUM. RTS. 347, 373 (2004) (asserting that victims of human rights violations have begun relying on the Inter-American Court to order states to pay reparations and arguing that if this trend continues, it could undermine the intended role of the Court as a body that compels states to adhere to the American Convention) [hereinafter Laplante, *Bringing Effective Remedies Home*]; Dinah Shelton, *Remedies in the Inter-American System*, 92 AM. SOC'Y INT'L L. PROC. 202, 203, 206 (1998) (explaining that although the Court has broad remedial powers that it often uses, there is still much development that needs to take place in the area of enforcement and implementation of ordered remedies).

20. See Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 157-58 (2004) (maintaining that although monetary reparations are recognized as a remedy for human rights violations, there are few instances where victims have actually received any money).

21. See G.A. Res. 60/147, *supra* note 12, ¶¶ 19-23 (outlining the goals of restitution and compensation as remedies for human rights violations).

22. See Jaime E. Malamud-Goti & Lucas Sebastián Grosman, *Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies*, in THE HANDBOOK OF REPARATIONS, *supra* note 11, at 540 (asserting that victims typically receive reparations either through the judicial system, where they may bring lawsuits against perpetrators, or through the administrative process, where victims are defined by a statute).

regimes or internal armed conflicts, especially those recommended by a TRC.<sup>23</sup> Certainly, in situations of mass violence where many victims are left in a setting where existing judicial mechanisms typically failed to protect their fundamental rights to begin with, there is an obvious impracticality to resorting to the courts to resolve all of these reparations claims; thus, administrative plans may offer a more efficient and politically feasible option.<sup>24</sup>

In these settings, “reparatory measures or reparations programs are integrated into wider social, political, and judicial reform processes, which together are intended to contribute to what is commonly termed ‘social reconstruction’ or ‘reconciliation.’”<sup>25</sup> In this sense, reparations schemes provide a type of official acknowledgment of wrongdoing and in this “newer, more political incarnation, especially in transitional contexts,” they seek to heal individuals and social wounds.<sup>26</sup> In effect, there is a growing international tendency to opt for an administrative reparations plan as part of a general transitional package that aims for broad societal reform and ultimately seeks to prevent future cycles of violence and human rights violations.<sup>27</sup> In this new legal scheme, new challenges arise that require careful attention. In particular, an urgent question exists with relation to the

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23. See PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 171-82 (2001). Often these commissions are in a good position to provide general recommendations for a reparations program because they have access to interviews with victims and other details about the atrocities that have taken place. *Id.* at 172.

24. See Naomi Roht-Arriaza, *Reparations in the Aftermath of Repression and Mass Violence*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 121, 122, 127 (Eric Stover & Harvey M. Weinstein eds., 2004) (listing the different reparations programs that have been implemented in the past, but noting that in reality many victims never received the monetary reparations). One reason for the discrepancy may be that, in poorer countries, reparations are not always economically feasible. *Id.* at 124.

25. M. Brinton Lykes & Marcie Mersky, *Reparations and Mental Health: Psychosocial Interventions Towards Healing, Human Agency, and Rethreading Social Realities*, in THE HANDBOOK OF REPARATIONS, *supra* note 11, at 590.

26. *Id.* at 590.

27. See Roht-Arriaza, *supra* note 24, at 121 (highlighting some past reparations plans which include Germany compensating victims that suffered during the Holocaust and the International Criminal Tribunal for the Former Yugoslavia mandating that victims be allowed to pursue compensation through their domestic court system).

acceptable criteria and standards for determining who is a victim with a right to reparations in administrative reparations plans.

B. THE CLEAN HANDS DOCTRINE AND THE PRINCIPLE OF NON-DISCRIMINATION: DETERMINING WHO IS A VICTIM

Jurisprudence delineates a clear definition of *who* is considered a victim of human rights violations.<sup>28</sup> Specifically, the Basic Principles consider victims to be “persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.”<sup>29</sup> Dependents and the immediate family of the direct victim, as well as persons intervening on behalf of the victim, are included in this definition.<sup>30</sup>

In addition, the Basic Principles include a non-discrimination clause which instructs that the application and interpretation of the Principles “must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.”<sup>31</sup> Likewise, Principle 3(c) indicates the duty to “provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice... irrespective of who may ultimately be the bearer of responsibility for the violation.”<sup>32</sup> Here, the Basic Principles recognize that the determination and distribution of reparations cannot be based on discriminatory practices.<sup>33</sup> While the Basic Principles do not enumerate the specific types of situations or acts that constitute discrimination, such typology can be inferred from known groups protected from discrimination in international, and most national, legal systems. These groups are usually defined

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28. See G.A. Res. 60/147, *supra* note 12, ¶ 8.

29. *Id.*

30. *Id.*

31. *Id.* ¶ 25.

32. *Id.* ¶ 3(c).

33. See *id.* ¶ 25 (noting that the application of the Basic Principles “must be consistent with international human rights law . . . and be without any discrimination of any kind or on any ground, without exception”).

by race, religion, gender, and ethnicity, among other classifications.<sup>34</sup> But what about discrimination based on guilt? That is, can reparations be denied to injured parties who are guilty of criminal wrongdoing, in particular wrongdoing associated with war or other acts of aggression, such as rebellion, terrorism and political violence?

Here, the discussion must refer to the issue of “clean hands.” A general principle of equity recognizes that a person “who asks for redress must present himself with clean hands.”<sup>35</sup> The Clean Hands Doctrine arises out of the concept of *in parti delicto* (of equal fault), which looks at the different levels of culpability of the parties to a dispute in order to determine fault and liability, such as in contract law, where an illegal or immoral agreement may serve as a defense to bar restitution.<sup>36</sup> Metaphorically speaking, this protection assures that “no polluted hand shall touch the pure fountains of justice.”<sup>37</sup> Thus, this common law principle seeks to balance blame in determining causation of injury and harm.<sup>38</sup>

The concept of “clean hands” more frequently applies between equal parties, such as states. For instance, Thomas Merrill discusses the basis for states’ claims for transboundary pollution in which a norm of reciprocity forms “a central element for identifying the appropriate equitable solution; specifically, they invoke the equitable maxim of ‘clean hands’—that one who seeks equity must do equity—as a justification for denying relief to states complaining of

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34. See JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* 59 (2d ed. 1998) (arguing that treaty regimes based on racial discrimination, women’s rights, and children’s rights “give added international prominence to the rights they address”).

35. BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 156 (1987).

36. See Steven L. Good & Celeste M. Hammond, *Real Estate Auctions: Legal Concerns for an Increasingly Preferred Method of Selling Real Property*, 40 *REAL PROPERTY, PROBATE AND TRUST J.* 765, 793 (2006) (discussing the Michigan Supreme Court’s refusal to find a breach of a duty of care when it would have been created by a fraudulent contract).

37. See *A Law and Economics Look at Contracts Against Public Policy*, 119 *HARV. L. REV.* 1445, 1445 n. 7 (2006).

38. See Aleksandr Shapovalov, *Should a Requirement of “Clean Hands” Be a Prerequisite to the Exercise of Diplomatic Protection? Human Rights Implications of the International Law Commission’s Debate*, 20 *AM. U. INT’L L. REV.* 830, 834-35 (2005) (describing the consideration of the wrongful conduct of each party to an action as part of the merits of a claim).

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pollution emanating from other states.”<sup>39</sup> Similarly, the Clean Hands Doctrine has arisen in the area of diplomatic protection, prompting the United Nations International Law Commission (“ILC”) to seek views of governments on aspects of “the wrong action of a complainant.”<sup>40</sup>

On the other hand, when a general public interest exists, the Clean Hands Doctrine may face certain limitations.<sup>41</sup> One such example can be seen in the U.S. Supreme Court’s decision in the antitrust suit *Perma Life Mufflers Inc. v. International Parts Corp.*:

There is nothing in the language of the antitrust Acts which indicates that Congress wanted to make the common-law *in pari delicto* doctrine a defense to treble-damage actions, and the facts of this case suggest no basis for applying such a doctrine even if it did exist. Although *in pari delicto* literally means “of equal fault,” the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing. *We have often indicated the inappropriateness of invoking broad common law barriers to relief where a private suit serves important public purposes . . .*<sup>42</sup>

The opinion of the U.S. Supreme Court suggests that overriding public interest may be invoked to limit what is historically a modality to mediate fairly between private parties.<sup>43</sup>

Yet, debates held during the ILC’s drafting of the Responsibility of States for Internationally Wrongful Acts suggest that the applicability of the Clean Hands Doctrine in international law is not

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39. Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 936 (1997).

40. Press Release, General Assembly, Legal Committee Is Told Draft Articles on Diplomatic Protection, U.N. Doc. GA/L/3263 (Nov. 2, 2004), available at <http://www.un.org/News/Press/docs/2004/gal3263.doc.htm>.

41. See *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 138-39 (1968) (refusing to apply the common law Clean Hands Doctrine where Congress has affirmatively legislated that plaintiffs harmed by anti-competitive practices may be entitled to damages).

42. *Id.* at 138 (emphasis added).

