

Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond

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A sustained reflection upon remedial obligations and possibilities is particularly necessary at this juncture in the development of international law, where important mechanisms with reparative functions have recently sprung up around the world: the International Criminal Court, the African Court of Human Rights, and several national schemes, as a result of proliferating transitional justice initiatives. This Article argues for a remedial model that emphasizes the restorative measures of satisfaction and rehabilitation, as well as general assurances of non-repetition. The work first examines the case law of the Inter-American Court of Human Rights, the only international human rights body with binding powers that has consistently ordered equitable remedies in conjunction with compensation. The Article next considers the strengths and limitations of the Inter-American Tribunal's unique reparative approach, which has been neglected in the literature despite significant evolution in recent years. The following section attempts to refine the Court's normative model by proposing a "participative" methodology, consisting in procedural reforms, to calibrate remedies more precisely to a victim's situation and necessities. Finally, the work discusses how the Court's victim-conscious balance of non-monetary

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orders and economic compensation, which has revamped standards for redress in international law, should be incorporated to a greater extent into the remedial approaches of other international courts and domestic institutions.

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I. INTRODUCTION

In its 2004 judgment *Plan de Sánchez v. Guatemala*, the Inter-American Court of Human Rights was confronted with a challenge of historic proportions: ordering appropriate redress for a Mayan indigenous community devastated by the mass murder of over 250 persons.¹ This was the first time any international tribunal ordered reparations for the survivors and next of kin of a full-scale massacre.² The breadth and depth of the remedies ordered are impressive—in addition to monetary compensation, the Court required the State to take the following measures, among others: the investigation, prosecution, and punishment of the responsible parties; a public acceptance of responsibility for the case's facts; establishment of a village housing program; medical and psychological treatment for all surviving victims; implementation of educational and cultural programs; and translation of the judgment into the appropriate Mayan language.³

Scholars and lawyers who have not been following developments at the Inter-American Court may be quite surprised by the *Plan de Sánchez* remedies. After all, the extent of redress ordered by tribunals for human rights violations often does not venture beyond

1. *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 49(2) (Nov. 19, 2004). All Inter-American Court of Human Rights judgments are available at <http://www.corteidh.or.cr/casos.cfm>.

2. See *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 105, ¶ 1 (Apr. 29, 2004) (separate opinion of Judge Cançado-Trindade). *Plan de Sánchez* was of a far greater magnitude than preceding cases such as *Aloeboetoe v. Suriname*, 1993 Inter-Am. Ct. H.R. (ser. C) No. 15 (Sept. 10, 1993) (seven deaths) and *El Amparo v. Venezuela*, 1996 Inter-Am. Ct. H.R. (ser. C) No. 28 (Sept. 14, 1996) (fourteen deaths).

3. See *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶¶ 93–111 (Nov. 19, 2004). The Court also granted costs for legal representation.

cash compensation and declarative relief.⁴ While deliberation on rights occupies a privileged place in judgments and scholarship, remedies have been set aside as mundane concerns—unworthy of much theorizing or judicial research and only grudgingly ordered.⁵ As a result, the reparative schemes commonly deployed across the globe are not only unimaginative, but may also be tragically inadequate.

This “right-remedy gap” has been increasingly challenged in both international and domestic forums.⁶ A sustained reflection upon remedial obligations and possibilities is particularly necessary at this juncture in the development of international law, where important mechanisms with reparative functions—the International Criminal Court, the African Court of Human Rights, and several national schemes—have recently sprung up around the world as a result of proliferating transitional justice initiatives. While these institutions may possess significant competence in the reparations domain, and purportedly seek to follow the principles of international law, they have few sources to draw upon when attempting to devise remedies. Indeed, the most experienced international human rights tribunal in existence, the European Court of Human Rights, hardly offers an attractive model: flaws in its remedial framework are partially responsible for the Strasbourg Court’s current crisis.⁷

This Article argues that reparative approaches that include

4. See *infra* notes 63–79 and accompanying text. This reluctance is generally found in both international and domestic judicial practice with regard to a variety of rights abuses.

5. See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857–58 (1999). Yet remedies have not always had such a humble status; in Roman law, for example, they were considered the main objective in the administration of justice.

6. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, at 1, U.N. Doc A/RES/60/147 (Mar. 21, 2006) [hereinafter Basic Principles] (affirming “the importance of addressing the question of remedies and reparation for victims . . . in a systematic and thorough way at the national and international levels”); World Conference on Human Rights, June 14–15, 1993, Vienna Declaration and Programme of Action, ¶ 29, § I, U.N. Doc. A/CONF.157/23 (July 12, 1993) (voicing “grave concern”); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, ¶ 5, Annex, U.N. Doc A/RES/40/34/Annex (Nov. 29, 1985) (remedies “should be established and strengthened where necessary”); ILARIA BOTTIGLIERO, REDRESS FOR VICTIMS OF CRIMES UNDER INTERNATIONAL LAW 249 (2004); CHRISTINE GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 224 (1987) (judicial remedies have been largely ignored, including their role in evolving international legal regimes); Nicolas Bratza, *Foreword* to EUROPEAN COURT OF HUMAN RIGHTS: REMEDIES AND EXECUTION OF JUDGMENTS, at v (Theodora Christou & Juan Pablo Raymond eds., 2005) (remedies are “long-neglected”); John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87–90 (1999).

7. See *infra* notes 271–96 and accompanying text for a discussion of the European Court of Human Rights.

only compensation and declarative relief are not only insufficient in egregious cases such as *Plan de Sánchez*, but they are also inadequate, inefficient, and even unwanted in many other scenarios of rights abuse. Thus, I espouse a remedial model that emphasizes the restorative measures of satisfaction and rehabilitation, as well as general assurances of non-repetition, in response to all human rights violations.

The discussion proceeds as follows. Part I reviews remedies typically ordered by international human rights bodies, the general doctrine of international law on reparations, and emerging principles in the field. Part II examines the case law of the Inter-American Court of Human Rights, the only international human rights body with binding powers that has consistently ordered equitable remedies in conjunction with compensation. Part III considers the strengths and limitations of the Inter-American Tribunal's unique reparative approach, which has been neglected in the literature despite significant evolution in recent years. Part IV attempts to refine the Court's normative model by proposing a "participative" methodology, consisting in procedural reforms, to calibrate remedies more precisely to a victim's situation and necessities. Finally, Part V discusses how the Court's victim-conscious balance of non-monetary orders and economic compensation, which has revamped standards for redress in international law, should be incorporated to a greater extent into the remedial approaches of other international courts and domestic institutions.

II. THE LEGAL LANDSCAPE OF REMEDIES

A. Definition

The victim's status within international law has undergone a great transformation over the last six decades.⁸ While it is disputed whether the individual's right to a remedy for state abuses has attained the rank of customary international law,⁹ this right is neverthe-

8. See, e.g., LOUIS HENKIN, *THE AGE OF RIGHTS* 16–18 (1990); Antônio Cançado-Trindade, *The Emancipation of the Individual from His Own State*, in *LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: UN CUARTO DE SIGLO* 159, 203–06 (2005), available at <http://www.corteidh.or.cr/docs/libros/cuarto%20de%20siglo.pdf>; Richard Falk, *Reparations, International Law, and Global Justice: A New Frontier*, in *THE HANDBOOK OF REPARATIONS* 479–85 (Pablo de Greiff ed., 2006).

