

# Legal consequences for torture in children cases: The Gomez Paquiyauri Brothers vs Peru case

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## Abstract

The Gomez Paquiyauri Brothers case, before the Inter-American Court of Human Rights, was the first international case concerning the protection of children in the context of armed conflict where an international court stated the law concerning the duties of States towards children even in the context of war, and provided for reparations. As such it represents a landmark decision. The case arose from the illegal detention, torture and extrajudicial execution of two minors, Emilio and Rafael Gomez Paquiyauri, at the hands of Peruvian Police in 1991, under the Fujimori Administration at a time when the internal war in Peru was at its peak. Unlike most cases coming to the jurisdiction of the Inter-American Court, the case had been subject to domestic criminal investigations that had led to the convictions of two low ranking policemen. Yet a more subtle pattern of impunity lied at the root of the case. Torture had been denied by the State, and the prosecutions of low ranking policemen had intended to cover up the responsibility of those who ordered a policy of torture and executions (including the existence of secret codes for the torture and elimination of suspects of “terrorism”) during the years of the internal armed conflict in Peru. The joint work of legal and medical expertise in the litigation of the case permitted the establishment of the facts and the law, obtain-

ing an award of 740,500 dollars for the victims and a number of measures of reparation including guarantees of non-repetition and satisfaction, such as the naming of a school after the victims.

*Keywords:* torture, children, impunity, evidence, forensic expertise, legal consequences, reparation

## 1. Establishing the facts of the case

Emilio (14) and Rafael (17) Gómez Paquiyauri, left their home on the morning of 21 June 1991 never to be back again. On their way to pick up lunch from their mother’s centre of work they were stopped and taken away by Peruvian Police, in the context of an encircling operation against subversive suspects unleashed by an early morning bomb attack against Navy personnel in El Callao, Lima, Peru. 1991 had been a year in which the violence of the internal armed conflict in Peru, developing since 1980, gained particular momentum and there existed a state of emergency. The fate of the minors in the hands of the police was made public in a press conference, presenting them as “terrorists” who had been killed in an “armed confrontation”. A police report recorded in a local Police Station had fabricated details of the alleged “armed confrontation” and even produced “confiscated weapons”.

The manner of how the cover-up story of the State for the killing of both minors was unveiled had a uniqueness of its own:

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Peruvian TV cameras covering the events have captured the moment of their detention. The images showed them walking and being suddenly stopped by the police. The cameras clearly captured the face of Emilio Gomez, just as he was introduced in the boot of the police car. An hour after their arrest, the Gomez Paquiyauri brothers were left dead in a morgue with labels on their bodies stating that they were unidentified. This footage constituted key evidence that at the moment of their arrest both minors had been defenceless and that they had indeed been executed following their arrest and not, as the police had accounted, been killed in an “armed confrontation”. As the father of another victim, tortured and killed in similar circumstances the same day, denounced the crimes on national television, a scandal unfolded (see Box). This forced the State organs to ‘investigate’ the events. However, only two lower ranking non-commissioned police were found to be crimi-

nally responsible for the killings and were released after serving just a short time of their sentences. Torture had not been an issue at all in the investigations. No reparation had been given to the relatives of the victims.

The Inter-American Commission on Human Rights submitted a complaint before the Inter-American Court of Human Rights on the basis that an officer who was portrayed as sole intellectual author<sup>a</sup> had not been detained and prosecuted, and on

a) The national criminal investigations in the case only reached the immediate superior of the actual non-commissioned officers that were in the police car that took the Gomez Paquiyauri brothers on detention. During the proceedings before the Inter-American Court though, counsel for the victims proved that this had not been the making of a single officer but rather, he in his place had received orders from those who directed the operation. It was also proved that the pre-established secret codes to eliminate detainees were part of a *modus operandi* designed as an anti-subversive State policy.

#### Box

Fredy Rodriguez Pighi (27), a medical student who was in the area by coincidence on the way to his girlfriend’s house, was also detained in the same operation. His detention was also recorded by TV cameras. The detainee had no visible wounds or signs of blood from haemorrhaging and no weapon was found on him. He appeared in the images face down on the ground, spread out in the outside garden of a building, his head covered with a coat, and his body stood upon by police officers. He was taken to the boot of a police car. The vehicle left for an unknown destination and 45 minutes later the corpse of Rodriguez Pighi was left at a local hospital with multiples bullet wounds from firearms. As in the Gomez case, the police reported that he had “died in armed confrontation with the police”. The autopsy report in his case showed that the victim had died from wounds perforating the head and wounds per-