43. See *id.* at 139 (“The plaintiff who reaps the rewards of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition.”).

necessarily a settled matter.<sup>44</sup> Article 31 establishes that “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”<sup>45</sup> In establishing this liability standard, the document makes no mention of the Clean Hands Doctrine, although the ILC discussed the idea of “clean hands” at different points during the drafting of the articles.<sup>46</sup>

For instance, in its 1999 deliberations of the draft articles, the ILC discussed the “so-called ‘clean hands’ doctrine” under the topic of “further justifications or excuses.”<sup>47</sup> The Special Rapporteur James Crawford, appointed by the ILC in 1997, explained that “if it exist[s] at all,” the Clean Hands Doctrine relates to admissibility.<sup>48</sup> Yet, ILC members disputed the Rapporteur’s assertion that the doctrine “was not yet part of general international law,” and instead asserted that it is “a basic principle of equity and justice.”<sup>49</sup> In that vein, an ILC member suggested that to include the Clean Hands Doctrine would be consistent with the ILC’s purpose “to promote the progressive development of international law and its codification.”<sup>50</sup> The ILC concluded that the Clean Hands Doctrine was “a principle of positive international law” but had an “impact on the scope of compensation” and not determinations of wrongfulness.<sup>51</sup> Yet, the discussion concludes with Rapporteur Crawford noting that no delegate wanted the doctrine to be mentioned in the chapter on contributing fault, and instead would only be available in “connection with the loss of the right to invoke state responsibility.”<sup>52</sup>

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44. See *Report of the International Law Commission on the Work of its 51st Session*, U.N. GAOR, 54th Sess., Supp. No. 10, ¶ 411-14, U.N. Doc. A/54/10 (1999) [hereinafter *ILC 51st Session Report*] (chronicling the debate over the applicability of the Clean Hands Doctrine to the law of state responsibility and its status as a “part of general international law”).

45. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 31, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Dec. 12, 2001).

46. See *ILC 51st Session Report*, *supra* note 44, ¶¶ 411-415.

47. See *id.* § 48.

48. See *id.* ¶ 412.

49. See *id.* ¶ 413.

50. See *id.*

51. See *id.* ¶ 414.

52. See *id.* ¶ 415.

During its 2000 debates of the draft articles, the ILC returned to the topic of the Clean Hands Doctrine in the course of reviewing mitigating factors to state liability, particularly the text pertaining to “contribution to the injury.”<sup>53</sup> One reading of this section suggests that the guidelines for finding degrees of liability, analogous to concepts of contributory fault or joint and several liability, are related to the “clean hands” concept.<sup>54</sup> France’s delegate, Alain Pellet, opined about the apparent confusion as to whether Special Rapporteur Crawford intended the text to reflect a sort of Clean Hands Doctrine, although the Rapporteur clarified the previous year that he did not intend such a result.<sup>55</sup> Pellet made note of the “extremely unclear” nature of the doctrine, and sought to clarify the debate by noting that even if the Rapporteur did not intend to invoke the concept of “clean hands” specifically, the general formula included this doctrine in the sense that “if a private individual had contributed to the damage, that contribution reduced the amount of the reparation.”<sup>56</sup> He continued by clarifying that the issue at hand was a “mitigation of the reparation, not of responsibility . . . .”<sup>57</sup> Agreeing, Rapporteur Crawford responded that the draft articles “embodied a well-established principle, namely, that account could be taken of the conduct of a person on whose behalf a State was submitting a claim in determining the amount of reparation.”<sup>58</sup> He conceded that this principle was associated at times with the Clean Hands Doctrine, but remarked that “whether that doctrine was autonomous in international law was open to question.”<sup>59</sup>

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53. See *Summary Record of the 2639th Meeting*, [2000] 1 Y.B. Int’l L. Comm’n 210, ¶ 24, U.N. Doc. A/CN.4/SR.2639 (noting that the ILC specifically considered whether a State must take reasonable steps to minimize damages and whether the failure to do so could preclude recovery).

54. See *id.* (noting that contributory fault was “generally recognized as being relevant to the determination of reparation” because the concept was included in documents such as the Convention on International Liability for Damage Caused by Space Objects).

55. See *id.* ¶ 48. (reporting that the concept of “clean hands” would be acceptable in some contexts, but not others).

56. *Id.* ¶ 51.

57. *Id.*

58. See *Summary Record of the 2640th Meeting*, [2000] 1 Y.B. Int’l L. Comm’n 216, ¶ 17, U.N. Doc. A/CN.4/SR.2640.

59. *Id.*

Certainly, review of the ILC debates reflects the uncertainty of the legality and applicability of the Clean Hands Doctrine, at least in regard to state responsibility for wrongful actions.<sup>60</sup> However, more recently in 2001, the ILC outright dismissed the Clean Hands Doctrine in its discussion of “circumstances precluding wrongfulness” found in Chapter V of the State Responsibility Articles.<sup>61</sup> Its Annual Report explains that “[t]he so-called ‘clean hands’ doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied. It also does not need to be included here.”<sup>62</sup> Thus, despite disagreement on the status of the Clean Hands Doctrine in international law, the exclusion could be read to affirm that it is not necessarily a set legal principle.

### C. THE INAPPLICABILITY OF THE CLEAN HANDS DOCTRINE IN INTERNATIONAL HUMAN RIGHTS LAW

While uncertainty exists as to the general status of the Clean Hands Doctrine in international law, this doctrine should not apply in international human rights law given the very nature and purpose of these protections.<sup>63</sup> Specifically, human rights guarantees specifically protect against as much state abuse and domination as against state negligence. Thus, a state’s failure to observe these international norms should result in remedying resulting harm regardless of the status of the victim.<sup>64</sup> To this effect, Alex Tawanda Magaisa argues the following:

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60. *See id.* (reporting that “the majority of the members of the Commission” favored the retention of a paragraph that superficially resembled the Clean Hands Doctrine after being assured that the paragraph did not actually contain the Clean Hands Doctrine).

61. *See Report of the International Law Commission on the Work of its 53rd Session*, U.N. GAOR, 56th Sess., Supp. No. 10, Ch. V, U.N. Doc. A/56/10 (1999).

62. *See id.* at Ch. V, ¶ 9.

63. *See Summary Record of the 2639th Meeting*, *supra* note 53, ¶ 48.

64. *See* Alex Tawanda Magaisa, “‘Clean Hands’? Thou Hath Blood on Your Hands”: *A Critique of the Supreme Court Judgement in the ANZ Case*, 1 INT’L J. CIV. SOC’Y L. 93 (2003) (asserting that the Clean Hands Doctrine is especially controversial when used to suggest that the State has no responsibility to uphold fundamental rights where a complainant has allegedly broken the laws of the State).

Even an accused who has confessed to committing an offence is still entitled to constitutional protection by the courts when he alleges that his constitutional rights have been violated. Prisoners who have committed offences against the state are still entitled to that protection despite having so-called “unclean hands” for disobeying the laws of the state . . . . There are other cases throughout the world where progressive courts have held that where the surrender of fundamental constitutional rights is concerned, the court’s inquiry cannot be limited to the “Clean Hands” of the complainant. The focus of constitutional rights protection is not on the guilt of the applicant but the constitutionality of laws or policies of the state.<sup>65</sup>

In this way, Magaisa questions the applicability of this equity-based doctrine in cases where fundamental legal rights are involved since it makes a mockery of the guarantees and protection of these rights, placing them at the “whims of the ruling party.”<sup>66</sup>

Shelton, writing on reparations in international human rights law, explains that “[i]n general, the character of the victim should not be considered because it is irrelevant to the wrong and to the remedy, and implies a value judgment on the worth of an individual that has nothing to do with the injury suffered.”<sup>67</sup> Yet, she discusses various decisions by the European Court of Human Rights, primarily related to arbitrary and wrongful detentions and abusive conditions of confinement, in which applicants convicted of crimes were denied reparations, although the Court issued a declaratory judgment in their favor.<sup>68</sup> Shelton’s analysis of the European Court of Human Rights’ approach to what she terms “the ‘bad man’ basis for denying compensation” suggests that where a claimant is guilty of wrongdoing, he or she may be denied reparations whether or not his or her conduct directly caused the injury.<sup>69</sup>

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65. *Id.* at 94-95.

66. *See id.* at 93-94 (noting that the Zimbabwean Supreme Court’s ruling implies that citizens must first comply with a law that may violate fundamental constitutional rights before they may challenge the law).

67. Shelton, *supra* note 1, at 119.

68. *See id.* at 209-11 (discussing two court opinions implying that the government may violate the rights of defendants who have committed a wrong).

69. *See id.* at 210.

Interpretation of this standard could read that *but for* the wrongful conduct of the person, he or she would not be subject to state control and thus would not have suffered harm. Alternatively, a person who commits a wrong loses the protections enjoyed by “non-delinquents,” creating a two-class tier of rights holders.<sup>70</sup> Given that the overarching purpose of human rights protection is to curb state abuse, one could argue that carving out exceptions where human rights violations have no consequences presents a worrisome precedent.<sup>71</sup>

On the contrary, decisions and commentaries of the organs of the Inter-American system suggest an opposite approach with regard to the Clean Hands Doctrine.<sup>72</sup> For instance, in *Martorell v. Chile*, the Inter-American Commission refers to the preliminary exceptions hearing held in *Fairén-Garbi v. Honduras* on June 16, 1987 before the Inter-American Court.<sup>73</sup> In recounting the experience, the Inter-American Commission explains that during the *Fairén-Garbi* hearing, Judge Rigoberto Espinal Irias asked if there could be “any possible relationship or tie between the violation of human rights and the so-called Clean Hands Theory, well known in international law.”<sup>74</sup> At that time, the Inter-American Commission responded with the following explanation:

The answer is obviously no. The Commission protects human beings, irrespective of their ideology or their behavior. Certain rights are inherent to every person, the right to life being the most important of all. Regardless of ideology,

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70. See *id.* at 211 (illustrating support from the European Convention on the Compensation of Victims of Violent Crimes for denying compensation to victims based on their misconduct).