9. See, e.g., DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 465 (2d ed. 2005) (right belongs to customary international law); Christian Tomuschat, *Reparation for Victims of Grave Human Rights Violations*, 10 *TUL. J. INT'L & COMP. L.* 157, 183 (2002) (does not exist in customary international law). Some argue that these initiatives to

less expressly guaranteed by numerous global and regional human rights agreements.¹⁰ Thus, states parties to these treaties that have violated the human rights of individuals within their jurisdiction are required to provide such persons with an appropriate remedy.

The concept of remedy is comprised of substantive and procedural elements, and both are universally guaranteed.¹¹ The procedural component refers to a victim's access to judicial, administrative, or other appropriate authorities, so that his or her claim of a rights violation may be fairly heard and decided. The substantive aspect, on the other hand, constitutes the result of those proceedings—that is, the redress or relief afforded the successful claimant.

This Article focuses on the issue of appropriate redress or reparation for human rights violations, including atrocious abuses such as those encountered in *Plan de Sánchez*. The principal international and regional human rights treaties all demand an “effective” remedy or recourse;¹² however, they do not offer specific guidance as to how states should undertake to repair violations of any character, much less of that terrible scale. Article 41 of the European Convention for the Protection of Human Rights, for example, tersely provides for “just satisfaction”:

If the [European Court of Human Rights] finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.¹³

In contrast, the text of Article 63(1) of the American Convention on Human Rights is more expansive:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the

redress violations come from moral and political pressures, not from adherence to existing or emerging legal standards. See ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* (2000).

10. See, e.g., American Convention on Human Rights art. 25, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention]; International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 (adopted Dec. 10, 1966) [hereinafter CAT]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

11. See SHELTON, *supra* note 9, at 7, 114.

12. See, e.g., American Convention, *supra* note 10, art. 25; ICCPR, *supra* note 10, art. 2(3); European Convention, *supra* note 10, art. 13.

13. European Convention, *supra* note 10, art. 41.

Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.¹⁴

The two treaties fail to define clearly the remedial powers of their respective courts. For example, what does “just satisfaction” precisely demand, or to what extent should harmful “consequences” actually be redressed? In order to assess the typical remedies afforded under international human rights law, then, we must consider how such instruments have been interpreted and developed by the relevant institutions.

B. *Typical remedies ordered*

Since 1959, the European Court of Human Rights has presided over cases of rights violations originating in the Council of Europe nations. The Court has consistently ruled that it lacks authority to issue explicit directions on remedial matters, such as the reversal of convictions, and has generally limited itself to granting declarative relief, material and moral compensation, and costs. The Tribunal’s restraint on this point is exemplified in the Grand Chamber’s *Scozzari and Giunta* decision:

[A] judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects [S]ubject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment.¹⁵

While the European Court is on the cusp of a new era in its remedial jurisprudence, which I address in a subsequent section, for decades

14. American Convention, *supra* note 10, art. 63(1).

15. *Scozzari v. Italy*, 2000-VIII Eur. Ct. H.R. 471, 528.

petitioners could only hope for a declaration of their rights and an award of compensation. Thus, even in a flagrant case of arbitrary detention, to offer one example, the Court would refuse to order expressly the victim's release.¹⁶

The Human Rights Chamber for Bosnia and Herzegovina also had *ratione materiae* jurisdiction over alleged violations of the European Convention,¹⁷ though its geographic focus was far more limited than the European Court.¹⁸ The Chamber's mandate prioritized allegations of severe and systematic violations, and enjoyed a wide competence to remedy abuses suffered in the context of the armed conflict.¹⁹ However, apart from ordering the restitution of illegally seized property, it rarely employed its broad powers in the reparations sphere.²⁰ By favoring the award of monetary compensation, the Chamber generally followed the narrow path of the European Court of Human Rights.

The tribunals mentioned thus far, the Inter-American and European Courts, as well as the Human Rights Chamber, receive individual applications²¹ from particular regions and hand down binding judgments. Similarly, the African Commission on Human and Peoples' Rights²² also processes individual complaints of rights violations. Yet the African Commission, like the Inter-American Commission on Human Rights,²³ is not a strictly judicial body and issues

16. This approach could result in the Court ordering a state to pay compensation rather than saving a life. See Tomuschat, *supra* note 9, at 163–64.

17. Among several other human rights instruments listed in the Appendix to Annex 6 of the General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Yugo., Dec. 14, 1995, 35 I.L.M. 75 [hereinafter General Framework].

18. As part of the 1995 Dayton Agreements, the State of Bosnia-Herzegovina and its two entities, the Bosnian Croat Federation of Bosnia-Herzegovina and the Republika Srpska, signed an Agreement on Human Rights, leading to the establishment of the Human Rights Chamber. Pursuant to Article XIV of Annex 6 to the General Framework, the Human Rights Chamber's mandate expired on December 31, 2003. *Id.* annex 6, art. XIV; Human Rights Chamber for Bosnia and Herzegovina, <http://www.hrc.ba/commission/eng/default.htm> (last visited Feb. 24, 2008).

19. The General Framework's Article VIII(2)(e) sets priorities, and Article XI(1) provides remedial powers. General Framework, *supra* note 17, arts. VIII(2)(e), XI(1).

20. See BOTTIGLIERO, *supra* note 6, at 187–89. For examples of the few instances when the Chamber ordered alternative reparations measures, see *id.* at 188; Manfred Nowak, *Introduction to HUMAN RIGHTS CHAMBER FOR BOSNIA AND HERZEGOVINA DIGEST* (2003).

21. Applicants could directly apply to the Human Rights Chamber; this is also the case in the European Court, since the entry into force of the 11th Additional Protocol to the European Convention in 1998. European Convention, *supra* note 10. In the Inter-American System, only the Inter-American Commission on Human Rights and states may refer cases to the Inter-American Court.

22. Established under the African Charter on Human and Peoples' Rights art. 30, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter] (entered into force Oct. 21, 1986), available at http://www.achpr.org/english/_info/charter_en.html.

23. See *infra* notes 271–319 and accompanying text for more on the Inter-American Commission.

only recommendations to states. With regard to remedies, the African Commission has rarely urged states to provide compensation for victims, much less other forms of redress.²⁴ On the other hand, the first binding human rights tribunal of Africa, the African Court on Human and Peoples' Rights, has now sworn in its judges.²⁵ The Protocol establishing the African Court, as of this writing, offers the Tribunal wide-ranging remedial competence on par with the Inter-American Court.²⁶ Consequently, there are expectations that the African Court will adopt a multidimensional approach to redress, and eschew a compensation-centered model.²⁷

On a global level, there are a handful of United Nations human rights institutions that examine individual petitions. Similar to the Inter-American and African Commissions, these bodies lack competence to order compensation or other remedies. The institutions nevertheless express their views to states as part of their compliance monitoring functions.²⁸ For example, the Human Rights Committee, created pursuant to the International Covenant on Civil and Political Rights, reviews state reports on treaty implementation and compliance, issues "general comments" on rights and duties established by the Covenant, and considers individual complaints lodged against states parties to the Covenant's First Optional Protocol. The Human Rights Committee's recommendations to states have become increasingly specific over time, and have included the following measures, among others: compensation; public investigation and prosecution; legal reform; restitution of liberty, employment or property; and medical care.²⁹

The spectrum of remedies recommended by the Human Rights Committee recalls the varied reparations ordered by the Inter-

24. See BOTTIGLIERO, *supra* note 6, at 131; Frans Viljoen & Lurette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004*, 101 A.J.I.L. 1, 16 & n.63 (2007).