forating the right hemithorax caused by projectiles. The shots had been fired at short range, as the wounds presented a blackish and scorched halo in the entry holes of the projectiles. The doctors who received the body noted on examination of it that the blood was “fresh, shining and warm”, which indicated that he had died between five and ten minutes before his arrival at hospital. It was also established that he had been hit by the bullet “whilst he was lying face down on a hard surface”, which had prevented the complete exit of the projectiles both from the skin and from the clothes. The father of Rodriguez Pighi, himself a medical doctor, denounced this crime in a Television program which prompted that the Minister of Defence address the issue. It was because of this denunciation that a criminal investigation about the three deaths by different police patrols during that operation was initiated.<sup>1</sup>

the basis that the family had not received any reparation for the wrongs done to them. As counsel for the victims I took a different view of the key legal issues at stake in the case. I considered that the State was internationally accountable first and foremost for the illegal arrest, treatment given to the minors prior to their executions, and for their extrajudicial executions. My starting point though was to understand and establish the facts fully. I wanted to understand the context in which these executions were carried out. Were these the deeds of just some bad apples in the police or was the State responsible for a more serious type of conduct such as a policy behind these executions? I wanted to establish as fully as possible what had happened with the minors in the time that they had been retained in the hands of the police.

The mere fact of having pushed the minors alive into the narrow space of the boot of a police car was sufficient to establish a violation of Article 5 (right to humane treatment) of the American Convention. Yet, from the perspective of counsel for the victims there was a twofold public interest in a proper investigation of the facts. On the one hand, it was the right to truth of the victims: facts had to be established so that the relatives of the victims could *know* and have the facts acknowledged. On the other hand, it was the need to have the facts acknowledged *for what they were*, if one was to prevent this type of recurrent behaviour from happening again: “no, this is not casual, incidental ill-treatment; this is torture”. The type of treatment afforded to the Gomez Paquiyauri children was too common in police practice in Peru (stepping on top of the detainees, blindfolding them, shoving detainees into the boots of the police cars<sup>b</sup>) to the point that it was regarded as *normal*.

The contention on the part of Peru that

the treatment meted out to the minors (including bundling them alive into the trunk of a car “because there were no handcuffs available”) “constituted some mistreatment but not torture”, resulted in a very careful examination on the part of the Court as to whether or not this treatment constituted torture. In its demand the Commission had already argued that in the case of children, the threshold for treatment considered to be torture (*vis a vis* inhuman or degrading treatment) was lower: the severity of the infliction of pain had to be seen in relation to the young age of the victim. His/her psychological and physical vulnerability had to be taken into account.

For the representative of the victims though, the facts constituting torture in the case comprised a wider set of events. Given the particular cruelty with which the minors had been assassinated and the state in which the corpses had been later found (relatives and media described that they had been urinated on) it was hard to believe for an experienced counsel, that in the 50 minutes that both minors had been in the hands of the police, their integrity had been duly respected. My task in this respect was first of all to identify the array of practices constituting severe psychological and physical intentional suffering, which the Peruvian authorities had inflicted on the children prior to assassinating them, so as to present the case of the victims in a proper manner.

b) The practice of bundling detainees in the boot of the police car was first examined by the Court in another Peruvian case: Case of Castillo Paez v Perú. Judgment of 3 November 1997, Series C No 34 at para. 66. In the said case, the Court held that this treatment constituted inhumane treatment.

*The challenges in establishing the facts*

I had only 10 days plus a possible extension of my deadline to a few more days to put together my case. Legal cases have procedural rules with tight deadlines and it is in that context that a legal counsel has to produce evidence, expert witnesses, reports, and sound pleadings to represent a case of a victim of torture. I carried out my investigations at the same time that I worked with the documentary basis already on record in the case. The Commission had submitted hundreds of pages related to the national prosecution of the case. A key task of someone representing the victims of human rights is to bring their perspective fully before the Court. I took testimonies of all members of the family that experienced the events in different ways as witnesses. It was important to inform the Court about the impact that these events had had on their lives. The credibility of these accounts was reinforced by all possible documentary evidence in their hands and by testimonies of independent witnesses that could further corroborate the manner of how the events had unfolded. I obtained footage of the events and watched again and again the moment of detention. Assisted by an experienced photographer I obtained pictures of the footage to be able to observe details of each of the moments. The minors were forced to kneel down, they were beaten and forced face down onto the ground. A police officer stood on their backs, their faces were covered with a coat depriving them of sensory perception (which is used to disorientate the person). In this condition, they were taken to the boot of a police car where they were both shut inside and taken to a destination, which was unknown to them at that moment. From a careful reading of the different versions the policemen that had been prosecuted in the case had given, I drew a picture of what had

happened after their detentions. They had been taken to a wasteland area known as “Pampa de los Perros” (Dog’s Land) following an order from above, where they were beaten with rifle butts, interrogated and later executed. The fact that their assailants had urinated on them showed the degree of lack of respect for any human dignity in the treatment of their remains.

