

Relevant aspects of the recent jurisprudence of the Inter-American System of Human Rights on issue of reparations for torture¹

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There is thirst for justice in areas throughout the American Continent. It is experienced by peoples who are self-aware and possess the inalienable right to procure material and spiritual wellness for themselves. Our Commission, which will obey the purpose of protecting and defending the rights that constitute the human dignity, cannot be destined to fail as if it were the creature of dreamers because it finds its reason for being in the best aspirations of the spirit of the Americas.

–*Romulo Gallegos*, First President of the Inter-American Commission on Human Rights, October 13, 1960.

I. General Remarks on the work of the Inter-American Commission on Human Rights

A. Antecedents

The Inter-American Commission of Human Rights (IACHR) formally came into being when the Ministers of Foreign Affairs of the States members of the Organization of American States (OAS) –gathered in Santiago de Chile in the Fifth Meeting of Consultation celebrated from August 12 to 18 of 1959– decided to create a seven members body entrusted to promote the respect for the Human Rights.³

In 1961, the IACHR began a series of visits to several countries for on-site observations of the human rights situation. Since then, the IACHR has made more than 106 visits to the Organization’s member states. Based in part on these on-site investigations, to date the Commission has published 95 country reports and thematic reports. In 1965, the IACHR was expressly authorized to examine complaints or petitions related to specific cases of human rights violations.

Through more than a half century of existence, the IACHR has been “the engine of the Inter-American System.”⁴ its decisions and recommendations, when carried out by the States, are an effective tool by which the States strengthen their mechanisms to protect and promote human rights. In the 2009 the IACHR, commemorated its 50th anniversary; the American Convention on Human Rights (“Pact of San Jose”), the normative backbone of the Inter-American System, meets

¹ This paper is an adaptation of the presentation delivered by Ma. Claudia Pulido during one of the panels of the Expert Meeting: “The Right to Reparation for Torture: the Role of African Human Rights Mechanisms”. This event took place on Kololi, Gambia on April 5-6, 2013.

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³OAS, Minutes of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, document available at: <http://www.oas.org/CONSEJO/SP/RC/Actas/Acta%205.pdf>.

⁴ Tara J. Melish, The Inter-American Commission on Human Rights Defending Social Rights Through Case-Based Petitions, in *Social Rights Jurisprudence Emerging Trends in International and Comparative Law* 339 (Malcolm Langford ed. 2008).

its 40th anniversary;⁵ and the Inter-American Court of Human Rights, the final and definitive interpreter of the American Convention, counts thirty years since its formal inauguration on September 3, 1979.

The IACHR consists of seven members who carry out their functions independently, without representing any particular country. All the members serve as country and thematic Rapporteurs⁶. Its members are elected by the General Assembly of the OAS for a period of four years and may be re-elected only once. The IACHR meets in regular and special sessions several times a year. The Executive Secretariat carries out the tasks delegated to it by the IACHR and provides the Commission with legal and administrative support in its pursuit of its functions.

The IACHR is an autonomous and principal organ of the Organization of American States in charge of the protection and promotion of human rights in the Americas. In essence, its fundamental function of the IACHR is to ensure the compliance of all members States of the OAS with the human rights norms and standards set forth by the organs of Inter-American System. These are contained mainly in the following instruments: the Charter of the OAS (1948), American Declaration on the Rights and Duties of Man (1948), American Convention on Human Rights (July 18, 1978)⁷, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (November 16, 1999), Protocol to the American Convention on Human Rights to Abolish the Death Penalty (August 28, 1991), Inter-American Convention to Prevent and Punish Torture (February 28, 1987), Inter-American Convention on Forced Disappearance of Persons (March 28, 1996), Inter-American Convention on the Prevention, Punishment and eradication of Violence Against Women "Convention of Belem Do Para" (March 5, 1995) and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities (September 14, 2001).

The American Convention on Human Rights also created the Inter-American Court of Human Rights and established the functions and procedures of the Court and of the Commission. In addition to examining complaints of violations of the American Convention committed by the

⁵ It was adopted at the Inter-American Specialized Conference on Human Rights celebrated in San José, Costa Rica on November 22, 1969.