25. Unfortunately the African Tribunal now faces delays following the 2004 decision to merge the new Court with the African Union's Court of Justice. Decision on the Seats of the African Union, ¶ 4, AU Doc. Assembly/AU/Dec.45 (III) (July 2004), available at <http://www.africa-union.org/AU%20summit%202004/Assm/Assembly%20Decisions%20-Final.pdf>.

26. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 27, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) [hereinafter Protocol to the African Charter] (entered into force Jan. 25, 2004), available at http://www.africa-union.org/rule_prot/africancourt-humanrights.pdf, provides that, if the Court has found a violation, it "shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

27. See BOTTIGLIERO, *supra* note 6, at 133.

28. See SHELTON, *supra* note 9, at 106.

29. See *id.* at 184-85. When recommending compensation, the Human Rights Committee generally refrains from specifying the amount.

American Court in *Plan de Sánchez*. This convergence suggests that current international legal standards on redress to victims may surpass the shackled approach of the European Court and Bosnian Chamber. The following brief section reviews these standards, discussing both the general doctrine of international law on reparations, as well as emerging principles in the field.

C. *Relevant International Legal Principles*

Since human rights treaties provide limited guidance, the international institutions recommending or ordering remedies for individual victims often return to the principles of state responsibility to assess the nature and extent of the redress available.³⁰ Although this body of law governs relationships between sovereign states, referring to it is justified. While major human rights treaties may not cite the concepts explicitly, they were drafted taking these bedrock principles into account.³¹ The established rules on state responsibility are now conveniently set out in the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts³² ("ILC Articles"), a product of over forty years of work.

Relevant to the present discussion are ILC Articles 30 ("Cessation and non-repetition") and 31 ("Reparation"), which provide, *inter alia*, that the state responsible for an internationally wrongful act is under an obligation: i) to cease the act, if it is continuing; ii) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require; and iii) to make full reparation for the injury (whether material or moral) caused by the act.³³ Separating cessation and non-repetition from the concept of reparation represents a shift from earlier approaches, which considered both measures to be forms of reparation known as satisfaction.³⁴ Now, however, cessation and non-repetition are understood as inherent "rule of law" obligations of the responsible state, independent from the notion of reparation.³⁵

The accompanying commentary on Article 31 explains that the state's duty "to make full reparation for the injury" derives from

30. *See id.* at 50.

31. *See, e.g.*, MARTINUS NIJHOFF, COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1975).

32. Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [hereinafter ILC Articles].

33. *Id.* arts. 30, 31.

34. *See* SHELTON, *supra* note 9, at 87.

35. *Id.*

the *Factory at Chorzów* case of the Permanent Court of International Justice.³⁶ In that landmark decision, the Court held that “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”³⁷ This principle of *restitutio in integrum* has been repeatedly cited by the International Court of Justice, as well as the Inter-American and European Courts of Human Rights.³⁸

The specific modes of reparation are elaborated in Article 34 of the ILC Articles: “Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination”³⁹ Restitution is the primary manner of remedy in interstate law, and the ILC considers satisfaction an exceptional measure, to be employed when restitution and compensation are insufficient. Since a restoration of the *status quo ante* is impossible after many forms of human rights violations, satisfaction must take a greater role in human rights law.⁴⁰ The Articles state that “[s]atisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.”⁴¹

Cessation and non-repetition, as well as restitution, compensation, and satisfaction are all integral elements of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (“Basic Principles”).⁴² The Basic Principles were adopted by the United Nations General Assembly in December of 2005, after an arduous process of development that extends back to 1988.⁴³ They draw from several

36. ILC Articles, *supra* note 32, art. 31 commentary.

37. *Factory at Chorzów* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

38. *See, e.g., Avena* (Mex. v. U.S.), 2004 I.C.J. 12, 25 (Mar. 31); *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 170 (June 15, 2005); *Barberà v. Spain*, 285 Eur. Ct. H.R. (ser. A) 50, 57 (1994).

39. ILC Articles, *supra* note 32, art. 34.

40. *See* SHELTON, *supra* note 9, at 103, 150; Sergio García-Ramírez, *La Jurisprudencia de la Corte Interamericana de Derechos Humanos en Materia de Reparaciones*, in *LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: UN CUARTO DE SIGLO* 1, 40 (2005), available at <http://www.corteidh.or.cr/docs/libros/cuarto%20de%20siglo.pdf>.

41. *See* ILC Articles, *supra* note 32, art. 37(2).

42. Basic Principles, *supra* note 6.

43. Theodoor van Boven was originally appointed to examine “the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms” and to develop basic principles and guidelines on remedies. *See* Civil and Political Rights, Including the Questions of: Independence of the Judiciary, Administration of Justice, and Impunity, U.N. Doc E/CN.4/2000/62 (Jan. 18, 2000). Van Boven submitted draft principles in 1993, which were subsequently revised in 1996 and again in 1997. *See id.* Cherif Bassiouni took up the mandate starting in 1998; however, not until 2005 were the Ba-

sources, including the UN Declaration of Basic Principles for Victims of Crime and Abuse of Power,⁴⁴ and “reaffirm” a victim’s right to redress mechanisms. According to the preamble, the Basic Principles “do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations”⁴⁵ Avoiding the contentious issue of defining “gross” violations of international human rights law and “serious” violations of international humanitarian law, the Basic Principles nevertheless are useful in outlining primary methods of reparation for victims.

Paragraph 18 provides as follows: “[victims] should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, . . . which include[s] the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”⁴⁶ Restitution comprehends restoring the victim to his or her original situation, such as a restoration of liberty, while rehabilitation includes “medical and psychological care as well as legal and social services.”⁴⁷ Satisfaction is comprised of a variety of possible measures: from apologies, “full and public disclosure of the truth,” and victim memorials, to judicial and administrative sanctions against the responsible parties.⁴⁸ “Guarantees of non-repetition” are equally diverse, including, *inter alia*, the establishment of effective civilian control over state security forces and human rights educational and training programs.⁴⁹

A report of the UN High Commissioner for Human Rights concerning the Basic Principles noted that “shall” was only used in reference to a “binding international norm,” while “should” is employed in cases of “less mandatory” principles.⁵⁰ In this regard, the Basic Principles have been criticized as overly conservative; for instance, Shelton remarks that the above-cited paragraph 18 actually restates existing law, so “shall” would have been appropriate.⁵¹ Fur-

sic Principles adopted by both the Commission on Human Rights, the Economic and Social Council, and, finally, the General Assembly. See Basic Principles, *supra* note 6.

44. Basic Principles, *supra* note 6 (found in the Preamble).

45. *Id.* (found in the Preamble).

46. *Id.* ¶ 18.

47. *Id.* ¶¶ 19, 21.

48. *Id.* ¶ 22.

49. *Id.* ¶ 23.

50. U.N. Econ. & Soc. Council [ECOSOC], *Report of the Consultative Meeting on the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law*, ¶ 8, U.N. Doc. E/CN.4/2003/63 (Dec. 27, 2002).