71. See Laplante, *Bringing Effective Remedies Home*, *supra* note 19, at 367-71 (explaining the need of the Inter-American Court to enforce reparation damages in Peru in order to combat human rights violations by the Peruvian government).

72. See *Fairén-Garbi v. Honduras*, 1994 Inter-Am. Ct. H.R. (ser. D) No. 2, ¶ 90 (June 26, 1987) (pointing out the obligation of States to guarantee rights recognized by the American Convention on Human Rights to all persons); *Martorell v. Chile*, Case 11.230, Inter-Am. C.H.R., Report No. 11/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 65 (1997) (emphasizing that all persons have full protection of their rights guaranteed under the American Convention on Human Rights).

73. *Martorell*, Case 11.230, Inter-Am. C.H.R., Report No. 11/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 78 n.6.

74. *Id.*

behavior or nature, if a person does not have “clean hands” it is of course the state’s duty to conduct a regular proceeding against that person. But under no circumstances does that mean that a country can execute the person, and certainly not by such a perverse method as forced disappearance. That is entirely unacceptable. There are no first and second-class citizens in diplomatic protection, Your Honor. The Commission has never asked about a person’s ideology or “why?” Never. And it never will.<sup>75</sup>

Similarly, while the Inter-American Court has never explicitly referred to the Clean Hands Doctrine, it has never called into question the guilt or innocence of petitioners when deciding a reparations claims; in fact, it has ordered reparations in cases where the guilt of the victim remained unclear.<sup>76</sup> For instance, in *Neira-Alegría v. Peru*, the government argued against moral reparations for relatives of prisoners convicted of terrorism who had disappeared when the state’s armed forces attempted to squelch a massacre in the

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75. *Id.*

76. The Inter-American Court has ordered reparations, including compensation, in cases where the victims had been convicted of guerrilla and subversive activities. See *Bámaca-Velásquez v. Guatemala*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 91, ¶¶ 62-65 (Feb. 22, 2002) (stating that the family of a victim who was captured and disappeared during an armed battle between the Guatemalan army and the guerrilla movement deserved a full reparations award). In other cases where the victim had alleged subversive ties, the Inter-American Court did not initiate inquiry into their innocence or guilt, and instead addressed only the conduct of the state and whether it amounts to a human rights violation. See, e.g., *Neira Alegría v. Peru*, 1996 Inter-Am. Ct. H.R. (ser. C) No. 29, ¶ 5 (Sept. 19, 1996) (holding Peru liable for human rights violations against alleged terrorists); *Castillo-Páez v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43, ¶ 3 (Nov. 27, 1998) (awarding reparations without addressing conduct of victim); *Loayza-Tamayo v. Peru*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 47, ¶ 11 (Mar. 8, 1998) (granting compensation and ordering release of imprisoned victim); *Castillo-Petruzzi v. Peru*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 223 (May 30, 1999) (ordering payment of court costs for families of victims accused of treason); *Benavides-Ceballos v. Ecuador*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 38, ¶ 48 (June 19, 1998) (awarding reparations to the parents of a human-rights victim based on violations of the Ecuadorian government); *Durand & Ugarte v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 89, ¶ 2 (Dec. 3, 2001) (declaring that Peru must compensate for human rights violations); *Cantoral-Benavides v. Peru*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 69, ¶ 198 (Aug. 18, 2000) (finding state violations against a victim who had been accused of treason); *Barrios Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 51 (May 14, 2001) (finding human rights violations against members of an alleged terrorist group).

Peruvian prison El Fronton on June 18, 1986.<sup>77</sup> In its defense, the State argued, “the next of kin had already suffered moral damages, but . . . the damages had been inflicted on them by the victims themselves when they unlawfully took part in acts connected with terrorism, which was the reason for their arrest and untimely deaths.”<sup>78</sup> However, the Inter-American Court rejected this argument, awarding moral damages to the family of the victims.<sup>79</sup> Thus, taken as a whole, the jurisprudence emanating from the Inter-American system of human rights can be read to reject the Clean Hands Doctrine in reference to international human rights reparations law.<sup>80</sup> Yet, in practice, as discussed below, states seeking to implement reparations, even those pursuant to the Inter-American Court’s orders, confront political realities that threaten true fidelity to the legal principle that human rights violations automatically confer full entitlement to reparations.<sup>81</sup>

## II. THE PERUVIAN NATIONAL REPARATION SCHEME EXCLUDES DIRTY HANDS

Without explicit and clear limits to the Clean Hands Doctrine in international human rights law, new types of violations of fundamental rights may arise through state policy and practices that discriminate among beneficiaries of reparations programs created in response to systematic and widespread human rights violations. This situation can be seen most poignantly in a country emerging from a politically divisive context, such as a civil war or internal armed conflict—for example, where the state defeated an illegally armed

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77. See *Neira-Alegría v. Peru*, 1996 Inter-Am. Ct. H.R. (ser. C) No. 29, ¶ 21 (noting that the government deemed the suggested amount of moral damages “exorbitant”).

78. *Id.*

79. See *id.* ¶ 58 (granting an indemnity of \$20,000.00 to each of the families of the deceased and to each of the survivors).

80. See, e.g., *Bámaca-Velásquez v. Guatemala*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 106; *Neira-Alegría v. Peru*, 1996 Inter-Am. Ct. H.R. (ser. C) No. 29, ¶ 5; *Castillo-Páez v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43, ¶ 3.

81. See Laplante, *Bringing Effective Remedies Home*, *supra* note 19, at 369 (asserting that “victim compensation for unlawful acts of the State can no longer be left to political discretion, but rather is a legal duty”).

group and subsequently restricted the group's participation in peace negotiations which likely included provisions for their protection. Without negotiated protections, these former combatants rely on the good will of the state to observe existing international protections found in treaties and customary law.<sup>82</sup> However, given that in practice, the full observance of these norms remains a distant ideal, the entitlement to reparations for those who suffer from wrongful state actions has become, *de facto*, a conditional right. Indeed, the criteria of innocence and guilt—even when not proven with judicial certainty—becomes a political, non-legal basis for determining who deserves reparations, and as a consequence, who enjoys full protection of their basic human rights. This result can be seen in the national reparations policy adopted by Peru as part of its overall political transition.

#### A. THE PERUVIAN TRUTH AND RECONCILIATION COMMISSION

Peru formed its TRC in 2001 to investigate the causes, consequences and responsibilities of its bloody and prolonged war between the guerrilla Communist party group *Sendero Luminoso* (or “Shining Path”), the Túpac Amaru Revolutionary Movement (“MRTA”), the armed peasant patrols, and the Peruvian armed forces.<sup>83</sup> Initially, Shining Path sparked its violent campaign against the state in the remote rural highlands of the country, beginning what quickly degenerated into a vicious reign of terror.<sup>84</sup> At first, the governmental response included a brutal counter-insurgency war led

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82. See *Fairén-Garbi v. Honduras*, 1994 Inter-Am. Ct. H.R. (ser. D) No. 2, ¶ 90 (demonstrating the international protections for all persons who are victims of human rights violations regardless of the actions of the victims).

83. See Supreme Decree of Peru, No. 065-2001-PCM, art. 2(a), *available at* <http://www.cverdad.org.pe/ingles/lacomision/cnormas/normas01.php> (last visited Sept. 2, 2007) (creating the Truth and Reconciliation Commission to investigate human rights violations in Peru from May 1980 to November 2000).

84. See CARLOS IVAN DEGREGORI, *AYACHUCHO 1969-1979: EL SURGIMIENTO DE SENDERO LUMINOSO: DEL MOVIMIENTO POR LA GRATUIDAD DE LA ENSEÑANZA AL INICIO DE LA LUCHA ARMADA [THE EMERGENCE OF THE SHINING PATH: ON THE MOVEMENT TOWARDS GRATITUDE FOR THE TEACHINGS OF THE BEGINNING OF THE ARMED STRUGGLE]* 17 (1990); Carlos Ivan Degregori, *The Origins and Logic of Shining Path*, in *THE SHINING PATH OF PERU* 51, 51-52 (David Scott Palmer ed., 1992) (describing the creation of Shining Path by Abimael Guzman Reynoso after his expulsion from the Peruvian Communist Party).

by the military, which often confused “Andean peasants” with “terrorists,” resulting in indiscriminate killing of this population.<sup>85</sup> As administrations changed, so did the tactics for fighting the enemy. The highest number of disappearances and extrajudicial killings were associated with the government of Alan Garcia in the 1980s; while the increased incidence of unlawful detention and torture took place under draconian anti-terrorism laws, instituted by the government of Alberto Fujimori in the 1990s.<sup>86</sup>

Indeed, Fujimori’s authoritarian control continued even after the government imprisoned the majority of leaders from the illegally armed groups in 1992 and largely defeated the guerrilla movement.<sup>87</sup> A highly questioned presidential campaign led to Fujimori’s third re-election, but soon after, he fled the country after a series of corruption scandals forced him to resign.<sup>88</sup> During this significant political opening, the interim government of Valentín Paniagua established the TRC by executive decree.<sup>89</sup> The TRC concluded its two-year investigation in August 2003, at which time it presented its Final Report based on almost 17,000 private and public testimonies as well as secondary sources.<sup>90</sup> It estimated that approximately

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85. See Deborah Poole & Gerardo Rénique, *Terror and the Privatized State: A Peruvian Parable*, 85 RADICAL HIST. REV. 150, 153 (2003) (explaining that the government justified rounding up Andean bystanders because they were “natural” allies of *Sendero Luminoso*).