The autopsy reports did not record any signs of torture or mistreatment, only the cause of death by bullet wounds. In other words, the medical account of the events had completely overlooked the torture of both minors. Moreover, at the time of the events, despite being a Party to the Inter-American Convention to Prevent and Punish Torture,<sup>c</sup> and the United Nations Convention Against Torture (ratified on 7 July 1988), Peru had not typified torture as a crime within its domestic legal system. This lack of criminalisation was per se a violation of the American Convention. Despite this, the investigation of the violence both minors had endured prior to their deaths could have well be done under less specific provisions of the criminal code such as bodily and mental harm.

The pictures taken by the relatives of the victims of the faces of the two boys and hands of one of them, as they found them in the morgue, served as a basis for my re-assessing the information provided in the

c) Peru became a party to the Inter-American Convention to Prevent and Punish Torture on the 27 of February 1990, prior to the Gomez Paquiyauri’s case. Article 6 of said instrument establishes: [...] The State Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature. The State Parties likewise shall take effective measure to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

autopsies. One of the thumbs of the older boy was almost severed from the hand. The colour of the skin next to it was black as though it had been burnt. What could have been the cause of this? Had it been caused by burning with a naked flame? What type of violence is required to take off a thumb in the manner shown in the picture? Investigating acts of torture requires the representative to go beyond stereotypical ideas of torture that identify it as a practice that takes place in a “chamber” and with methods such as giving electric shocks, burning with cigarettes or using other quasi-medieval types of instruments. Can someone be “tortured” by gunshots?

## 2. The Istanbul Protocol

Nowadays, the legal representative concerned with these types of cases has at hand the accumulated knowledge of professionals from different fields of expertise who have been working for the rehabilitation of survivors of torture for several decades, and *he or she should use it*. The Istanbul Protocol: *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* expressly recognises gunshots as a possible form of torture.<sup>2</sup>

## 3. Working with experts

I felt I was on the right track. Yet establishing the truth required working with other experts in the field. In particular, I urgently needed to discuss the case with Forensic Pathologists and with medical experts working in the field of rehabilitation for torture. As I observed the disfigured faces of the Gomez Paquiyauri brothers in the pictures, I needed to establish whether what I saw corresponded to the damage the bullet wounds causing their deaths only: I needed to know whether it was possible (upon

observation of the material), to see any evidence of additional harm consistent with violence by third persons. Legal knowledge did not suffice. I needed medical knowledge. I urgently also needed to get expertise from the medical and psychological point of view to establish what would have been for a child to experience what both minors experienced prior to their deaths. Logically, we can imagine. But we needed to conceptualise and to scientifically explain for example, why would being shot in the boot of a car cause on a child a different type of psychological harm than on an adult. Two relatives of the victims were themselves children when confronted with the images of their siblings dead. The type of reactions (the 8 year brother suddenly felt pain in his legs, had recurrent nightmares etc.) both had, needed to be subjected to a psychological expert examination. I considered that the relatives had also been victimised by these facts: witnessing torture inflicted on another person has been, after all, identified as a form of torture in itself in the Istanbul Protocol.

*Gathering expert views as written evidence and as oral evidence: the role of each type of evidence*

### i. Written evidence

As counsel for the victims in this case I sought out three independent views of forensic pathologists with wide experience in investigating torture. In putting questions before them I worked with the hypothesis that this was the case of a defenceless minor, who was immobilised in the hands of his captors, and who being in that state, had received gunshots in the hands. Such a wound had not caused his death, nor was it intended to do so. Such a wound had only been inflicted for the purpose of causing suffering in the context of a possible interrogation. In ad-

dition, a second question was: were the injuries and bruises shown in the faces of the brothers, the consequence of bullet wounds only, or was there any evidence in the pictures consistent with the violent acts of third persons that were not the cause of death? An important lesson for those intending to represent victims in international cases is to remember that although *prima facie*, a brief autopsy report that does not register any information about torture seems to deny evidence of torture in a case, rather than being proof that torture did not take place, may well be evidence of the contrary. The first issue addressed by the forensic pathologists I approached therefore was whether or not the autopsy reports satisfied international standards in the investigation of alleged extrajudicial executions and torture. It was important, therefore, to establish *what information was lacking* in those reports.