51. SHELTON, *supra* note 9, at 147 & n.211.

thermore, the Basic Principles' inclusion of cessation measures under the heading of satisfaction fails to reflect the conceptual distinction made in the ILC articles. Incorporating cessation within the rubric of reparation implies that, in the absence of a victim, the state has no duty to desist from illegal conduct.⁵²

While the Basic Principles inevitably have shortcomings, and do not constitute a binding agreement in international law, they nevertheless have already exerted an impact upon the rights of victims. While the Basic Principles were being prepared and debated, other important international instruments borrowed key aspects from the working text. For example, the International Convention for the Protection of All Persons from Enforced Disappearance,⁵³ and UN principles and recommendations on combating impunity,⁵⁴ among other instruments, have incorporated the elements of rehabilitation, satisfaction, restitution, and guarantees of non-repetition. In 2004, the UN Human Rights Committee issued General Comment No. 31, entitled "The nature of the general legal obligation imposed on states parties to the Covenant," replacing its limited Comment No. 3 on the same topic. The Committee, consistent with its state recommendations mentioned above, affirmed that reparation to victims not only entails compensation, but also "can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."⁵⁵

While the Inter-American Court and United Nations human rights institutions advanced victim-oriented remedies, a watershed development occurred on a different front: over one hundred nations ratified the Rome Statute of the International Criminal Court ("ICC"). The 1998 Statute requires the establishment of "principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation," mandates the States Parties to

52. *See id.* at 149.

53. G.A. Res. 61/177, art. 24, U.N. Doc. A/RES/61/177 (Dec. 20, 2006) (not yet in force).

54. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Revised Final Report: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, ¶ 41, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997) (prepared by Mr. Joinet pursuant to Sub-Comm. decision 1996/119); ECOSOC, *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, Principle 34, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (prepared by Diane Orentlicher).

55. U.N. Int'l. Covenant on Civil & Political Rights, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004).

establish a trust fund for the benefit of victims of those crimes within the Tribunal's jurisdiction, and orders the Court "to protect the safety, physical and psychological well-being, dignity and privacy of victims."⁵⁶ The Statute is remarkable in that it grants victims, vis-à-vis an international forum, the right to receive reparation directly from the individual perpetrators of their suffering.⁵⁷ Furthermore, and crucial to the present discussion, it underscores the necessity of non-monetary remedies for victims, such as rehabilitation and the restoration of dignity, in the wake of rights violations.

The ICC and the UN Human Rights Committee, then, both stand in strong support of non-monetary remedies. Yet the Committee lacks authority to issue mandatory directives on the matter, and the ICC is only in its infant stages of development. The Basic Principles elaborate upon reparative modalities, but they are non-binding and fail to explain when precisely they are applicable, as they avoid defining "gross violations of international human rights law" and "serious violations of international humanitarian law."⁵⁸ To better understand the applicability and potential of measures seeking rehabilitation, satisfaction, restitution, and non-repetition,⁵⁹ this Article will next examine the case law of the Inter-American Court of Human Rights, the only international tribunal with binding jurisdiction that has ordered all such remedies. The discussion will consider the context and nature of these orders in Inter-American jurisprudence; subsequent sections will critique this normative model and assess its implications for other international and national institutions.

56. Rome Statute of the International Criminal Court arts. 68(1), 75(2), 79, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]. Furthermore, Article 68 provides that participation of victims will be allowed at all stages of the proceedings "determined to be appropriate by the Court." *Id.* art. 68.

57. See BOTTIGLIERO, *supra* note 6, at 212–14; Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 867–68 (2006); Falk, *supra* note 8, at 497; Christopher Muttukumaru, *Reparation to Victims*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 262, 262–70 (Roy S. Lee ed., 1999).

58. These terms are in the title of the Basic Principles, yet are never defined.

59. It is noted that the terms "rehabilitation," "satisfaction," "restitution," and "guarantees of non-repetition" are used throughout this Article to delineate general concepts; it is not claimed that they are absolute or mutually exclusive categories.

III. CASE LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS CONCERNING NON-MONETARY REMEDIES

A. Background

The framers of the American Convention intended that the Inter-American Court would have broad powers in the reparations domain.⁶⁰ In fact, not only may the Tribunal order wide-ranging remedies, but it also retains jurisdiction over its cases and thoroughly supervises state compliance with judgments.⁶¹ During the supervisory process, the Court resolves disputes between the parties and dispenses binding instructions on how the reparations orders should be effectuated. All of this stands in stark contrast to the Tribunal's counterpart, the European Court of Human Rights, which immediately forwards a decided case to the Committee of Ministers, a political body that oversees the fulfillment of judgments by issuing occasional recommendations.⁶² Indeed, at least while the Inter-American Court's caseload remains manageable, it is uniquely positioned to order and enforce equitable remedies.

B. Early Reparations Jurisprudence

Despite the considerable potential granted by Article 63(1), during the Court's first decade of contentious cases it showed marked restraint toward non-monetary remedies. In *Velásquez-Rodríguez*⁶³ and *Godínez-Cruz*,⁶⁴ the initial two reparations judgments, the Tribunal had little to say on the subject. Beyond awarding compensation for the deaths, it ruled that the State had a continuing duty—as long as the “fate” of the disappeared was not known—to investigate the forced disappearances, as well as “to prevent involuntary disappearances and to punish those directly responsible.”⁶⁵ In passing, the

60. See, e.g., *Baena-Ricardo v. Panama*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 104, ¶ 89 (Nov. 28, 2003) (discussion of the *travaux préparatoires* of the American Convention); JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 233–35 (2003).

61. For the Court's assessment of its supervisory competence, see *Baena-Ricardo v. Panama*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 104 (Nov. 28, 2003).

62. Article 46(2) of the European Convention provides that “[t]he final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.” European Convention, *supra* note 10, art. 46(2).

63. *Velásquez-Rodríguez v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 7 (July 21, 1989).

64. *Godínez-Cruz v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 8 (July 21, 1989).

65. *Godínez-Cruz v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 8, ¶ 32 (July 21,

Court also noted a state's obligation to inform relatives about the victim's fate and the location of any remains.⁶⁶ In response to requests for additional measures, the Tribunal held that its judgment on the merits served as a sufficient form of "moral satisfaction" to the victims.⁶⁷

Of the early reparations jurisprudence, *Aloeboetoe v. Suriname*,⁶⁸ a case involving seven members of a Maroon ethnic community killed by military forces, has justifiably attracted scholarly attention. The 1993 judgment ordered the State to reopen a village school and staff it with personnel, bring a local medical clinic back into operation, and establish a trust fund for relatives of the victims. The remedies ordered for the Maroon village are surprising given the caution of *Velásquez-Rodríguez* and *Godínez-Cruz*. In fact, the collective measures exceed the scope of the case's violations, since the Tribunal rejected arguments that harm had been perpetrated upon the community as a whole.⁶⁹ The *Aloeboetoe* ruling marked a level of remedial activism that would not be even approximated for another five years in Inter-American case law.⁷⁰ A study of the few cases from the period indicates that *Aloeboetoe*'s generous non-monetary reparations are hardly representative of the Court's general approach. For instance, in *el Amparo v. Venezuela*, a 1996 decision regarding the deaths of fourteen persons, the Tribunal denied all such remedies except an order for the State to continue its criminal investigations into the murders.⁷¹

El Amparo's sole instruction is a centerpiece of the Court's jurisprudence, from *Velásquez-Rodríguez* to the present: the state

1989); *Velásquez-Rodríguez v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 34 (July 21, 1989).

66. These passages are found in the merits decisions. *Godínez-Cruz v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 191 (Jan. 20, 1989); *Velásquez-Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 181 (July 29, 1988).

67. *Godínez-Cruz v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 8, ¶ 34 (July 21, 1989); *Velásquez-Rodríguez v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 36 (July 21, 1989).