86. See Hortensia Munoz, *Human Rights and Social Referents: The Construction of New Sensibilities*, in SHINING AND OTHER PATHS: WAR AND SOCIETY IN PERU, 1980-1995, at 447, 451-53 (Steve J. Stern ed., 1998) (giving account of a notoriously violent suppression of a prison uprising under Garcia’s leadership); Enrique Obando, *Civil-Military Relations in Peru, 1980-1996: How to Control and Co-opt the Military (And The Consequences of Doing Do)*, in SHINING AND OTHER PATHS: WAR AND SOCIETY IN PERU, 1980-1995, at 385, 402 (Steve J. Stern ed., 1998) (explaining that Fujimori would not investigate human rights violations connected to attempts to eliminate alleged terrorists).

87. See Poole & Rénique, *supra* note 85, at 157 (describing how Fujimori expanded executive power and used military force in his “war against terrorism”).

88. See Roger Atwood, *Democratic Dictators: Authoritarian Politics in Peru from Leguía to Fujimori*, 21 SAIS REV. 155, 161, 171 (2001) (explaining that Peruvians thought of Fujimori as a dictator and forced him to resign after he was accused of bribery and illegal arms trafficking).

89. See Supreme Decree of Peru art. 1, *supra* note 83.

90. See Truth and Reconciliation Commission (Peru), Final Report, available at <http://www.cverdad.org.pe/ingles/ifinal/conclusiones.php> [hereinafter TRC Final Report]; Press Release, TRC Final Report Was Made Public on August 28th at Noon (August 2003), available at <http://www.cverdad.org.pe/ingles/informacion>

69,280 people had been killed during the war, making it one of the country's most deadly conflicts.<sup>91</sup> In the section of the Final Report addressing the issue of accountability, the TRC held the *Sendero Luminoso* responsible for fifty-four percent of the deaths reported to the TRC and the armed forces for thirty-six percent.<sup>92</sup> The TRC also found that the casualties ran along class and race lines, with three-quarters of the victims belonging to the poor, rural and indigenous population.<sup>93</sup> Indifference on the part of the powerful elite residing in urban centers contributed to the unabated violence, due to a long historical tradition of marginalization of the victim population.<sup>94</sup>

As a partial response to its findings, the TRC designed the PIR and assigned it multiple purposes, including a comprehensive response to the serious individual and community harm caused by the war as well as an affirmation of the dignity and status of the victims.<sup>95</sup> In effect, the PIR formed a central part of the TRC's proposed plan for national recovery, sustainable peace and reconciliation, promising to contribute to "democratic consolidation, the return of faith in the future and to lay the foundation of a new social pact."<sup>96</sup> In its introduction, the PIR presents the ethical, political, psychological and juridical justifications for its proposals, linking reparations to the prevention of violence and the promotion of national reconciliation.<sup>97</sup>

As a consequence of these ambitious aims, the PIR contains five components that include symbolic reparations (for example, public gestures, acts of recognition, memorials, etc.), reparations in the form of services like health and education, restitution of citizen rights, individualized economic reparations, and collective, community-wide reparations.<sup>98</sup> It also includes definitions of victims and beneficiaries that are among the most inclusive to date, including victims of forced disappearances, kidnapping, extrajudicial killing,

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91. See TRC Final Report, *supra* note 90, ¶ 2.

92. See *id.* ¶ 13.

93. See *id.* ¶¶ 6-7 (observing that "the process of violence, combined with socioeconomic gaps, highlighted the seriousness of ethno-cultural inequalities that still prevail in the country").

94. See *id.* ¶¶ 8-9.

95. PIR, *supra* note 6, at 147-48.

96. See *id.* at 139 [translation by author].

97. See *id.* at 139-43.

98. See *id.* at 159-205.

assassinations, forced displacement, arbitrary detention without due process, forced recruitment, torture, rape and people wounded, injured and killed in acts against international humanitarian law.<sup>99</sup> The families of these victims are also considered beneficiaries of the PIR.<sup>100</sup> However, despite the inclusive nature of the PIR due to TRC's intent to include all foreseeable victims, the PIR struggled with the treatment of one group: members of illegally armed groups and their families.<sup>101</sup>

#### B. THE TRUTH COMMISSION STRUGGLES WITH THE CLEAN HANDS DOCTRINE

The *Grupo sobre el Plan Integral de Reparaciones* (Integral Reparations Plan Group) ("GPIR"), responsible for designing the PIR, specifically contemplated the concept of "clean hands" during its drafting of the PIR, and presented the issue to the TRC commissioners for debate.<sup>102</sup> This discussion was prompted in part by a Working Paper entitled "*Parámetros para el Diseño de un Programa de Reparaciones en el Perú*" (Parameters for the Design of a Reparations Program in Peru) and produced by the International Center for Transitional Justice ("ICTJ") in New York and the Asociación Pro Derechos Humanos of Peru ("APRODEH").<sup>103</sup> In

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99. See *id.* at 149 (noting the TRC's effort to include recent doctrinal developments in international human rights).

100. See PIR, *supra* note 6, at 150.

101. See *id.* at 149-50 (affirming, on the one hand, that all victims of human rights violations deserve reparations regardless of the legality or morality of their personal actions, and yet asserting on the other that since members of subversive terrorist organizations rose against a democratic regime they were not to be considered victims).

102. See JULIE GUILLEROT & LISA MAGARRELL, REPARACIONES EN LA TRANSICIÓN PERUANA: MEMORIAS DE UN PROCESO INACABADO [REPARATIONS IN THE PERUVIAN TRANSITION: REPORTS OF AN UNFINISHED PROCESS] 30, 142-43 (2006) [hereinafter GUILLEROT & MAGARRELL] (explaining that the TRC formed the GPIR specifically to examine the recommendations for a comprehensive plan for reparations).

103. See CENTRO INTERNACIONAL PARA LA JUSTICIA TRANSICIONAL & ASOCIACIÓN PRO DERECHOS HUMANOS, PARÁMETROS PARA EL DISEÑO DE UN PROGRAMA DE REPARACIONES EN EL PERÚ [INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE AND THE PRO HUMAN RIGHTS ASSOCIATION, PARAMETERS FOR THE DESIGN OF A REPARATIONS PROGRAM IN PERU] 1, 15 (Working Paper, 2002) [hereinafter WORKING PAPER] (asking the TRC, the Peruvian Government, and civil society to debate the various issues described in the working paper,

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setting forth the “minimum criteria” for reparations programs and referring to international experiences and standards, the ICTJ/APRODEH Working Paper explains:

The program must satisfy the principles of non-discrimination and equality. The principle of non-discrimination prohibits prejudicial distinctions in the definition of categories of beneficiaries or the manner of reparation. The principle of equality requires treating similar cases with equality. In relation to these principles, international law has clearly disabanded with the notion that in order to receive reparations, victims of human rights violations or international humanitarian law need to have “clean hands.”<sup>104</sup>

In a later section entitled “Concept of Victims,” the ICTJ/APRODEH Working Paper goes into further discussion on the limits of the Clean Hands Doctrine.<sup>105</sup> It sets the human rights violation as the point of departure, regardless of the relationship between the victim and author of the violation.<sup>106</sup> It also argues that the definition of victim must leave out any allusion to the “previous conduct” of the injured person, and then asks:

What effect does the “clean hands” concept have in relation to reparations? Supposing a victim of a human rights violation had belonged to an illegally armed group, or had participated in subversive activities or was a member of the military who became a victim of a violation of humanitarian law while at the same time committing abuses in the name of the State, how does this conduct affect the state’s duty to repair?<sup>107</sup>

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including the “clean hands” doctrine); GUILLEROT & MAGARRELL, *supra* note 102, at 30 (noting that the TRC used the working paper as a reference point when making recommendations for reparations).

104. See WORKING PAPER, *supra* note 103, at Executive Summary 3 [translation by author] (noting that a successful reparations program should provide monetary compensation for individuals and be compatible with other methods of transitional justice, such as truth-seeking and governmental reform).

105. See *id.* at 15-16 nn.17-19 (listing several Inter-American Court decisions illustrating that the character or conduct of the victim is irrelevant to an order of reparations).

106. See *id.* at 15.

107. See *id.* at 15 n.17 [translation by author] (defining the Clean Hands

The ICTJ/APRODEH Working Paper answers its own interrogatory by explaining how relevant norms and practice dictate that the illegality or immorality of a person's conduct does not annul his or her entitlement to reparations, due in part to the non-discrimination principle that forms one of the principal pillars of human rights and humanitarian law.<sup>108</sup> The authors rely principally on the jurisprudence of the Inter-American Court of Human Rights, observing that "the Court has never suspended or modified its [reparations] determination based on the status or conduct of the victim. At the moment of determining whether the victims has the right to be repaired or not, the Court limits itself to evaluating the State's conduct and its consequences for the affected person."<sup>109</sup>

Julie Guillerot, who was a co-author of the Working Paper and later an integrant of the GPIR, and Lisa Magarell, a senior associate with the ICTJ who also was a co-author and consultant to the GPIR, discuss the TRC's dilemma in their book recounting their experience.<sup>110</sup> Guillerot and Magarell indicate that the ethical, political and legal ramifications that the TRC faced during their "intense discussion" of the exclusion of illegally armed groups amounted to one of the only major issues in the development of a reparations plan.<sup>111</sup> Some TRC commissioners demonstrated great reluctance to include "subversives" whose "horrendous crimes" were not considered justified given that they were carried out against a legitimate democratic regime.<sup>112</sup> Moreover, other commissioners realized that the inclusion of members of illegally armed groups

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Doctrine as a concept which renders a victim's prior conduct a factor to his or her rights). This factor is irrelevant in the context of human rights because they belong to every human being to the same degree. *Id.*

108. *See id.* at 15 n.18 (defining the non-discrimination principle, concerning reparations, as the application of international human rights norms without any prejudice to race, gender, ethnicity, language, ideology, religion, economic class, or other categories).