⁶ The current composition of the IACHR is as follows: José de Jesús Orozco (México) President and Rapporteur for human rights defenders; Tracy Robinson (Jamaica) First Vice President and Rapporteur for women's Rights; Rosa Maria Ortiz (Paraguay) Second Vice President and Rapporteur for children's rights; Felipe Gonzalez (Chile) Member and Rapporteur for Migrant workers and their families; Rodrigo Escobar Gil (Colombia) Member and Rapporteur for Persons Deprived of Liberty; Rose-Marie Antoine (St. Lucia/Trinidad & Tobago) Member and Rapporteur for afrodescendants and against racial discrimination; Dinah Shelton (United States) Member and Rapporteur for Indigenous Peoples. The IACHR has also designated Commissioner Tracy Robinson as the head of a Unit on the rights of LGTBI people and communities, and the Commissioner Rose-Marie Antoine as the head of a Unit on Economic, Social and Cultural Rights. Moreover, the Inter-American Commission has an Special Rapporteur on the Freedom of Expression, this is an independent experts who is not a member of the Commission. The current Rapporteur on Torture is Catalina Botero (Colombia).

⁷The American Convention on Human Rights was adopted in 1969 and came into force in 1978. As of December 2012, a total of 24 member states, out of the 35 member States of the OAS were parties to the Convention: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. The Bolivarian Republic of Venezuela announced its decision to denounce the American Convention on Human Rights on September 10, 2012. Under Article 78 of that treaty, that denunciation shall take effect one year after notice of it was served to the OAS Secretary General.

instrument's states parties, the IACHR has competence, in accordance with the OAS Charter and with the Commission's Statute, to consider alleged violations of the American Declaration by OAS member states that are not yet parties to the American Convention

Traditionally, the Inter-American Commission on Human Rights has been the heart of the Inter-American System due to two main reasons: first, because of its prominent and historical role as a monitoring body, discharging for many decades its *promotional* mandate; and second, because of its increasing work as a quasi-judicial institution discharging its *contentious* mandate of receiving and deciding individual complaints. The latter function has become during the last two decades the main role of the Inter-American Commission. This shift in functions is the consequence of the transition from military regimes to democratically elected governments in the region, the evolution of the system of petitions, the possibility of addressing gross and systematic violations of human rights through the litigation,⁸ and the growing human rights culture and knowledge in the region. Because of these factors, the processing of individual complaints is today the most relevant tool of the IACHR in protecting the human rights of hundreds of victims in the Americas.

Its decisions on the imperative of nullifying the effects of laws that grant amnesty for egregious violations of human rights committed by dictatorships and authoritarian governments, its decisions on matters related to elections and freedom of expression, and its recommendations on the participation of women and indigenous peoples, are just some examples of the importance of the voice of the IACHR, which has reverberated in its 50-year history while monitoring countries under authoritarian regimes, smoothing the transitions to democratic government and helping in the process of consolidating democracy. Through recommendations addressing structural problems that prevent millions of people from fully enjoying and exercising their human rights, the Inter-American Commission has also played a vital role in preventing human rights violations.

Official web site: <http://www.oas.org/es/cidh/>

B. The way the Inter-American Commission performs its mandate: its tools

As it was mentioned, the IACHR is a quasi-judicial body, with both monitoring and promotional functions and also with competence to receive cases and decide on their merits; which fulfills its mandate through the following mechanisms: (1) System of petitions and cases, (2) Friendly settlements; (3) Precautionary measures, (4) On-site visits and country reports, (5) Thematic rapporteurships, (6) Thematic reports, (7) Public hearings, and (7) Litigation before the Inter-American Court.

<i>System of petitions and cases</i>	Any person, group of persons, or nongovernmental entity that is legally recognized in one or more OAS member states may petition the Commission with regard to the violation of any right protected by the American
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⁸ Jose Miguel Vivanco, *International Human Rights Litigation in Latin America: The OAS Human Rights System*, in *Collective Responses to Regional Problems: The Case of Latin America and the Caribbean* 73, 79-80 (Carl Kaysen, Robert A. Pastor and Laura W. Reed eds. 1994).