68. *Aloeboetoe v. Suriname*, 1993 Inter-Am. Ct. H.R. (ser. C) No. 11, ¶¶ 11–15 (Sept. 10, 1993).

69. *See id.* ¶¶ 83–84.

70. The anomaly that *Aloeboetoe* represents may be explained by an unprecedented visit made by the Court's Deputy Secretary to Suriname. It was decided that the Deputy Secretary "would travel to Suriname in order to gather additional information regarding the economic, financial, and banking situation of the country [and to] visit the village of Gujaba to obtain data that would enable the Court to deliver a judgment taking into account the prevailing conditions." *Aloeboetoe v. Suriname*, 1993 Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 40 (Sept. 10, 1993). This personal visit likely occasioned a more sympathetic and generous approach to remedies in the case.

71. *El Amparo v. Venezuela*, 1996 Inter-Am. Ct. H.R. (ser. C) No. 28, ¶¶ 61–62 (Sept. 14, 1996).

must investigate the matters giving rise to violations and, if appropriate, punish the responsible parties.⁷² These requirements, according to the Court, derive from a state's general obligation to respect and ensure human rights within its jurisdiction, as set out in the American Convention's Article 1(1).⁷³ In this way, investigation and prosecution—public-minded measures that seek to prevent recurrence of violations—are independent from a state party's duty to redress individual victims, found in the Convention's Article 63. The Court, then, upholds the ILC's conceptual distinction between guarantees of non-repetition on the one hand, and reparation on the other.⁷⁴ However, semantics aside, it is impossible to deny that the investigation and punishment of perpetrators also have a crucial reparative function on the individual level, providing satisfaction due to victims and family members.⁷⁵

The Court's first remedies addressing individual victims, apart from compensation and simple declarations of violations, are orders that states find and return the corpses of the disappeared and executed. While locating and identifying cadavers constitute basic steps of a criminal investigation, here a central objective is the satisfaction, and even the rehabilitation, of both family members and communities.⁷⁶ For example, one of the few remedies ordered in the

72. Note that the Court has become increasingly specific and demanding with respect to its requirements in this area. Now the Court may require, *inter alia*: i) the sanction of any public officials, as well as private individuals, who are found responsible for having obstructed criminal investigations; ii) adequate safety guarantees for the victims, other witnesses, judicial officers, prosecutors, and other relevant law enforcement officials; and iii) the use of all technical and scientific means possible—taking into account relevant standards, such as those set out in the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions—to recover promptly the remains of deceased victims. *See, e.g.,* *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 207–08 (June 15, 2005); *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶¶ 275–77 (Nov. 25, 2003).

73. *See, e.g., Velásquez-Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (Ser. C) No. 4 ¶¶ 166–67, 178–81 (July 29, 1988).

74. *See Garrido v. Argentina*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, ¶ 72 (Aug. 27, 1998). This explains why, when the Court issues separate merits and reparations judgments, the merits decision is the one to address the state's duty to investigate, as this is autonomous from reparations obligations. On the other hand, one could argue that Article 63(1), broader than most reparations provisions, actually includes the “ensure and respect” meaning within its text as well, in effect erasing the line between guarantees of non-repetition and redress.

75. In the *Nineteen Tradesmen* case, a medical doctor interviewed the next of kin of persons who had disappeared. He testified before the Inter-American Court that the majority of these family members showed a “fundamental need” that the facts were investigated and that the crimes were punished, so that they could move on with their lives. *Nineteen Tradesmen v. Colombia*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 72(g) (July 5, 2004). Also note that prosecution and punishment were historically ordered by arbitral tribunals as satisfaction measures. *See SHELTON, supra* note 9, at 278.

76. *See, e.g., Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 100 (June 15, 2005) (order made by Court, after stating that “one of the greatest sources of

1996 judgment *Neira-Alegria v. Peru* was a “moral reparation”; that the State “do all in its power to locate and identify the remains of the victims and deliver them to their next of kin.”⁷⁷ This measure is so fundamental in Inter-American jurisprudence that willful obstruction in this regard or disrespectful treatment of corpses would eventually be regarded as cruel and inhuman treatment toward the next of kin.⁷⁸ As oppressive Latin American military regimes often murdered suspected adversaries and concealed or destroyed their corpses, several disappearance cases have made their way to San José. Consequently, the “find and return” order has become commonplace over the years.⁷⁹

C. *Developments in 1998*

The Tribunal’s composition changed in the late 1990’s, and a new receptivity to equitable remedies emerged. A broader perspective is immediately evident in the text of *Garrido v. Argentina*, which considers several restitutionary measures and medical rehabilitation as potential means of redress:

The specific method of reparation varies according to the damage caused; it may be *restitutio in integrum* of the violated rights, medical treatment to restore the injured person to physical health, an obligation on the part of the State to nullify certain administrative measures, restoration of the good name or honor that were stolen, payment of an indemnity, and so on.⁸⁰

Faced with providing redress for two disappearances, the *Garrido*

suffering for the Moiwana community members is that they do not know what has happened to the remains of their loved ones and, as a result, they cannot honor and bury them in accordance with fundamental [cultural] norms” and are unable to function normally as a community).

77. *Neira-Alegria v. Peru*, 1996 Inter-Am. Ct. H.R. (ser. C) No. 29, ¶ 69 (Sept. 19, 1996).

78. *See, e.g., Villagrán-Morales v. Guatemala*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 174–75 (Nov. 19, 1999). Of course, this posture also adheres to an ancient moral principle, found in works such as *The Iliad* and *Antigone*. *See* HOMER, *THE ILIAD* (Samuel Butler trans., 1898); SOPHOCLES, *ANTIGONE* (Reginald Gibbons & Charles Segal, trans., Oxford University Press 2007).

79. The order has also expanded to include more elements, such as an exhumation of the victim before family members or the prompt burial (to be paid by the state) of the victim in a location chosen by next of kin. *See Bámaca-Velásquez v. Guatemala*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 82 (Feb. 22, 2002) (exhumation); *Juvenile Reeducation Institute v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 322 (Sept. 2, 2004) (burial at location determined by next of kin).

80. *Garrido v. Argentina*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, ¶ 41 (Aug. 27, 1998).

court first awarded compensation, after acknowledging that its case law primarily required monetary reparation in such instances.⁸¹ Next, while only the usual investigation and criminal process were mandated in the judgment, the language was more exacting: “[Argentina shall] investigate the facts leading to the [disappearances] . . . and to bring to trial and punish the authors, accomplices, accessories after the fact and all those who may have played some role in the events that transpired.”⁸² The Court recognized that additional measures could be justified, “to prevent a recurrence of the offending acts,” and may have ordered them had the State not already begun to take serious steps in that direction.⁸³ Argentina’s legal representative indicated to the Tribunal that a bill had been introduced criminalizing forced disappearance,⁸⁴ and reported that the results of a fact-finding commission examining the disappearances would be published.⁸⁵

Finally, the potential for redress provided by the American Convention was seriously explored in *Loayza-Tamayo v. Peru*.⁸⁶ Ms. Loayza-Tamayo, a university instructor accused of belonging to a major terrorist organization, was detained, tortured, and tried before “faceless” judges. Even before the Inter-American Court changed its composition, its 1997 merits decision had ordered her release, “[in application] of Article 63(1),” after declaring several rights violations.⁸⁷ Then, in the reparations judgment issued three months after the *Garrido* decision, the Tribunal required the State: to provide the victim with teaching opportunities in a public institution, which offered the same benefits as the sum of the teaching jobs she held at the time of her detention;⁸⁸ to reinstate the same pension and retirement rights and benefits to which she was entitled prior to the detention; and to adopt all domestic legal measures to render her flawed conviction null and void.⁸⁹

In addition to these restitutionary measures, the Tribunal con-

81. *See id.*

82. *Id.* ¶ 74.