109. *See id.* at 15-16.

110. *See* GUILLEROT & MAGARRELL, *supra* note 102, at 142.

111. *See id.* (discussing at length how the issue of the exclusion of certain victims from the PIR led to intense discussion and complex efforts to reconcile the conceptually acceptable with the politically acceptable).

112. *See id.* (contrasting the differing approaches of the TRC Commissioners concerning reparations for subversives and reparations for members of the Armed Forces and the National Police, though these groups had committed comparable numbers of human rights violations).

could “sink” the whole reparation project if rejected by public opinion.<sup>113</sup> As products of their country’s own culture, history and politics, the commissioners’ concern reflected great savvy in what really amounted to a political project: guaranteeing that their final recommendations would be implemented and that political opposition could not disrupt the country’s delicate transition to peace and reconciliation.

C. RECONCILING THE POLITICAL WITH THE LEGAL:  
CONTRADICTORY APPROACH TO THE CLEAN HANDS DOCTRINE

The final text of the PIR simultaneously reflects the influence of the ICTJ/APRODEH lobbying efforts to disband the Clean Hands Doctrine and reveals the political tension between absolute legal considerations and political realities.<sup>114</sup> In principle, the TRC adopts the idea that identity of a perpetrator, and his or her relation to the victim, does not matter in the determination of reparations.<sup>115</sup> Specifically, it presents a definition of the “victim of the violation” that does not depend on the previous conduct of the injured person, using verbatim text from the ICTJ/APRODEH Working Paper on the principles of non-discrimination and equality before the law.<sup>116</sup> The TRC notes that “the Peruvian practice, as much through the adoption of national norms as through the fulfillment of reparation judgments and friendly settlements with international organs, affirms that all people who suffered a violation of their human rights can be repaired without considering the legality or morality of their personal actions.”<sup>117</sup>

Yet, in the next paragraph, the TRC notes:

Considering the nature of the violence in Peru, . . . those people who were harmed, wounded or killed during armed confrontations and belonged in those moments to terrorist,

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113. *See id.*

114. PIR, *supra* note 6, at 149-50 (rejecting the notion that victims must have “clean hands” and advocating the principle of non-discrimination). This view, however, only applied to those victim-perpetrators who suffered while fighting for the Peruvian government such as members of armed forces or police and not to members of subversive organizations.

115. *See id.* at 149.

116. *See id.* [translation by author].

117. *Id.* at 149-50 [translation by author].

subversive groups cannot be considered victims. These people took up arms against the democratic regime and thus faced legitimate and legal repression dictated through the norms of the State.<sup>118</sup>

The TRC then distinguishes that members of the Armed Forces, police, and self-defense committees who were harmed, wounded or killed during armed confrontations “will be considered victims in this scheme. These people were harmed as a consequence of the legal and legitimate act of defending the democratic order and deserve recognition and respect from the State and Society.”<sup>119</sup> It thus carves out a questionable distinction for members of the armed forces who, although complying with their official duties and being wounded or killed during acts of official service, would be treated as victims deserving reparations (as opposed to pensions, or compensation of other kind, for duty served).<sup>120</sup> Here, the TRC added to an already existing tension in Peru in which “victims of terrorism” (the armed forces) have more rights, recognition and protections than “victims of the state” (populations often labeled as terrorists).<sup>121</sup>

Yet, the TRC’s text leaves ambiguous whether members of subversive groups under other circumstances could be considered victims, and thus beneficiaries of the PIR.<sup>122</sup> On that point exactly, the text of the PIR reiterates the previously stated exclusion, although with a small but significant change: it excludes members of subversive organizations who were wounded or killed “as a *direct* result of armed confrontation, *unless the affectation resulted in a violation of their human rights.*”<sup>123</sup> Thus, in the end, the PIR, in a somewhat circuitous manner, concedes to the elimination of the Clean Hands Doctrine.<sup>124</sup> Additionally, it also includes what amounts

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118. *See id.* at 150 [translation by author].

119. *See id.* [translation by author].

120. *See id.*

121. *See* GUILLEROT & MAGARRELL, *supra* note 102, at 124, 145-46 (chronicling the Peruvian Congressional debate on the exclusion of victims of violence who were involved in subversive activity, and describing, in part, the political atmosphere at the time of that debate).

122. *See* PIR, *supra* note 6, at 153.

123. *Id.* [translation by author] (emphasis added).

124. *See* GUILLEROT & MAGARRELL, *supra* note 102, at 145-46 (describing how the tension surrounding, and sensitivity called for by, these issues led to much

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to a “safety valve” of sorts, adding that “victims who are not included in the PIR and who can claim their right to reparations reserve their right to resort to the courts.”<sup>125</sup>

The resulting compromises that favor the armed forces, even if they committed human rights abuses, at the exclusion of illegally armed groups that suffered human rights abuses at the hands of state agents, amounts to what Guillerot and Magarrell view as “an uncomfortable text that reveals the tension between a more pure vision of human rights and one that encapsulates the moral rejection of one sector of victims, that is one between the juridically correct and the politically ‘acceptable’ according to the TRC given the Peruvian context.”<sup>126</sup>

#### D. THE PERUVIAN LAW OF REPARATIONS: ADOPTING THE CLEAN HANDS DOCTRINE

Even though the TRC published its Final Report and recommendations in August 2003 with the hope that the Executive Office would immediately implement it, in reality civil society and victims-survivors have carried the burden of exerting pressure on the government to implement these suggestions.<sup>127</sup> Finally, after much lobbying and debate, the Peruvian Congress enacted a law implementing the PIR on July 29, 2005. The PIR objective is to “establish the normative framework for the Plan Integral de Reparaciones - PIR for victims of the violence that occurred between May 1980 and November 2000, in conformity with the conclusions

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complex analysis within the TRC).

125. PIR, *supra* note 6, at 153 [translation by author]; *see also* GUILLEROT & MAGARRELL, *supra* note 102, at 145-46 (discussing, in part, the political atmosphere that led to these inclusions).

126. *See* GUILLEROT & MAGARRELL, *supra* note 102, at 144 [translation by author].

127. *See* Lisa J. Laplante & Kimberly Theidon, *Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru*, 29 HUM. RTS. Q. 228, 241-42 (2007) [hereinafter Laplante & Theidon, *Truth with Consequences*] (describing the grassroots, victims-survivors movement that has been necessary to pressure the government into implementing the TRC’s recommendations). In South Africa, follow-up measures to the TRC were slow to follow its work, causing delays in awarding reparations and thus causing victim frustration. Furthermore, certain communities in Peru have rejected the TRC because of its failure to meet its promises.

and recommendations of the Final Report of the Truth and Reconciliation Commission.”<sup>128</sup> While the law incorporated the majority of the PIR’s recommendations, it created one controversial article of exclusion. Specifically, article 4 of the law reads, “members of subversive organizations are not considered victims and thus not beneficiaries of the programs enumerated in this law.”<sup>129</sup>

With respect to this exclusion, former Peruvian Congresswoman Gloria Helfer conceded that one of the most hotly contested issues during congressional debate on the law revolved around the resistance to “paying terrorists.” Helfer herself had to contemplate what political concessions were necessary in the effort to make sure the bill did not die.<sup>130</sup> Moreover, she admitted that defending the rights of all victims, including those associated with subversive groups, meant running the risk of herself being called a terrorist.<sup>131</sup> Indeed, the societal fear of being labeled a terrorist, and thus being ostracized and even imprisoned, arose out of actual historical circumstances fomented by Peruvian laws that created the crime of “apology for terrorism” in the 1990s.<sup>132</sup> Even the TRC’s twelve commissioners faced threats of prosecution for this “crime” in 2003 when they included videos of leaders of the *Sendero Luminoso* and MRTA as part of a general public hearing on perpetrators.<sup>133</sup>

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128. See PIR Law art. 1, *supra* note 8 [translation by author].

129. *Id.* art. 4.

130. See Lisa J. Laplante, *Heeding Peru’s Lesson: Paying Reparations to Detainees of Anti-Terrorism Laws*, 2 HUM. RTS. COMMENT. 88, 96-97 (2006) [hereinafter Laplante, *Heeding Peru’s Lesson*] (observing that “Peruvian society is still deeply traumatiz[ed] by the years of terrorism” and that because of this, “a program of reparations that could include compensation, and possibly release, for all people subject to the anti-terrorism laws is politically unpalatable”).

131. See *id.* at 96 (noting that opponents of the TRC attempted to undermine its authority and legitimacy by declaring that the Commission would release imprisoned terrorists and would “encourage a relapse of terrorism”).

132. See Jim Davis, *A Cautionary Tale: Examining the Use of Military Tribunals by the United States in the Aftermath of the September 11 Attacks in Light of Peru’s History of Human Rights Abuses Resulting from Similar Measures*, 31 GA. J. INT’L & COMP. L. 423, 427-31 (2003) (discussing the specific details of the Peruvian anti-terrorism legislation).