	<p>Convention, by the American Declaration, or by any other pertinent instrument, in accordance with the applicable provisions and its Statute and Rules of Procedure⁹. Through the system of petitions and cases, the IACHR has had great impact on an individual level. When a State does not comply with the recommendations formulated by the Commission in its merit report, the Commission is entitled to present that case before the Inter-American Court on Human Rights. Of course if the given State has accepted the competence of the Court. By 2012 the Commission had received thousands of complaints, corresponding to almost 20,000 petitions concerning individual violations; only during the 2012 the Commission received 1936 petitions.</p> <p>More: http://www.oas.org/en/iachr/mandate/petitions.asp</p>
<i>Friendly settlements</i>	<p>When the Commission receives a petition, it shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for human rights. If a friendly settlement has been reached, the Commission shall draw up a report, which shall contain a brief statement of the facts and of the solution reached. From 2000 to 2012 the IACHR has adopted 98 friendly settlements.</p> <p>More: http://www.oas.org/en/iachr/decisions/friendly.asp</p>
<i>Precautionary measures</i>	<p>Precautionary measures are one of the Commission's most effective means of protecting the rights of persons who are in imminent danger of irreparable harm. Indeed, precautionary measures have had a significant impact in protecting rights, especially the right to life and the right to personal integrity. These measures perform a "precautionary" function in the sense that by virtue of the Commission exercising its jurisdiction, a legal situation is preserved; they are "protective" measures in the sense that the exercise of the human rights recognized in instruments of the inter-American system is preserved, thereby avoiding irreparable harm to persons. In practice, the member States of the OAS, the persons who turn to the system and the human rights community as a whole have recognized that precautionary and provisional measures are important tools for protecting human rights in the inter-American system. During the 2012 the IACHR granted 35 precautionary measures, out of 448 requests received.</p> <p>More: http://www.oas.org/en/iachr/decisions/precautionary.asp</p>
<i>In loco visits and country reports</i>	<p>The Commission conducts <i>in loco</i> visits to the countries to do an in-depth analysis of the general situation and/or investigate a specific situation. In general, these visits lead to the preparation of a report on the human rights situation observed, which is published and presented to the Permanent Council and to the General Assembly of the OAS. It is important to differentiate the <i>in loco</i> visits, from the working visits. The later are specific visits conducted by one Commissioner in its role as a thematic or country rapporteur. Country reports these are comprehensive human rights documents that address the main human rights challenges observed in a</p>

⁹ Also, under the terms of Article 45 of the American Convention, the IACHR may consider communications from a State alleging rights violations by another state; which has only happened twice in history.

	<p>given country by the IACHR during an <i>in loco visit</i>. Since its creation, the IACHR has issued sixty-three country reports¹⁰. Exceptionally, the Commission can publish a country report without previously visit the country, like in the case of Venezuela, which does not allow the Commission to conduct an <i>in loco visit</i>.</p> <p>More: http://www.oas.org/en/iachr/reports/country.asp</p>
<i>Thematic rapporteurships</i>	<p>The rapporteurships are special team created with the aim and purpose of working on an specific field of the international human rights law, they represent the highest level of thematic concern of the Commission. There are currently eight thematic rapporteurships on: the rights of women; migrant workers; the rights of the child; the rights of persons deprived of liberty; the rights of Afro-descendants; the rights of indigenous peoples; human rights defenders, and freedom of expression. The Commission has also designated two special Units: on the rights of LGBTI persons and communities, and on the issue of Economic, Social and Cultural Rights. All these specialized groups of professionals work across all the mechanisms and procedures of the IACHR as a quasi-judicial body, they even participate in the system of petitions and cases.</p> <p>More: http://www.oas.org/en/iachr/mandate/composition.asp#tab3</p>
<i>Thematic reports</i>	<p>The IACHR prepares and publishes reports on a wide range of specific human rights issues, such as: citizen security and human rights, maternal health, rights of indigenous peoples, and corporal punishment. Between the 2000 and 2012, the Inter-American Commission released thirty-four thematic reports.</p> <p>More: http://www.oas.org/en/iachr/reports/thematic.asp</p>
<i>Public hearings</i>	<p>Twice a year the Inter-American Commission on Human Rights holds public hearings in its headquarters. These hearings are mostly thematic on human rights issues relevant in the region; however, some of them are also refer to petition or cases pending before the Commission or to the degree of compliance with precautionary measures granted by the Commission.</p> <p>More: http://www.oas.org/es/cidh/audiencias/topics.aspx?lang=en</p>
<i>Litigation before the Inter-American Court</i>	<p>The Commission plays a fundamental role in taking cases to the court. When it does, it is there as the guarantor of the American Convention and the defender of the public interest. Specifically, in exercise of its authorities under Article 61 of the American Convention, the Commission has initiated all the cases that the Court has taken up. The Commission may also request that the Court adopt provisional measures, and may request advisory opinions from the Inter-American Court regarding questions of interpretation of the American Convention and other human rights treaties.</p> <p>More: http://www.oas.org/en/iachr/decisions/cases.asp</p>