83. *Id.* ¶ 41. Despite the broader perspective evinced in *Garrido*, the Court omitted the key “find and return” order, which clearly seems to have been a mistake.

84. The State used the Inter-American Convention on Forced Disappearance of Persons as a model. *See id.* ¶ 66.

85. *See id.* ¶ 67.

86. *Loayza-Tamayo v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42 (Nov. 27, 1998).

87. *Loayza-Tamayo v. Peru*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 84 (Sept. 17, 1997). In contrast, the detainees in a 1999 case involving Peru were not ordered released, although the Court found procedural violations in their trials. *Castillo-Pertruzzi v. Peru*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 221 (May 30, 1999).

88. *Loayza-Tamayo* held teaching jobs in both public and private universities at the time of her detention.

89. *See Loayza-Tamayo v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 192 (Nov. 27, 1998).

sidered at length the “serious damage” inflicted upon Loayza-Tamayo’s “life plan,” which according to the Court was a topic of scholarly discussion at the time.⁹⁰ Although it was ultimately decided that the “life plan” could not be quantified in “economic terms,” the recognition that Loayza-Tamayo’s “options for personal fulfillment” had been gravely compromised may have served as some measure of satisfaction for her.⁹¹ In any event, the range of remedies ordered in the judgment, both non-pecuniary and pecuniary, reflect the Court’s growing concern with the “exigencies of justice” and the “complete redress of the wrongful injury,” thus further approaching the ideal of *restitutio in integrum*.⁹²

Keeping with its practice concerning society-wide orders, the *Loayza* Court required Peru to “investigate the facts . . . identify those responsible, to punish them, and to adopt the internal legal measures necessary to ensure compliance with this obligation.”⁹³ In its decision on the merits, the Tribunal had ruled certain legislation inconsistent with the American Convention (primarily due to double jeopardy concerns). Yet it refused to directly order the repeal of the laws, simply instructing the State to “comply with its obligations” under the Convention.⁹⁴ While the Court was ready to advance on several fronts in *Loayza-Tamayo*, it was not yet prepared to demand explicit legal reform, a remedy that would not be granted until the 1999 case *Castillo-Petruzzi*, which also dealt with terrorist suspects in Peru.⁹⁵

The new perspective introduced with *Garrido*, then, was not fully put into practice. When the Court heard more disappearance cases, it fell back into the comfortable remedial scheme of *Velásquez-Rodríguez*: compensation, an order to investigate, and a general instruction to “prevent.” More detailed and extensive “guarantees of non-repetition” could have been justified in both *Castillo-Páez v. Peru*⁹⁶ and *Blake v. Guatemala*,⁹⁷ for instance, as the cases were products of institutionalized violence in their respective countries.⁹⁸ While the harsh repression of the Fujimori regime and the

90. *Id.* ¶ 147.

91. *Id.* ¶¶ 153–54.

92. *Id.* ¶ 151.

93. *Id.* ¶ 171.

94. *Id.* ¶ 164.

95. *Castillo-Petruzzi v. Peru*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 221 (May 30, 1999).

96. *Castillo-Páez v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43 (Nov. 27, 1998).

97. *Blake v. Guatemala*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 48 (Jan. 22, 1999).

98. In *Castillo-Páez*, the Court found that during the period in question, there existed in Peru a state-sponsored practice concerning “the forced disappearance of persons thought to be members of subversive groups”, furthermore, “the security forces also placed the de-

bloody excesses of the Guatemalan civil patrols were proven before the Court, it was still reluctant to require explicit public measures to address such situations.⁹⁹ In this way, the most significant changes brought about by *Garrido* and *Loayza-Tamayo* took place on the personal level, directed to the individual victim.

It is understandable that *Loayza-Tamayo* became a testing ground for the Court's remedial competence. In the first place, Ms. Loayza-Tamayo was one of the few living victims¹⁰⁰ who appeared before the Tribunal, and she was undoubtedly a sympathetic figure. Moreover, there were concrete steps that could be taken to restore her rights and the changed Court was more disposed to considering *restitutio in integrum*.¹⁰¹

D. Contemporary Era

The Court unleashed a barrage of reparations judgments in 2001, ten in total,¹⁰² nearly doubling its jurisprudence on the subject. The cases encompass a range of human rights and a diversity of remedies, directed to individual victims, communities, and society at large. Indeed, the Tribunal's current approach to redress was almost

tainees in the trunks of police cars," as had occurred in the case. *Castillo-Páez v. Peru*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 34, ¶ 42 (Nov. 3, 1997). In *Blake*, the Court found that "civil patrols enjoyed an institutional relationship with the Army . . . operated under its supervision [and] a number of human rights violations, including summary and extrajudicial executions and forced disappearances of persons, have been attributed to those patrols." *Blake v. Guatemala*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 36, ¶ 76 (Jan. 24, 1998).

99. Possibilities include orders to build transparency/accountability within government institutions, to increase civilian control over the military, and to implement military/police training programs on human rights.

100. This does not contemplate next of kin, who are increasingly deemed victims in their own right by the Inter-American Court. See *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶¶ 50–62 (Nov. 25, 2003) (separate opinion of Judge García-Ramírez).

101. Of particular note is the Court's preoccupation with her derailed "life plan," which revealed a bias in favor of professionals and the educated sector. In *Suárez-Rosero v. Ecuador*, a 1999 case involving the four-year arbitrary detention of an airport worker, the concept was not even referenced. 1999 Inter-Am. Ct. H.R. (ser. C) No. 44 (Jan. 20, 1999). Yet the "life plan" resurfaced with respect to an illegally-imprisoned university student in the 2001 judgment *Cantoral-Benavides v. Peru*. Cantoral-Benavides was ultimately granted a scholarship by the Court to compensate for the violations that "prevented the victim from fulfilling his vocation, aspirations and potential, particularly with regard to his preparation for his chosen career and his work as a professional." *Cantoral-Benavides v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 60 (Dec. 3, 2001). A damaged "life plan" was discussed in a more recent case. *Gutiérrez-Soler v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶¶ 87–88 (Sept. 12, 2005). While the Court ordered medical and psychological treatment for the victim, a taxi driver and mechanic, no scholarships or vocational assistance were granted.

102. This count includes combined judgments that unite decisions on the merits with reparations judgments, such as *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

fully developed during that critical year. Beginning with several path-breaking 2001 cases, the current section presents general categories of non-monetary remedies now ordered by the Court, including restitution and cessation, rehabilitation, apologies, memorials, legislative reform, training programs, and community development schemes.¹⁰³

1. Victim-centered Remedies

a. *Restitutionary and Cessation Measures*

The new millennium, in fact, not only opened a new chapter on reparations, but also ushered in the era of multiple-victim cases before the Court. By way of comparison, in the 1996 decision *el Amparo*, the Tribunal granted reparations for sixteen victims, the largest case of its first decade of contentious matters. In 2001, *Baena-Ricardo v. Panama* involved 270 state employees who had been arbitrarily dismissed from their jobs—setting the Court down a path to progressively larger cases that continues to the present day.¹⁰⁴ While *Baena*'s overly simplified analysis on the merits is worthy of criticism,¹⁰⁵ the remedial orders follow *Loayza-Tamayo*'s emphasis on restoring victims to their status quo ante:

the State must reinstate the 270 workers . . . in their positions, and should this not be possible . . . it must provide employment alternatives where the conditions, salaries and remunerations that they had at the time that they were dismissed are respected. In the event that, likewise, the latter is not possible, the State shall proceed to pay the indemnity that corresponds to the termination of employment, in conformity with the internal labour law. In like manner, the State shall provide pension or retirement retribution as applicable to the beneficiaries of victims who may have passed

103. *Suárez-Rosero* and *Castillo-Pertruzzi* served as two key transitional cases, from 1999, which bridged the early approaches to the current remedial model. *Castillo-Pertruzzi v. Peru*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 41 (May 30, 1999); *Suárez-Rosero v. Ecuador*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 44 (Jan. 20, 1999).