133. See Human Rights Watch, *Peru-Truth Commission Under Pressure*, Aug. 12, 2003, available at <http://hrw.org/press/2003/08/peru081203.htm> (last visited July 31, 2007) (noting that a legislator who supported Fujimori filed the complaint with the Peruvian prosecutor).

Here, Guillerot and Magarrell point out that the strong opposition against an inclusive law emanated principally from members of Congress from the Alianza Popular Revolucionaria Americana (“APRA”) political party, whose leader Alan Garcia was president from 1985-1990 and himself faced charges for human rights violations.<sup>134</sup> One of the most notable legislative debates revolved around the use of the term “victims of the internal armed conflict,” which included victims of both state agents and illegally armed groups; Garcia instead ardently defended that the term “victims of terrorism” applied only to victims of the “terrorist groups.”<sup>135</sup> Guillerot and Magarrell term this stance as “eminently auto-protectionist,” given that the TRC implicated the APRA government in the 1980s in the internal armed conflict.<sup>136</sup>

While the passage of the law was met with celebration since it at least represented a positive step toward reparations for the majority of victims, the law also created new tension due to its glaring exclusion.<sup>137</sup> The implementation of the PIR now requires mechanisms for classifying “some people who do not deserve their rights,” which amounts to not recognizing them as human, while also permitting governments to continue justifying abusive and violating acts.<sup>138</sup> In this way, the pending assignment facing Peruvian society relates to determining who is a “deserving victim” and who is not.<sup>139</sup> Having now established the *Consejo de Reparaciones* (“Council of

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134. See GUILLEROT & MAGARRELL, *supra* note 102, at 146 n.54 (characterizing the Garcia administration’s position as one of self-preservation).

135. See *id.*

136. See *id.*; see also TRC Final Report, *supra* note 90, ¶¶ 89-97 (detailing the actions of the APRA under the leadership of Alan Garcia). The TRC concluded that during this time “the armed forces acted with greater autonomy in their counter-subversive actions, without either the Executive or the Legislative branch providing them with a legal framework to do so.” *Id.* ¶ 92.

137. See Ronald Gamarra, *Human Rights, Justice and Democratic Transition: Institutional Review*, in *THE LEGACY OF TRUTH—CRIMINAL JUSTICE IN THE PERUVIAN TRANSITION* 69, 74 (Lisa Magarrell & Leonardo Filippini eds., Catherine Jagoe trans., 2006) (discussing how the PIR advances the cause of non-monetary reparations, but also does not go far enough concerning monetary reparations).

138. See GUILLEROT & MAGARRELL, *supra* note 102, at 147-48 [translation by author].

139. See *id.* (commenting that the designation “members of subversive organizations” is both overinclusive and underinclusive).

Reparations”), charged with creating the *Registro Unico* (The Registry) of victims, the State must set about identifying and certifying victims, a process that includes screening out those with alleged ties to illegally armed groups.<sup>140</sup> Yet as an administrative body, the Council of Reparations does not have the facilities, nor can it count on the resources, to carry out the type of judicial proceedings that guarantee full due process.<sup>141</sup> Thus, it faces the daunting task of devising a protocol that will permit such a determination.<sup>142</sup>

Significantly, the Council of Reparations cannot necessarily rely on previous determinations of who is, and is not, a person who has, or had, subversive ties.<sup>143</sup> Indeed, both national and international courts have found Peru’s anti-terrorism laws unconstitutional and contrary to fundamental human rights norms, putting into question the thousands of convictions declared under its provisions.<sup>144</sup> For instance, the overbroad definition of terrorism prescribed by the laws led to many arrests and convictions for non-violent acts, at times meting out punishments based only on a person’s ideology or for uncorroborated, circumstantial accusations of membership to terrorist groups.<sup>145</sup> Thus, in 1996, the same Fujimori government that created this legal regime began to release hundreds of people convicted of terrorism through a special process that determined their innocence.<sup>146</sup>

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140. See PIR Law, *supra* note 9, art. 9 (establishing the *Registro Unico*).

141. See Gamarra, *supra* note 137, at 79-80 (suggesting that the Peruvian domestic court system cannot handle the heavy caseload of human rights violation claims).

142. See *id.* at 74 (outlining the goals to be met in implementing the PIR law, including “setting up the Council for Reparations properly”).

143. See Laplante, *Heeding Peru’s Lesson*, *supra* note 130, at 88-89 (providing an example of an individual who was charged with, and acquitted of, being a part of *Sendero Luminoso* in 1986, and arrested and convicted of the same crime in 1997 based on the same evidence that led to his previous acquittal).

144. See Laplante, *Bringing Effective Remedies Home*, *supra* note 19, at 367-71 (providing an overview of the various decisions against the law); Laplante, *Heeding Peru’s Lesson*, *supra* note 130, at 92-95; see also Davis, *supra* note 132, at 432-33 (outlining the various international bodies that have issued statements condemning Peru’s human rights abuses under the anti-terrorism legislation).

145. See Laplante, *Heeding Peru’s Lesson*, *supra* note 130, at 93-94 (stating that the crimes of apology and association with terrorists gave the government broad reach to incarcerate people as, for example, when a Peruvian boy was imprisoned for unknowingly providing food to members of *Sendero Luminoso*).

146. See Davis, *supra* note 132, at 431-32 (noting that Fujimori created a

Of equal significance, it is important to consider how this registration process will impact local communities where the brunt of the political violence occurred. Harvard anthropologist Kimberly Theidon has written on local, micro-reconciliation processes used by these communities to reintegrate former members of illegally armed groups, resulting in a functioning, albeit delicate, equilibrium and co-existence.<sup>147</sup> Yet, what will happen to this achievement of local peace when state registrars begin to enter and inquire into who deserves reparations? What type of instability, turmoil and new conflict will it introduce? Worrisome is the risk of false accusations that could preclude people from reparation benefits, leading to more tension—a possibility that becomes more real when considering that under Fujimori's terrorism laws many people spent years in jail based on false accusations, sometimes made on the basis of personal vendettas alone.<sup>148</sup>

The Council of Reparations' members include two human rights activists, one indigenous leader, two retired generals, a retired policeman and a businessman.<sup>149</sup> One of the retired generals, Danilo Guevara, expressed during a public conference held soon after the formation of the Council of Reparations that "it would be offensive if [members of] Sendero Luminoso were repaired," adding that the PIR would only benefit the innocent.<sup>150</sup> After the conference, a member

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commission to address the issue of people unjustly imprisoned under the anti-terrorism legislation).

147. See Kimberly Theidon, *Justice in Transition: The Micropolitics of Reconciliation in Postwar Peru*, 50 J. CONFLICT RESOLUTION 433, 456 (2006) ("My research with communities in Ayacucho prompts me to assert that 'national reconciliation' is several steps behind the transitional justice that campesinos have elaborated and practiced in the face of the daily challenges of social life and governance at the local level where intimate enemies must live side by side.").

148. See Laplante, *Heeding Peru's Lesson*, *supra* note 130, at 91 (noting that Fujimori's anti-terrorism laws removed important due process protections, allowing people to be convicted based on the uncorroborated accusations of others).

149. See RPP Noticias, *Del Castillo: Estoy Contento con Nominación de Macher en Consejo de Reparaciones [Del Castillo: I Am Happy with the Nomination of Macher to the Reparations Counsel]*, Oct. 23, 2006, [http://www.rpp.com.pe/portada/politica/53134\\_1.php](http://www.rpp.com.pe/portada/politica/53134_1.php).

150. See Danilo Guevara, Remarks at Coloquio Internacional: Las Reparaciones a las Víctimas de la Violencia en Colombia y Peru: Retos y Perspectivas [Reparations to Victims of Violence in Colombia and Peru: Challenges and Perspectives] (Dec. 5-6, 2006) (notes on file with author).

of the Council of Reparations with a human rights background said that she sensed that Guevara and his colleagues were named to the council to guarantee stringent exclusion of any person suspected of subversive activity, thus paralyzing the process through a contentious and continuous battle on who is, and is not, a “subversive.”<sup>151</sup> With the stigma of the war still fresh, and victims often suspected of allegiance with terrorist groups, the subjectivity of this process causes great concern.<sup>152</sup>

Peru’s dilemma leaves left unanswered one important question: What will those excluded from the PIR do to demand their right to reparation if excluded? Here, one must consider that the PIR law, like the TRC’s proposed plan, contemplates a legal escape hatch that could, in the end, create a worse political situation than would have existed had illegally armed groups been included in the PIR’s administrative plan.<sup>153</sup> Specifically, article 4 of the PIR law, which excludes “subversives,” concludes that “[v]ictims who are not included in the PIR and claim to have a right to reparations retain the right to resort to the judicial venue.”<sup>154</sup> Certainly, this clause allows the government to escape accusations of altogether denying legal recourse to victims, thus outright violating international human rights law.<sup>155</sup> Indeed, a state representative directly responsible for the implementation of the PIR assumed this very position during an interview.<sup>156</sup> In responding to questions on the exclusion clause, he explained that the clause left open the judicial venue for victims excluded by virtue of their alleged links to subversion; he added that

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151. Author’s personal conversation with Council of Reparations member, Lima, Peru (Dec. 6, 2006).

152. See Laplante, *Heeding Peru’s Lesson*, *supra* note 130, at 96 (observing that opponents of the TRC accused it of pardoning imprisoned “terrorists”).