The independent Medical and Legal Report from the Department of Forensic Pathology of the Basque Institute of Legal Medicine, sought by counsel for the victims and prepared by Dr. Rafael Alcaraz and Dr. Benito Morentín, noted that a number of tests that should have been conducted in compliance with the autopsy protocols had not been carried out. In this report, the experts Dr. Rafael Alcaraz and Dr. Benito Morentín, noted in respect of the autopsy protocols regarding Emilio and Rafael Gómez Paquiyauri that they were conducted in a superficial manner (succinct or brief). It contains no tests or photographic material and that the findings referred exclusively to the injuries caused by a firearm.<sup>3</sup>

The report provided by these forensic pathologists was complemented by other expert views concerning psychological and physical torture in the case based on interviews with the family, their affidavits, photographs of the moment of the detention, and

video footage of the police operation and the detention of the minors. Expert views of Dr. Edith Montgomery, specialist on Research related to Children and Torture from the Rehabilitation Centre for Torture Victims based in Copenhagen, as well as expert affidavits from Dr. Bent Sorensen (former Expert of the UN Committee Against Torture) and Dr. Inge Genefke, leading medical expert on torture and its effects, all submitted by counsel for the victims, added further evidence of the commission of torture in the case.

The following are some of the aspects to take into account (from the perspective of the legal representative) when working with experts:

- Contacting experts with relevant experience: If one is trying to ascertain effects of *falanga* beatings, then find an expert with experience on this type of torture. In this case I needed experts with as much experience as possible on Forensic Pathology (extrajudicial executions and torture) and Medical Experts with good experience working in the field of children as victims of torture.
- If possible find an expert that can assess the evidence in the native language. Although use of interpreters and translations are common in the representations of cases, highly technical medical reports or autopsy protocols may not contain easy language to translate and important information can be lost in the translation. In this case the Forensic Experts I contacted could examine all evidence in the native language.
- An informal discussion of the case with the expert can provide a starting point to quickly assess whether the expert can address the question the legal representative is posing or not. The expert will immediately let you know what he/she

needs to see. He/she may reassure you on some lines of argumentation or may challenge an hypothesis you took for certain. Identifying clearly the expertise that is required, providing a succinct background of the case with clear questions to the expert is a *sine qua non* on this first contact.

- Once an Expert has agreed to work on a case, the legal representative must provide all necessary material for the Expert to have a sound understanding of all issues relevant to his expertise. This includes providing the position of the other parties in the case or relevant evidence that other parties may have submitted. It is important that in the expert report, all the material that was made available to him/her is mentioned. It is also important that counsel for the victims clearly guides the expert as to the format the written report must have. Different courts have different styles in their working practice. In my experience a good report will always have a good structure. It will indicate what specific points it will address and it will state what it needs to state under each question or aspect addressed.

ii. Corroborating expert views and assisting to present highly technical language into a narrative accessible to non-experts:  
oral evidence

The written expert reports I obtained were extremely important to support my line of argumentation. Why did I consider it necessary to bring additional expertise directly before the Court, in Costa Rica? A hearing has the purpose of putting before a court the key aspects of a controversy. One can present thousands of pieces of evidence during the written proceedings yet the key points can be lost in the midst of this evidence. It is crucial to convey during the hearing the

crux of the legal issues the court will have to decide upon and to assist the court with the answers to these legal questions. Bringing experts before the court is crucial in that sense, not only to centre the case on the key aspects that are subject to a judgment, but to assist the court in establishing facts. Oral evidence of an expert allows the judge to ask questions, gives the opportunity to the other party to ask questions and in this manner it serves the purpose to enlighten the subject and to corroborate earlier expert reports submitted. I was very privileged to work with very experienced experts during the hearing in the Gomez Paquiyauri case, Dr. Inge Genefke and Dr. Hans Petter Hougen. I wish to make the following comments about their participation as experts in the case. Besides assisting to establish that the treatment both Gomez Paquiyauri brothers underwent amounted to torture, Dr. Genefke's role was extremely important to explain in which way the relatives of the children were secondary victims of torture. She interviewed each of the relatives and studied all the material (including videos, photographic material etc) very carefully. She brought with her an experience of many decades of treating survivors of torture including her experience as having being part of a Panel of Experts sitting on the United Nations Compensation Commission (UNCC) for violations of international law including torture, in the context of the Iraqi invasion of Kuwait. Among other things, this panel acknowledged that damage occasioned during periods of armed conflict usually has serious psychological and physical dimensions and that being forced to witness the torture of others, particularly a child, spouse or parent, is torture in itself.<sup>d</sup>