104. *Baena-Ricardo v. Panama*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 72, ¶ 88 (Feb. 2, 2001).

105. Due process and judicial protection violations (Articles 8 and 25 of the American Convention, respectively) are found by the Court with respect to all 270 petitioners based upon an evaluation of only a few individual judicial proceedings. *See id.* ¶¶ 141–43.

away.¹⁰⁶

The Court also granted moral and material damages, including lost wages, to the numerous victims.¹⁰⁷

Not only did the Tribunal prove willing to take on a case comprising an unprecedented number of victims, it also required equitable remedies that, while necessary for restitution, posed substantial compliance difficulties for the State.¹⁰⁸ Somewhat complex restitutionary remedies were also ordered that same year in *Ivcher Bronstein v. Peru*.¹⁰⁹ Among other measures, the Court obligated the State “to enable [the victim] . . . to recover the use and enjoyment of his rights as majority shareholder” of his media company, after such rights were suspended by Peruvian authorities.¹¹⁰ As in *Baena*, the Tribunal prudently held that domestic law and competent national authorities should determine the process applied, including the assessment of all lost benefits and dividends.¹¹¹ Even so, both cases have suffered from disputes in the supervisory stage.¹¹²

More common than the property matters¹¹³ before the Tribunal are cases involving due process violations.¹¹⁴ Procedural violations have prompted Court orders to reverse criminal convictions,¹¹⁵ grant retrials,¹¹⁶ nullify death sentences,¹¹⁷ expunge criminal re-

106. *Id.* ¶ 214(7). Note that this “*Loayza*” approach to restitution was also found to an extent in *Suárez-Rosero v. Ecuador*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 44, ¶ 76 (Jan. 20, 1999), as the Court ordered that the State clear the victim’s name and cancel an outstanding fine. A few years later, the Court required that a victim’s employment and pension be reinstated, as in *Loayza*. See *De la Cruz-Flores v. Peru*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 115, ¶¶ 169–71 (Nov. 18, 2004).

107. For an approach similar to *Baena*, see *Acevedo-Jaramillo v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 144 (Feb. 7, 2006).

108. And, in fact, the case did result in deep complications, leading Panama to challenge the Court’s competence to supervise the implementation of remedies. See *Baena-Ricardo v. Panama*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 104, ¶¶ 53–54 (Nov. 28, 2003).

109. *Ivcher-Bronstein v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74 (Feb. 6, 2001).

110. *Id.* ¶ 191(8).

111. See *id.*

112. See *Baena-Ricardo v. Panama*, 2005 Inter-Am. Ct. H.R., ¶¶ 8–31 (“Considerando” section) (Nov. 28, 2005) (Monitoring Compliance with Judgment), available at http://www.corteidh.or.cr/docs/supervisiones/baena_28_11_051.pdf (only in Spanish); *Ivcher-Bronstein v. Peru*, 2005 Inter-Am. Ct. H.R., ¶¶ 8–11 (“Considerando” section) (Sept. 21, 2005) (Monitoring Compliance with Judgment), available at http://www.corteidh.or.cr/docs/supervisiones/ivcher_21_09_051.pdf (only in Spanish).

113. See also *Five Pensioners v. Peru*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 98 (Feb. 28, 2003); *Cantos v. Argentina*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 97 (Nov. 28, 2002); *Cesti Hurtado v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 78 (May 31, 2001).

114. Of course, a case may contain both elements.

115. See, e.g., *Herrera-Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 195 (July 2, 2004); *Cantoral-Benavides v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, ¶¶ 77–78 (Dec. 3, 2001).

116. See, e.g., *Fermin-Ramírez v. Guatemala*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 126, ¶ 138(7) (July 20, 2005); *Hilaire v. Trinidad & Tobago*, 2002 Inter-Am. Ct. H.R. (ser. C)

cords,¹¹⁸ and cancel fines imposed,¹¹⁹ remedies that constitute measures of satisfaction as much as restitution for the victims. On some occasions, such as *Loayza-Tamayo*, due process violations have led the Court to demand the release of detainees, although such a result is by no means assured.¹²⁰

Obviously, where a victim has been arbitrarily detained, a restoration of liberty ceases the ongoing violation. In such a case, or in the case of the return of illegally seized objects, the concept of cessation is indistinguishable from restitution.¹²¹ Depending upon one's definition of an "ongoing violation," then, a restitutionary remedy could instead be considered a cessation order.¹²² For example, should an illegal dismissal be defined as a violation that continues until the employment is reinstated? The characterization, in fact, may be of considerable significance. As discussed above, the return of a victim's corpse has attained primary status as a remedy, in part because the Court has recognized the great suffering family members endure when they cannot properly mourn and bury a loved one. The remedy's categorical nature may also be attributed to the legal definition of a forced disappearance: without the cadaver, the disappearance technically continues.¹²³ Thus, the state must make every effort to recover the missing corpse, as it has unqualified obligation to cease all actions and omissions in contravention of the American Convention—as opposed to its qualified duty to repair (including restitution and satisfaction), which may be waived by the victim.¹²⁴

No. 94, ¶ 223(9) (July 21, 2002); *Castillo Pertruzzi v. Peru*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 41, ¶ 226(13) (May 30, 1999). In several of these judgments the Court specifies how the pertinent law should be applied in the retrial.

117. See, e.g., *Fermin-Ramirez v. Guatemala*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 126, ¶ 138(9) (July 20, 2005); *Hilaire v. Trinidad & Tobago*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 223(11) (July 21, 2002).

118. See, e.g., *Acosta-Calderon v. Ecuador*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 129, ¶ 175(7) (June 24, 2005) (the Court states here that the remedy functions as a "satisfaction measure"); *Cantoral-Benavides v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 99(5) (Dec. 3, 2001); *Suárez-Rosero v. Ecuador*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 44, ¶ 113(1) (Jan. 20, 1999).

119. See, e.g., *Berenson-Mejia v. Peru*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 119, ¶ 248(5) (Nov. 25, 2004); *Suárez-Rosero v. Ecuador*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 44, ¶ 113(1) (Jan. 20, 1999).

120. Victims were not ordered released, despite due process violations, in *Berenson-Mejia v. Peru*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 119 (Nov. 25, 2004), and *Castillo Pertruzzi v. Peru*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 41 (May 30, 1999).

121. See ILC Articles, *supra* note 32, art. 30.

122. This is not to say that the two are interchangeable. Unlike restitution, cessation is not subject to limitations relating to proportionality. See *id.*

123. See Inter-American Convention on the Forced Disappearance of Persons art. III, June 9, 1994, 33 I.L.M. 1529, available at <http://www.oas.org/juridico/English/Treaties/a-60.html>.