153. See Laplante & Theidon, *Truth with Consequences*, *supra* note 127, at 248 (noting that providing for reparations can be essential to meeting victims’ expectations of justice and to preventing violence from returning).

154. See PIR Law, *supra* note 8, art. 4 [translation by author].

155. See Laplante, *Bringing Effective Remedies Home*, *supra* note 19, at 362-63 (discussing the ways in which the Peruvian government has attempted to comply with its international legal obligations but noting that, “Peru provides a case study of a nation which has suddenly begun to demonstrate increased cooperation with the orders of the Inter-American Court, but continues to fail in guaranteeing effective remedies at home”).

156. Interview with Public Functionary (Dec. 18, 2006) (notes on file with author).

the excluded victims may eventually resort to the Inter-American Commission and Inter-American Court, if necessary.<sup>157</sup> In the self-assured manner of offering this solution, he appeared to not have fully contemplated the political earthquake that would result if his suggestion were actually followed. Certainly, if it seemed politically impossible to justify relatively modest administrative reparations for members of illegally armed groups, how would the public react to such individuals' ability to receive more generous reparations packages, including monetary indemnification amounting to thousands of dollars issued by the Inter-American Court?<sup>158</sup> Ironically, around the same time that this Peruvian official offered this technical solution, the Inter-American Court actually issued its judgment in favor of Peruvians suspected, and in some cases convicted, of terrorism and detained in the Peruvian Castro Castro Prison—a decision that has resulted in the polemic situation predicted above.<sup>159</sup>

#### E. THE INTER-AMERICAN COURT'S DECISION IN *CASTRO CASTRO PRISON*: CHALLENGES TO PERU'S NATIONAL REPARATION POLICY

In the midst of Peru's growing political dilemma over the exclusion of subversives from the PIR, the Inter-American Court tested Peru's attempt to reconcile its exclusive reparations policy with its legal international obligations.<sup>160</sup> Specifically, in *Castro*

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157. See Laplante, *Bringing Effective Remedies Home*, *supra* note 19, at 367 (stating that the "Liberated Innocents," who were imprisoned under the anti-terrorism laws and later vindicated, resorted to the Inter-American Court of Human Rights to seek redress of their claims after realizing that domestic remedies would be ineffective).

158. See Laplante, *Heeding Peru's Lesson*, *supra* note 130, at 96-97 (explaining that the Human Rights Committee viewed Peru's anti-terrorism legislation as giving rise to a right to a remedy regardless of the culpability of the victim, whereas the TRC saw this as politically untenable); see also Lisa J. Laplante, *Entwined Paths to Justice: The Inter-American Human Rights System and the Peruvian Truth Commission*, in *PATHS TO INTERNATIONAL JUSTICE: SOCIAL AND CULTURAL PERSPECTIVES* (Marie Dembour & Tobias Kelly eds., 2007) [hereinafter Laplante, *Entwined Paths to Justice*].

159. See *Miguel Castro Castro Prison v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 470 (Nov. 25, 2006) (ordering the Peruvian government to pay reparations to the victims of human rights abuses at the Castro Castro Prison).

160. See *id.* ¶ 415 ("The obligation to repair, regulated in all its aspects . . . by

*Castro Prison*, the court ruled in favor of reparations for survivors and families of prisoners killed during a state-led massacre meant to quell an uprising of inmates detained on charges of, and in some cases convicted of, the crime of terrorism.<sup>161</sup>

The court based its decisions on evidence that the State violated the fundamental human rights to life and physical and mental integrity.<sup>162</sup> Specifically, on May 6, 1992, state forces carried out “*Operativo Mudanza I*” (Operation Move 1) to suppress an alleged prison uprising led by people detained for terrorism, which lasted four days, although evidence indicates that the prisoners desisted from their rebellion shortly after the arrival of the state agents.<sup>163</sup> The prison massacre resulted in the death of 42 inmates, injury to 175, and cruel, inhumane and degrading treatment of some 322 others.<sup>164</sup> Forensic evidence and testimony of survivors revealed that the mortality arose out of execution-like killings.<sup>165</sup>

In the hearings on the merits, Peru assumed partial responsibility. This was due in part to then-President Alejandro Toledo’s general effort to promote the political transition and thus comply with international human rights obligations in the spirit of the TRC’s findings which included the *Castro Castro Prison* case.<sup>166</sup> Yet, despite its partial acceptance of responsibility, the State presented the argument that the acts of violence were directed toward two prison barracks “occupied... by inmates accused of crimes of terrorism linked to Peru’s communist party Sendero Luminoso” and that the

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International Law, may not be modified or ignored by the State obliged, by invoking stipulations of its domestic law.”).

161. *See id.* ¶ 210 (explaining that state officials carried out the “operative” that was the subject of this case against inmates convicted of terrorism).

162. *See id.* ¶ 197(15)-(59) (detailing the human rights abuses committed by state officials in carrying out the “operative” to transfer inmates from the Castro Castro Prison to other prisons).

163. *See id.* ¶ 197(33)-(37) (stating that on May 8-9, 1992, the inmates tried to negotiate with state officials but failed). Some inmates later tried to surrender by exiting the prison unarmed but were gunned down by state agents.

164. *See id.* ¶ 3.

165. *See id.* ¶ 243 (concluding that “the shots fired by the police agents did not seek to immobilize or persuade the inmates, but instead cause an irreparable damage t[o] the lives of said people”).

166. *See id.* ¶¶ 143, 197(6), 205, 228(m); *see also* Laplante, *Entwined Paths to Justice*, *supra* note 158 (discussing how Peru sought to comply with international norms, beginning with the transitional government).

action “had a direct purpose: attack Sendero Luminoso.”<sup>167</sup> Moreover, the State added that this action was taken “from the government’s military strategy, towards this group, under the logic of an adversary war.”<sup>168</sup>

In response, the Inter-American Court refers to Peru’s “context of systematic human rights violations, in which there were extrajudicial killings of people suspected of belonging to illegally armed groups, like Sendero Luminoso, and that said practices were realized by state agents following the orders of military and police leaders.”<sup>169</sup> The court continues by recognizing that the right to life “plays a fundamental role in the American Convention since it is essential for realizing all other rights,” and that the State has both an affirmative and negative obligation to protect the “full and free exercise of the rights of all the people under its jurisdiction.”<sup>170</sup> The court discussed the armed forces’ need to use restraint in keeping public order, balancing public security with the protection of fundamental human rights.<sup>171</sup> The court thus found in favor of the petitioners, declaring that the State violated the fundamental rights of the victims. As such, the court ordered reparations for the survivors and families.<sup>172</sup> In essence, the court rejected the Clean Hands Doctrine offered by the State as a defense.<sup>173</sup>

Yet, the State offered a contradictory defense during the reparations phase of the hearing. First, it expressed concern that it had already expended large sums of money to comply with past court judgments and friendly settlements made with the court.<sup>174</sup> Mentioning the unmanageability of the large class of victims

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167. See *Miguel Castro Castro Prison*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 160, ¶¶ 93, 230, 235.

168. See *id.* ¶ 235 [translation by author].

169. See *id.* ¶¶ 93, 230, 235, 236 [translation by author].

170. See *id.* ¶ 237 [translation by author].

171. See *id.* ¶¶ 239-240.

172. See *id.* ¶¶ 179, 252, 424, 425 (ordering \$10,000 in material damages for the families of each of the forty-one inmates killed and each survivor partially incapacitated, and \$25,000 for each survivor fully incapacitated).

173. See *id.* ¶¶ 252, 258.

174. See *id.* ¶ 412(a) (noting that Peru had already spent \$6,941,673.35 on individual judgments and \$336,923.87 on friendly settlements issued by the Inter-American Commission on Human Rights, for victims of the internal armed conflict).

contemplated in the case at issue, the State offered the possibility of instead approving a national law that would determine reparations “with criteria of equality and universality, without discrimination.”<sup>175</sup> In fact, the State appealed to the court to recognize “its intention to implement these policies and that will fix the order of reparations.”<sup>176</sup> The State’s solicitation came before the passage of the PIR law, and in retrospect presents an ironic foreshadowing of future problems for the politics of reparations in Peru.<sup>177</sup>

F. NATIONAL CONFLICT AND CONTROVERSY EMANATING FROM  
THE *CASTRO CASTRO PRISON* DECISION

The reaction to the court’s decision in *Castro Castro Prison* has resulted in a national crisis, with some surprising and serious political developments that run contrary to the overall goal of the TRC to promote political transition and reconciliation. For instance, recently re-elected President Alan Garcia reacted to the court’s decision by saying it was “indignant that a court would reach a conclusion that would harm Peru, a victim of the insanity of a terrorist sect.”<sup>178</sup> Prime Minister Jorge del Castillo publicly declared that “the judgment obligates us to pay terrorists with the money of Peruvians. The other day the daughter of a member of Sendero presented herself as innocent and deserving fifty thousand dollars because her father died. And who pays the innocents that her father killed?”<sup>179</sup> As a reaction, the Peruvian Congress initiated criminal charges against former President Toledo for having accepted partial responsibility for the State’s actions at Castro Castro Prison,

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175. See *id.* ¶ 412(b).

176. See *id.* ¶ 412(f) [translation by author].

177. See Laplante & Theidon, *Truth with Consequences*, *supra* note 127, at 245-46 (discussing the lack of funding, the slow pace, and the criticism of the reparations process in Peru).