Not only was her expert knowledge in matters relevant to the substantive issues of the case of great value, but her practical knowledge rehabilitating survivors of tor-

ture was invaluable concerning procedural aspects during the hearing. For example, she pointed out to me that it was important to have medical support at hand for the relatives during the actual hearing. As the Tribunal does not have a Victim Support Unit and victims do not have resources to bring additional privately gathered support, this was an important lesson I learnt as representative. Indeed, Dr. Genefke was right. The mother of the victims had a break down during her cross-examination and I was glad Dr. Genefke had foreseen this possibility and was allowed to assist the victim as an emergency measure. For my next cases in the future I made sure I had, additional to my expert witnesses, professional psychological support for the victims available during the hearing in case the proceedings themselves brought up a need for professional help.

In what concerns the expertise of Dr. Hougen I regard that his input as expert was of particular importance because of the following reasons:

- i) he explained in language accessible to the court a very difficult set of forensic findings based on the examination of the evidence and aided by the graphic material he examined, projected on a screen, which made a big difference from just reading a written report
- ii) his style was clear and to the point
- iii) he answered the questions of the Court in an equally clear manner clarifying any point that remained obscure

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d) United Nations Compensation Commission, Expert Report on Mental Pain and Anguish (Prepared for the United Nations Compensation Commission, 14, March 1993, Report of the Panel of Experts Appointed to Assist the United Nations Compensation Commission in Matters Concerning Compensation for Mental Pain and Anguish, reproduced in, ILR 109, 42-447, p. 440.

- iv) he absolved new questions I put before him based on evidence I had not had in my possession at the time of my original pleadings (assessing evidence consistent with blows with gun butts in the clothing of the victims)
- v) he was very consistent as expert witness, using the right degree of assertiveness in his way to answer questions put forward by the representative of State in the case.

I believe that an important point in working with expert witnesses in these type of oral proceedings is to familiarise as much as possible the expert with the procedure itself he/she will participate in (explaining what will happen exactly, what are the rules, how many judges will be present, and the formalities about their presentation) as well as ensuring the expert is clear about the time he/she has to present the information and the manner (whether it will be through guided questions or through his/her own sole presentation).

iii. The facts as they emerged  
Based on the joint effort of experts and legal counsel to establish the facts of the case, the following picture emerged.

The deprivation of the freedom of both minors took place under circumstances of extreme violence: their apprehension by force and their summary execution by the impact of bullets when they were in a state of complete defencelessness. The Inter-American Court of Human Rights stated in the Villagrán and Others Case that it is reasonable to infer the extreme aggressiveness of the treatment received by persons placed in that situation. In the *cas d'espèce* it had been likewise demonstrated that in the space of about 50 minutes comprising the interval between their arrest and their summary execution Emilio and Rafael were isolated

from the rest of the world in the hands of their captors.

As this Court had asserted on previous occasions “isolation from the outside world produces in any person moral suffering and psychological apprehension, placing that person in a position of particular vulnerability and increasing the danger of being treated with aggressive and arbitrary behaviour [...]” that connection the Court recognised the severe effects that lack of the ability to communicate has on all persons deprived of their freedom.<sup>4</sup> The lack of communication per se of Emilio and Rafael was a source of severe anxiety and extreme psychological and moral suffering for both of them. It is reasonable to infer that both were therefore aware that their lives under those circumstances were in grave danger.<sup>5</sup>

It was submitted by counsel of the victims that in the case of minors the denial of communication per se constitutes torture. It was demonstrated that the minors were arrested, made to kneel and a police officer forced them to the ground. He would then stand on them and jump on them. Their faces were then covered so that they were disorientated from their surroundings whilst this violence would continue, perpetrated by a large group of police officers surrounding them. Thus, they were to be dragged by the hair to the boot of a vehicle where they were both to be shut in without ventilation and in cramped surroundings for about 15 minutes. Thereupon the boot was to be opened so that they could be beaten with the butts of rifles by the police officers who victimised them. They had been taken to a desolate location, Pampa de los Perros (Dogs’ Land). During the space of time when they were taken out of the boot and executed, they were interrogated at the same time as they were tortured. As the opinion of the expert Dr. Montgomery asserted:

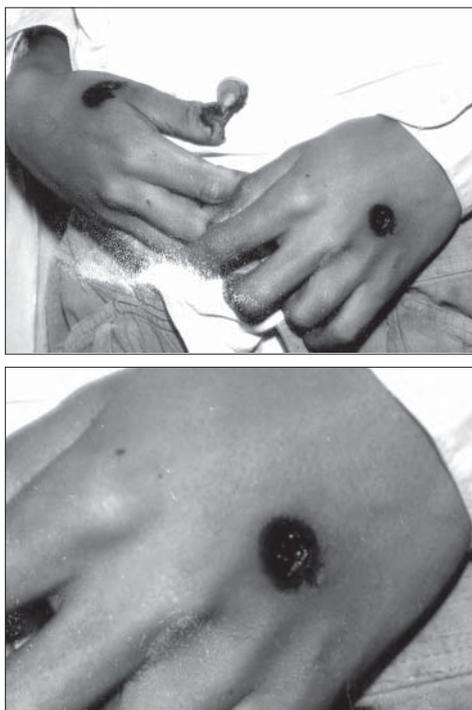
Torture methods can be divided into physical and psychological methods, but in practice it is usually a combination of both. Torture methods that threaten destruction of the body and its functions, or death, are assumed to provoke a maximum degree of fear and horror, and thus to be the most traumatic. In the case of children the threshold of what may be considered torture or serious infliction of pain is lower than as an adult due to children’s more vulnerable condition and their limited ability to make sense of what is happening to them. [...]

The pictures of Emilio and Rafael testify to the physical maltreatment and torture they had suffered prior to their death. In addition to the physical pain inflicted on them, they have been confronted with severe threats to their life and integrity and must have gone through a period with a maximum degree of fear and horror prior to their death. What they have been exposed to must be considered physical as well as psychological torture.<sup>6</sup>

The expert opinion of the Department of Forensic Pathology of the Basque Institute of Legal Medicine showed that the corpses of the victims had traumatic corporal lesions that did not appear to be reflected in the autopsy report and that were not the effect of the bullet wounds that caused their deaths. Moreover, in the same expert statement it was established that there were serious deficiencies regarding the autopsy protocols of both minors with no account of why they did not take notice of the injuries occasioned in the victims by the blows with gun butts and possible fractures of bones and bruising caused by other acts of aggression such as the fact that fully grown police officers had been standing on the backs of both of them. Thus, from observation of the photograph of Emilio’s face, the experts have noticed grazes in the middle part of the face that were consistent with the use of violence by a third party. In the case of Rafael it was noted that the ecchymosis of

the upper lid of the right eye was consistent with a direct traumatism independent of the gunshot wounds since in that area there can be detected a certain amount of inflammation on the orbital edge of the exterior of the eye. Likewise, the experts noted in the case of Rafael a series of lesions in the area of the nose, in the area of the right malar and in the area between the lower lip and the chin, as well as in the area of the chin itself, which from their location in different parts would indicate that they had not been caused by the mere falling of the body as a result of death but by the violence of third parties.

Furthermore, special mention needs to be made of the lesions on Rafael's hands. The savage nature of these suggested severe, terrible suffering, which Rafael experienced before his death and which it is reasonable to assume that his little brother had to witness. The said lesions were caused by gunshots from a distance of one centimetre, which demonstrates also the degree of defencelessness as regards the victim and the degree of violence as regards the agent of the State. From the photograph of the hands it could be appreciated that there could have been two or three shots, one of which would have destroyed the thumb (Figure 1). The said shots were fired when the youth was still alive, in a situation of defencelessness and completely unable to move. The expert examination conducted also indicates that these injuries to the hands were independent of the bullet wounds that caused his death. In that connection it was ruled out that these wounds could have been caused by the same bullet that hit the victim in the head (assuming he had been executed with his hands on the nape of his neck). This is because it would have been impossible for two or three bullet wounds to appear in the hands since, upon the impact of the first bullet, the hand would have fallen away.



**Figure 1.** Detail of the hands of one of the Gomez Paquiyaui Brothers.



**Figure 2.** Shows an example of how a gun shot at a distance of 1 cm with a 9mm caliber pistol using armoured ammunition, looks like. See the similarity. [Taken from the Expert Report of Dr. Benito Moretin and Dr. Rafael Alcaraz, Department of Forensic Pathology of the Basque Institute of Legal Medicine, in the case.]