¹⁰ Jamaica 2012, Honduras 2010, Venezuela 2009, Honduras 2009, Haiti 2007, Bolivia 2007, Haiti 2005, Colombia 2004, Guatemala 2003, Venezuela 2003, Guatemala 2001, Paraguay 2001, Peru 2000, Canada 2000, Dominican Republic 1999, Colombia 1999, Mexico 1998, Brazil 1997, Bolivia 1996, Ecuador 1997, Haiti 1995, El Salvador 1994, Haiti 1994, Communities of Peoples in Resistance in Guatemala 1994, Colombia 1993, Guatemala 1993, Haiti 1993, Peru 1993, Haiti 1990, Panama 1989, Haiti 1988, Paraguay 1987, Chile 1985, Guatemala 1985, Suriname 1985, Guatemala 1983, Cuba 1983 (Seventh), Nicaraguan population of Miskito origin 1983, Suriname 1983, Colombia 1981, Guatemala 1981, Bolivia 1981, Nicaragua 1981, Argentina 1980, Cuba 1979 (Sixth), Haiti 1979, El Salvador 1978, Nicaragua 1978, Panama 1978, Paraguay 1978, Uruguay 1978, Chile 1977, Chile 1976, Cuba 1976 (Fifth), Chile 1974, El Salvador and Honduras 1970, Cuba 1970, Haiti 1969, Cuba 1967, Dominican Republic 1966, Dominican Republic 1965, Cuba 1963, yCuba 1962.

II. General remarks on reparations ordered by the Inter-American Court and Commission on Human Rights in their recent cases about torture

As a starting point, it is important to set out that both, the IACHR and the Inter-American Court of Human Rights consider that torture and cruel, inhuman or degrading punishment or treatment are strictly prohibited by international human rights law. That the prohibition of torture and cruel, inhuman or degrading punishment or treatment is absolute and non-derogable, even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crimes, martial law or a state of emergency, civil commotion or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophes. And, that nowadays the absolute prohibition of torture, both physical and psychological, belongs to the domain of international *jus cogens*. The Court has understood that an act that constitutes torture exists when the ill-treatment is: (a) intentional; (b) causes severe physical or mental suffering, and (c) is committed with a purpose or objective, including the investigation of crimes.

In light of this basic principle, and the analysis of the facts presented in the selected cases – *Lysisas Fleury et al. v. Haiti*, Judgment of November 23, 2011; *Torres Millacura et al v. Argentina*, Judgment of August 26, 2011; *Cabrera Garcia and Montiel Flores v. México*, Judgment of November 26, 2010; *Bayarri v. Argentina*, Judgment of October 30, 2008; *Case of Caesar v. Trinidad and Tobago*, Judgment of March 11, 2005– the Inter-American Court has consistently ordered the following means of reparation:

A. The obligation to investigate the facts and identify, judge and, if corresponding, punish those responsible

In this respect, the Inter-American Court has established the general principle that the State must remove all factual and legal obstacles that maintain impunity and initiate the necessary investigations to determine and, as appropriate, punish those responsible for the violations. Furthermore, the States have to conduct these actions according to the following elements: (a) using of the Istanbul Protocol; (b) investigations must initiate *ex officio*, and be conducted with due diligence, within a reasonable period of time, using all the available resources to obtain and analyze evidence, following all the possible logical lines of investigation, with the active participation of the representatives of the victims, and conducted within a reasonable period of time; (c) the independence of the medical staff in charge of examining the victims of torture must be respected, so they can apply all the appropriate procedures, according the medical protocols; (d) the evidence in cases of torture must be collected promptly, so the damage could me appropriately observed and documented; and y (e) ensure the right of the victim to be heard and to participate in trial free from threats and other acts of intimidation or harassment.

When there are procedural and investigative irregularities related to the domestic investigations of the proven acts of torture, the Court has determined that it will be appropriate for the State to adopt the pertinent disciplinary, administrative or criminal actions.

B. Measures for satisfaction, rehabilitation, and guarantees of non-repetition

1. *The judgment in itself:* as a mean of satisfaction the Court has traditionally asserted in the vast majority of its cases that their judgments in themselves are means of satisfaction for the victims.

2. *Publication of the Judgment:* likewise, as a mean of satisfactions the Court has traditionally ordered the States to publish the whole judgment, and/or its relevant parts, and/or the official summary prepared the Court, within a certain period of time and according to other specifications set forth by the own Court.

3. *Deleting the victims' names from all criminal records:* in very few cases, the Court has ordered as a mean of rehabilitation the elimination of criminal records, when victims have been prosecuted by the State in violation of their human rights and subsequently acquitted by the national judicial authorities, the Court has ordered the elimination of their criminal record as reparation. In the Bayarri case, for example, the Court has established that Mr. Bayarri was subjected to proceedings that involved the violation of his right to due process. Therefore, the Court required that the State ensure the immediate elimination of the name of Juan Carlos Bayarri from all public records, especially police records, in which it appears with a criminal record related to these proceedings. In contrast, in the case of Cabrera Garcia and Montiel Flores the Court did not granted this way of reparation, even though requested by the representatives of the victims.

4. *Medical and psychological care:* the Court has consistently deemed the necessity to provide for a measure of rehabilitation an adequate specialized treatment and medication to the bodily and psychological suffering inflicted on the victims, taking into account their needs. Therefore, having confirmed the violations and the damages suffered by the victims, the Tribunal has considered necessary to order measures of rehabilitation. In the case of Cabrera Garcia and Montiel Flores, the Court ordered the State to provide the victims with an amount to cover the expenses of the specialized medical and psychological treatment, as well as other related expenses, since they have had moved to other cities after the facts of the case.

5. *Training programs for civil servants and law enforcement personnel:* in cases of torture the Court has also consistently ordered the State, as a measure for non-repetition to adopt concrete measures directed to the training of those authorities involved in the facts. As a clear example, in the case of Lysisas Fleury the Court established that the State must implement, within a reasonable time and with the respective budgetary provision, a compulsory program or course as a part of the general and ongoing training of all ranks of the Haitian National Police, to include, *inter alia*, courses or modules on national and international human rights standards, particularly on the proportionate use of force, the appropriate treatment of detainees, and the investigation and prosecution of acts that constitute cruel, inhuman or degrading treatment, and torture.

6. Another measures of non-repetition are the Strengthening the accountability mechanisms and organs of supervision for the police and other law enforcement authorities who can

be involve in human rights violations; the implementation of a public registry of detainees; and the reform or derogation of domestic legislation, when laws are in breach of the American Convention or other relevant treaties of the Inter-American System. As an example of the later, the Court in the case of Caesar ordered Trinidad and Tobago to abolish the laws that allowed the corporal punishment on convicted persons)

7. Moreover, as in all the other cases, the Inter-American Court on Human Rights has granted *compensatory damages* for: (a) pecuniary damage, taking into account the victim's loss of earnings and/or income, as well as the consequential damages; (b) non-pecuniary damage related to the circumstances of each case in order to establish monetary compensation for non-pecuniary damages and in the cases of torture applies the criteria of the harm does not need to be prove. For instance, in the Bayarry case the Court considers inherent in human nature that any persons subjected to torture experiences profound suffering, anguish, terror, feelings of powerlessness and insecurity, so that this harm does need to be proved. In this case the Court established, in equity, the sum of US\$100,000 as a compensation for non-pecuniary damage as to the consequences of a physical and psychological nature that the torture produce.