178. See Marco Sánchez, *Alan Garcia: “Pediremos a la CIDH Precisiones a su Sentencia”* [Alan Garcia: “We Will Ask the Inter-American Court of Human Rights for Clarifications on Its Sentence”], LA REPÚBLICA, Dec. 31, 2006, available at <http://www.larepublica.com.pe/content/view/136949/483> [translation by author].

179. See Del Castillo: “Se Obliga a Todos los Peruanos a Pagarles a Terroristas” [Del Castillo: “All Peruvians are Forced to Pay Terrorists”], LA REPÚBLICA, Jan. 12, 2007, available at [http://www.larepublica.com.pe/component?option=com\\_contentant/task/view/id,138400/Itemid,0/](http://www.larepublica.com.pe/component?option=com_contentant/task/view/id,138400/Itemid,0/) [translation by author].

claiming he had thus failed to defend national interests as required by the National Constitution.<sup>180</sup> With the preeminent concern relating to the actual payment from public coffers to “terrorists,” the State promoted the freezing of Fujimori’s assets to guarantee the payment of reparations.<sup>181</sup>

In the meantime, the public campaign against the idea of terrorists receiving reparations continued through other means. Particularly, a faction of Peruvian newspapers known to be sponsored by ultra-right wing groups and militias sought to disrupt the political process spearheaded by the TRC.<sup>182</sup> One of their targets became a memorial erected, and partially supported by a local municipality, for the victims of the internal armed conflict called *El Ojo que Lloro* (the Eye that Cries) which the court in *Castro Castro Prison* calls “an important acknowledgment to the victims of the violence in Peru.”<sup>183</sup> Noting that only some of the names of prisoners were included in the monument, the court ordered that in one year’s time all names of the victims at Castro Castro Prison should be integrated into the monument.<sup>184</sup> The press and certain public figures attacked the monument, threatening to demolish it, close it down, or at least remove names of the Castro Castro prisoners from the other 25,000

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180. See Carolina Martín, *Declaran Procedente Acusación Constitucional contra Toledo [Constitutional Accusations Against Toledo are Declared Appropriate]*, LA REPÚBLICA, Jan. 23, 2007, available at [http://www.larepublica.com.pe/component/option,com\\_contentant/task,view/id,139872/Itemid,0/](http://www.larepublica.com.pe/component/option,com_contentant/task,view/id,139872/Itemid,0/).

181. See César Romero, *Juez Embarga Bienes de Fujimori por la Matanza de Castro Castro [Judge Seizes Fujimori’s Property for the Slaughter at Castro Castro]*, LA REPÚBLICA, Jan. 17, 2007, available at [http://www.larepublica.com.pe/component/option,com\\_contentant/task,view/id,139047/Itemid,0/](http://www.larepublica.com.pe/component/option,com_contentant/task,view/id,139047/Itemid,0/).

182. See Carlos Castro, *El Retorno de los Bárbaros [The Return of the Barbarians]*, LA REPÚBLICA, Jan. 7, 2007, available at [http://www.larepublica.com.pe/component/option,com\\_contentant/task,view/id,137744/Itemid,0/](http://www.larepublica.com.pe/component/option,com_contentant/task,view/id,137744/Itemid,0/).

183. *Miguel Castro Castro Prison*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 454.

184. See *id.* (ordering Peru to allow the victims’ next of kin to include an inscription with the victim’s name on the monument); Lisa Laplante, *Memory Dialogues and Symbolic Burials: Paths to Reconciliation in Peru*, REFUGEE TRANSITIONS, Autumn 2007, available at <http://www.startts.org.au/default.aspx?id=330>; see also Mary Turgi, *Silent Crisis: Global Migration in the 21st Century*, 4 PERSPECTIVES 7 (2007) (describing *El Ojo que Lloro* as a labyrinth formed by stones, each with the name of a victim, that forms a path to a large center rock that has a constant stream of water).

officially recognized victims.<sup>185</sup> Because the memorial serves as an important mourning site for families who never found their loved ones, the inclusion of the Castro Castro Prison victims on the memorial provoked much public debate on which names deserve to be included in the public monument.<sup>186</sup>

Meanwhile, some suggested that the government would seek to withdraw from the Court's contentious jurisdiction, a claim later rebuked by Garcia under the pressure of a steady national and international campaign against this possibility.<sup>187</sup> On the 18th and 19th of January 2007, the State sent its State Attorney, Luis Alberto Salgado, to meet with representatives of the court to express its rejection of the *Castro Castro Prison* decision.<sup>188</sup> Salgado expressed that "many of these victims were perpetrators, and also linked to Sendero Luminoso."<sup>189</sup> As a solution, the State offered to award these victims non-pecuniary reparations in health and education, as well as collective measures, presumably offering to integrate them into the PIR, to avoid the dilemma of paying reparations to suspected terrorists.<sup>190</sup> In the turmoil of the controversy, the former president of the TRC went on record to comment that the current government "appears each day more like that of Fujimori," suggesting that

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185. See Romina Mella, *No Es un Homenaje a los Terroristas [It is Not a Tribute to Terrorists]*, LA REPÚBLICA, Jan. 18, 2007, available at [http://www.larepublica.com.pe/component/option,com\\_contentant/task,view/id,139194/Itemid,0/](http://www.larepublica.com.pe/component/option,com_contentant/task,view/id,139194/Itemid,0/). Before the TRC began its work, the state had estimated that the conflict left 25,000 victims, based on names registered at with the Ombudsman's office; these same names are those found on the stones in the Ojo que Llorá monument.

186. See Romina Mella, *Ocrospoma Pide Retirar las 41 Piedras [Ocrospoma Asks for the Removal of 41 Stones]*, LA REPÚBLICA, Jan. 17, 2007, available at [http://www.larepublica.com.pe/index.php?option=com\\_content&task=view&id=139050&Itemid=0](http://www.larepublica.com.pe/index.php?option=com_content&task=view&id=139050&Itemid=0).

187. See *Gobierno Niega Retiro de la Corte Interamericana de Derechos Humanos [The Government Denies Withdrawal from the Inter-American Court of Human Rights]*, LA REPÚBLICA, Jan. 27, 2007, available at [http://www.larepublica.com.pe/component/option,com\\_contentant/task,view/id,140535/Itemid,0/](http://www.larepublica.com.pe/component/option,com_contentant/task,view/id,140535/Itemid,0/).

188. See *Estado Plantea Indemnizar con Salud o Educación [The State Proposes Indemnifying with Health and Education]*, CORREO, Jan. 29, 2007, available at [http://www.correoperu.com.pe/paginas\\_notas.php?nota\\_id=41820&seccion\\_notas=1](http://www.correoperu.com.pe/paginas_notas.php?nota_id=41820&seccion_notas=1) [translation by author].

189. See *id.*

190. See *id.*

current politics were running contrary to the goals of non-repetition promoted by the TRC.<sup>191</sup>

## CONCLUSION

While experts continue to debate the Clean Hands Doctrine's applicability in international law, national experiences like that of Peru reveal that its use in national reparations schemes presents serious legal and political issues. Indeed, we are left with important and pressing questions: In the aftermath of mass violence, especially conflict caused by civil strife between state agents and illegally armed groups, what are the criteria for repairing human rights violations? Does international jurisprudence provide clear enough guidance on this issue? And even if it does, do political realities permit states to reject outright the Clean Hands Doctrine?

Peru's dilemma offers important opportunities for reflection and debate, especially given the ever increasing popularity of truth commissions. Indeed, as more national reparations plans arise, the issues generated by the Clean Hands Doctrine may have greater significance. Despite clear arguments against the adoption of the Clean Hands Doctrine in cases of human rights violations, practical political considerations may force states to nevertheless apply the principle. One wonders if the chance of widespread state adoption could be used to tip the debate in favor of adopting this equitable doctrine, which arguably still does not enjoy universal acceptance. At the same time, without clear consensus—and rejection of the Clean Hands Doctrine—a new tension may arise in the national-international justice scheme. For instance, if international enforcement bodies like the Inter-American Court uphold the non-discrimination principle in human rights protections, in direct contradiction to domestic administrative programs, it could produce two classes of beneficiaries with those “terrorists” excluded from national plans at times winning more generous reparations packages. What new national tensions would this situation create? There is always the risk that if an international decision proves to be too

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191. See Juan Álvarez, *Este Gobierno se Parece Cada Vez Más al de Fujimori* [This Government Each Day Appears More and More Like that of Fujimori], LA REPÚBLICA, Jan. 15, 2007, available at [http://www.larepublica.com.pe/component?option=com\\_content/task/view/id,138426/Itemid,0/](http://www.larepublica.com.pe/component?option=com_content/task/view/id,138426/Itemid,0/).

polemic and risky in politically sensitive contexts, states like Peru may attempt to withdraw their consent to be subjected to international human rights systems, and thus leave citizens with less recourse to hold the state accountable.<sup>192</sup>

The attempt to reconcile its international human rights obligations with its political situation merits close observation of Peru's experience. Its struggle will inform the answers to some of the posed questions. One hopes that the international human rights system now enjoys enough strength to support civil society in its current local battle to make sure that all nationals enjoy their human rights, not only those who are believed to be innocent.

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192. See, e.g., Natasha Parassram Concepcion, *The Legal Implications of Trinidad & Tobago's Withdrawal From the American Convention on Human Rights*, 16 AM. U. INT'L L. REV. 847, 847 n.1, 849 nn.3-4 (2001) (analyzing Trinidad and Tobago's decision to withdraw from international human rights treaty as a reflection of its society's desire to deter violent crime).