Even if it were assumed that there were several killers who fired at the same time, the experience of more than 20 years of carrying out autopsy protocols in cases of this type of violent death on the part of one of the most prominent experts in this field in Spain, Dr. Rafael Alcaraz, indicated that even in the case of simultaneous shots, the bullets would not have been able to impact exactly at the same time with the hand falling away as soon as the first bullet was hitting it.

Therefore, such dramatic lesions that could be observed on Rafael's hands served no other purpose than to cause him severe suffering imposed with intent, in the context of the interrogation to which he was submitted prior to his death. The mouths of the boys were full of earth and their trousers full of holes as if they had been beaten with rifle butts as the video records showed. And the police had urinated on them, as it had been established from the testimonies of all witnesses involved.

#### **4. The holding of the Inter-American Court concerning Torture**

The Court handed its judgment on July 8, 2004.<sup>7</sup> In what concerns the prohibition of torture the most important points the Court held were:

##### *Direct victims*

i) Cases in which the victims of human rights are children are especially grave, as their rights are reflected not only in the American Convention, but also in numerous international instruments, broadly accepted by the international community – notably in the United Nations' Convention on the Rights of the Child that “establish the duty of the State to adopt special protection and assistance measures in favour of children under their jurisdiction.” In the case in

question these violations gave rise to Aggravate State responsibility.

- ii) The fact that the alleged victims were children requires applying the highest standard in determining the seriousness of actions that violate their right to humane treatment.
- iii) The Court held that the treatment given to the Gomez Paquiyauri brothers amounted to torture. The treatment consisted of an array of events including: “during their detention and before their death, [the victims] received physical and psychological maltreatment that consisted of: being thrown on the ground, kicked, a policemen stood on their backs and other policemen covered their head. They were also beaten with shotgun butts and subsequently murdered by gunshots to the head, thorax and other parts of the body, with evidence of more injuries and bullet wounds than would have sufficed to cause their death, if that had been the only intention of the agents of the Peruvian National Police”.
- iv) In situations of massive human rights violations, the systematic use of torture has as its aim the intimidation of entire populations<sup>7</sup>
- v) Torture is “strictly forbidden by international law”; a prohibition that is today “absolute and non-derogable”. Not even in the most extreme situation such as war, threat of war, the “fight against terrorism”, state of siege or states of emergency, political instability, or any other emergency or national calamity is torture permissible.<sup>7</sup>
- vi) An international juridical system of absolute prohibition of all forms of torture, both physical and psychological, has been established, and it is today part of the sphere of international jus cogens.<sup>7</sup>

*Relatives*

Following the principle already enunciated in the Villagrán Morales et al in respect of the recognition of relatives of victims, as victims in their own right in specific cases, the Court also recognised in the Gómez Paquiyauri Brothers case that the immediate relatives of the two victimised children had been victims of inhuman and degrading treatment in their own right under the circumstances of the case.

*Impunity*

As a legal counsel in the case I had succeeded to demonstrate that the victimisation of the Gomez Paquiyauri brothers had not been a case of “an excess” by two bad policemen. They had been tortured and murdered in the context of a round-up operation directed by the highest echelons of the police. The policemen who victimised the minors were following orders. When one of the policemen involved was asked why he did not report the deaths, he said, “out of loyalty to my superiors” and that these officers had offered him many things including the fact that the case would pass to the military jurisdiction “and that there it was completely different”. Different patrol cars that victimised detainees at different times the same day had followed the same modus operandi. The orders received came directly from the headquarters. The order not to take the victims to detention but to Dog’s Land, to be executed came by police radio using a pre-established secret code (DX hundred nine) to carry out the executions of detainees. Orders would be followed up. Superiors would ask over the radio whether the order had been carried out or not with the code “twenty one twelve”. The operator would reply “twenty one”. The reply in code meant “yes”.

Proof that torture and the elimination of

detainees within the framework of this operation was part of the Police plan to combat what they considered to be terrorist attacks, was demonstrated by the fact that all those detained under this operation were executed in similar circumstances by personnel of different patrol-cars in different places, their bodies then left in a hospital as if “unidentified” (marked NN), arguing similar alibis, that they had died in an armed confrontation with the police.

Proof also that these arbitrary detentions, torture and summary executions were carried out following superior orders as part of the operation was noted by the Peruvian court itself that investigated the Gomez Paquiyauri’s and Rodriguez Pighi’s assassinations, which affirmed:

[...] the conclusion is reached that the criminal actions carried out by the two police units are closely related; it is proved that the matter relates to a decision taken beforehand [...], to execute that day subversives who were arrested, as reprisals against terrorist actions, which had broken out again; and this is explained by the help they received in order to produce fake alibis, in the reports they presented, even accompanying weapons of war. It also explains the radio communications received in code by the operators of both police vehicles, [...] it explains the rapidity with which they operated and why in the La Perla police station no one asked for an account of or even at least noticed the disappearance of the detainees [...]