C. A look to some recent relevant cases of the Inter-American Commission

The IACHR on its parts has also many interesting experiences granting reparation in cases in which the victim was subject to torture. As for example, in the case of Manuel Manríquez v. México¹¹, it was proven before the Commission that the victim was severely tortured by agents of the Judicial Police, to get him to confess that he had murdered two people; and then, convicted upon that evidence. In its decision, the IACHR called the State to adopt the appropriate and necessary measures to review the validity of the trial of Mr. Manríquez, considering the violations of his rights so that the judicial organs duly analyze his liability for the criminal charges imposed against him. Moreover, to guarantee the rights to defense of Manuel Manríquez, to which end the State should: permit reasonable access for his defense attorneys to the prison where he is being held; refrain from imposing on them abusive or degrading treatment; and to provide the IACHR and the defense attorneys all official documentation that is the basis for applying any restrictive measure imposed on said prisoner and said attorneys, including, specifically, the manuals and instructions of the Federal Centers for Social Rehabilitation.

Similarly, in a very recent decision, regarding also a case in which the victim was convicted on the grounds of evidence produced under torture, the decision of IACHR had the effect *inter alia* of allowing the victim to present an appeal in conformity with articles 8.2.h and 8.3 of the American Convention and ultimately obtaining his freedom¹².

¹¹ IACHR, Report No. 2/99, Merits, Case of Manuel Manríquez v. México, February 23, 1999.

¹² IACHR, Report No. 66/12, Merits (publication) Case of Rubén Luis Godoy v. Argentina, March 29, 2012.

Likewise, a similar result was obtained in the case of Luis Rey García Villagrán, by means of a friendly settlement agreement obtained his freedom¹³. Luis Rey García Villagrán was a victim of illegal detention, torture and violations of due process in the criminal case against him. In the friendly settlement agreement, the Mexican State, through the Government of the State of Chiapas, undertook the compromise to make the necessary arrangements in order to analyze the criminal proceedings against him and determine if a violation had been committed. As a result of the fulfillment of the commitments made by the State of Mexico in the friendly settlement agreement, Mr. Luis Rey García Villagrán was released on December 22, 2009. In addition, the friendly settlement agreement contemplated the State's commitment to provide medical and psychological care to the victim and his family and the payment of compensation for loss of earnings and the affectation of his "life plan". As part of the friendly settlement, the State promised to give Luis Rey García Villagrán the sum of one million pesos for the installation of a printing workshop, and an accounting firm, so that he and his family could resume their life and make a living.

Also, on December 22, 2009, the Governor of the State of Chiapas, acting on behalf of the Mexican state, acknowledged in a public event that the victim had been tortured and illegally deprived of his liberty by the State Judicial Police in 1997 and publicly apologized for the violations committed against him.

Another example of restitution measures that have been incorporated in friendly settlement agreements is the case of Alejandro Ortiz Ramirez. Through the signing of a friendly settlement agreement, the State of Mexico publicly recognized the innocence of Mr. Alejandro Ortiz Ramirez, who was allegedly tortured and detained for a crime he did not commit. The agreement also included the final release of Alejandro Ortiz Ramirez, which he obtained on September 24, 2004; the State's commitment to provide psychological care for the victim; scholarships for his sons and a house for him and his family, 100% subsidized by the Government¹⁴.

The inter American System has been effective in the protection of victims of torture, who have obtained different kinds of reparations. However, access to the System does not always assure justice at the national level despite the decisions of its bodies. Justice for victims of torture and other human rights violations remains a pending international obligation in most States of the region.

¹³ IACHR, Report No. 164/10 (friendly settlement), Petition 12.623, Luis Rey García Villagrán, Mexico.

¹⁴ IACHR, Report No. 101/05 (friendly settlement), Petition 388/01, Alejandro Ortiz Ramírez, Mexico.