The participation of the superior officers was corroborated further by the facts, evidence that might have compromised them, such as the tapes where all the orders given via the Patrol Radio from the headquarters, disappeared that day. In addition, the codes that the police used were changed straight away. This could not have been the work of a subordinate or a middle-ranking official. Moreover, the statements of the non-com-

missioned officers denouncing the high command was consistent with the fact that a dispute over jurisdiction was raised for the case to be heard in the military jurisdiction. Again, this was instigated at the highest levels of the police force.

It was therefore established that the Peruvian police effectively operated under the criteria in the context of Peru's internal armed conflict, that the best subversive was a dead one. The directive that the security forces applied was to eliminate the alleged subversive and not allow him to get into the hands of the judicial authorities.

As counsel for the victims I had been able to trace one of the low ranking policemen that had been prosecuted for the crimes committed against the minors. The Inter-American Commission had presented this witness before the Court and cross-examination of this participant of the events had given a further source of evidence and information in order to establish the facts. The facts of the case constituted indeed "a typical schema of impunity", in accordance with which,

when events of this nature are unearthed and there is a lot of public and judicial pressure, amongst other factors, military or police institutions "hand over" in some way lower ranking officers, with the promise of offering them legal counsel, safety in the prison environment, help for their families, measures to obtain benefits for them in prison and, possibly a return to the force once they have been released. In exchange for all this, the lower ranking officers promise not to denounce their superior officers who, as in this case, usually remain immune from punishment.<sup>e</sup>

This was fully accepted by the Court, who stressed the duty of the state to use all the legal means at its disposal to combat this type of situation, since impunity fosters chronic recidivism of human rights viola-

tions and total defencelessness of victims and their relatives.

### **5. Legal consequences: the Implementation of the Court's ruling**

Among the legal consequences that the Court established was a compensation award of \$ 740,500 dollars in total for the relatives of the victims. Whilst the Court awarded \$240,500 for pecuniary damages, it was the award for moral damages (\$5,000) that reflected more evidently the Court's view of the gravity of the violations committed by the State of Peru in the said case. The Court also ordered the acknowledgment of responsibility by the State of Peru before the relatives of the victims in a public ceremony, the publication of proven facts of the judgment in a newspaper of national circulation, the investigation of the events and prosecution of all the perpetrators of the crimes (including the intellectual authors), and the naming of a school after the victims in the locality where they lived. Up to the point that this author continued with the representation of victims in this case, the State of Peru had complied with the publication of the relevant part of the said judgment, with the ceremony acknowledging the truth, with the payment of the full amount ordered by the Court to the victims and with the naming of a school after the name of the victims.

<sup>e</sup>) Demanda de la Comisión Inter-Americana de Derechos Humanos ante la Corte Inter-Americana de Derechos Humanos en el Caso de Emilio Moisés Gómez Paquiyauri y Rafael Samuel Gómez Paquiyauri (11.016) contra la República del Perú, 5 de febrero de 2002, at para. 75. On file with the author. Translation by Barry Cheetham and revised by the author.

*Notes*

1. Tinta MF. The landmark rulings of the Inter-American Court of Human Rights on the rights of the child. Leiden: Martinus Nijhoff, 2008:58-172.
2. The Istanbul Protocol: Manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment. United Nations, Office of the High Commissioner for Human Rights, Professional Training Series, No. 8, November 2001.
3. Tinta MF. The landmark rulings of the Inter-American Court of Human Rights on the rights of the child. Leiden: Martinus Nijhoff, 2008:58-172.
4. Rosero CS. Sentencia de 12 de noviembre de 1997. Serie C No 35, para. 90; Caso Villagrán Morales et al. Sentencia de 19 Noviembre 1999. Serie C No. 63, para 164.
5. Caso Villagrán Morales y Otros. Sentencia de 19 de Noviembre 1999. Serie C No. 63, para 163.
6. Montgomery E, (Anexo 58 del memorial presentado por la parte agraviada, 2002).
7. Int-Am. Ct. H.R., Series C: Decisions and Judgments No. 110, case of the Gómez Paquiyauri Brothers vs Peru, Judgment of July 8, 2004.