124. See *Garrido v. Argentina*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, ¶ 72 (Aug. 27,

Regardless of the criteria used, it suffices to say that both restitution and cessation orders abound in the Court's jurisprudence.¹²⁵ One recent case involving intellectual property and freedom of expression illustrates how the two remedies may interact in pursuit of complete redress. In *Palamara-Iribarne v. Chile*, the State prohibited a retired admiral from publishing his book, a critical account of the Chilean Navy, and seized all copies of the publication.¹²⁶ In its judgment, the Court ordered Chile not only to return the stolen copies (restitution), but also demanded that the State allow the publication of the work.¹²⁷ The latter requirement could be conceived, in addition to a measure of satisfaction, as a cessation of the ongoing, illegal suppression of the book.

b. Rehabilitation Measures

The Tribunal has awarded compensation for the medical and psychological expenses incurred by victims for many years. Until recently, it would also occasionally order an additional amount for future expenses, if continued treatment was proven to be necessary.¹²⁸ Starting with *Nineteen Tradesmen v. Colombia*,¹²⁹ however, the Court's rehabilitation methodology underwent a transformation. The 2004 judgment required the State to provide, through its national health institutions, free medical and psychological care to the family members of the nineteen executed victims.¹³⁰ The Tribunal gave detailed directions, such as: "psychological treatment must be provided that takes into account the particular circumstances and needs of each

1998).

125. The orders range from property restitution to measures that facilitate a return from exile. For examples of orders concerning exiled victims, see *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 212 (June 15, 2005); *Nineteen Tradesmen v. Colombia*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 295(10) (July 5, 2004).

126. *Palamara-Iribarne v. Chile*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135 (Nov. 22, 2005).

127. *See id.* ¶ 269(9).

128. *See, e.g.,* *Molina-Theissen v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 108, ¶ 71 (July 3, 2004) (included under moral damages); *Bulacio v. Argentina*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 100 (Sept. 18, 2003) (included under moral damage heading); *Cantoral-Benavides v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 50 (Dec. 3, 2001); *Blake v. Guatemala*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 48 (Jan. 22, 1999); *Loayza-Tamayo v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 129(d) (Nov. 27, 1998).

129. *Nineteen Tradesmen v. Colombia*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109 (July 5, 2004).

130. The Court first became receptive to this idea in 2001 with the approval of the *Barrios Altos* settlement, where it approved the terms of the parties. *Barrios Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 87 (Nov. 30, 2001). *Cantoral-Benavides* also included a perfunctory order that the victim's mother receive medical and psychological care. *Cantoral-Benavides v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 51(e) (Dec. 3, 2001).

of the next of kin, so that they can be provided with collective, family or individual treatment, as agreed with each of them and following individual assessment.”¹³¹

Thus, instead of awarding a cash amount for future expenses as material damages, the Court changed its tack and fashioned an injunction ordering the necessary care from state facilities. While the solution takes the guesswork out of future expenses and likely offers the state financial benefits,¹³² the victim is no longer given the option to select private facilities, which in most cases are probably superior. Not only has this approach nearly supplanted the former one, it has been adopted in an overwhelming amount of decisions since 2004.¹³³ That is, in scenarios where the Court may have overlooked needs for future medical treatment in past cases, it is now ordering it according to the *Nineteen Tradesmen* model. While this development may reflect an enhanced commitment to rehabilitating victims, it is likely that several other factors are also at play, such as an expanding definition of victim that the Court cannot quite control, and increasingly larger cases arriving in San José.¹³⁴

One particularly notable incarnation of this remedy is found in *Juvenile Reeducation Institute v. Paraguay*.¹³⁵ The detention center was extremely overcrowded, plagued by violence, and had been

131. *Nineteen Tradesmen v. Colombia*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 278 (July 5, 2004).

132. According to Seibel, as opposed to cash payments, providing health care can create employment and strengthen the state system. Hans Dieter Seibel, *Reparations and Microfinance Schemes*, in THE HANDBOOK OF REPARATIONS 676, 686 (Pablo de Greiff ed., 2006).

133. See, e.g., *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006); *Baldeón-García v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 147 (Apr. 6, 2006); *Sawhoyamaya Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006); *Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006); *García-Asto v. Perú*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 137 (Nov. 25, 2005); *Gómez-Palomino v. Perú*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 136 (Nov. 22, 2005); *Mapiripán Massacre v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005); *Raxcacó-Reyes v. Guatemala*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 133 (Sept. 15, 2005); *Gutiérrez-Soler v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132 (Sept. 12, 2005); *Fermín-Ramírez v. Guatemala*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 126 (June 20, 2005); *Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); *Caesar v. Trinidad & Tobago*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 123 (Mar. 11, 2005); *Serrano-Cruz Sisters v. El Salvador*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120 (Mar. 1, 2005); *Berenson-Mejía v. Peru*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 119 (Nov. 25, 2004); *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116 (Nov. 19, 2004); *De la Cruz-Flores v. Peru*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 115 (Nov. 18, 2004); *Juvenile Reeducation Inst. v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 112 (Sept. 2, 2004); *Nineteen Tradesmen v. Colombia*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109 (July 5, 2004).

134. Also the Court now seems to be more comfortable with injunctions than cash awards, unlike many domestic courts.

135. *Juvenile Reeducation Institute v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 112 (Sept. 2, 2004).

ravaged by three fires within eighteen months that led to several deaths and injuries. The Court, in possession of a list of all the Institute's detainees from 1996 to 2001, decided to require psychological treatment for that entire population—over 3000 victims—pursuant to the same terms as *Nineteen Tradesmen*.¹³⁶ Additional medical care, including any necessary surgery, was ordered for those children who had suffered burns in the fires. To supervise this elaborate scheme, the Court called for the establishment of a committee, whose members would include at least one civil society representative along with state officials.

Juvenile Reeducation Institute featured another remedy that appeals to a more holistic notion of rehabilitation: the establishment of special education and vocational assistance programs for former detainees. As the Tribunal found, the case involved “children . . . who were very poor;” furthermore, the majority of them were pre-trial detainees, mixed with adults, and lacked adequate legal representation.¹³⁷ Despite their vulnerable condition and Paraguay's obligation to provide them enhanced measures of protection, however, they were subjected to a dangerous environment for sustained periods that lacked medical and educational resources. The Court's wide-ranging order, then, was a commendable attempt to reverse the damaging effects of that ordeal, and to furnish opportunities that were illegally denied them while in state custody.¹³⁸

The Court has ordered scholarships for higher education, such as in *Cantoral-Benavides v. Peru*.¹³⁹ Other measures have permitted once-detained individuals to update their professional skills through state-funded courses.¹⁴⁰ In more recent cases, family members of persons who were extra-judicially killed or disappeared have been provided scholarships to complete their primary and secondary studies, or to undertake literacy programs.¹⁴¹

136. See *Juvenile Reeducation Inst. v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 112, ¶¶ 318–19 (Sept. 2, 2004).

137. *Id.* ¶ 262.

138. Cf. American Convention, *supra* note 10, art. 5(6) (“Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.”). See also *Raxcacó-Reyes v. Guatemala*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 133, ¶ 135 (Sept. 15, 2005) (court orders educative and other measures to be carried out while petitioner is in prison, so that he can be eventually reintegrated successfully into society).

139. See *Cantoral-Benavides v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 80 (Dec. 3, 2001).

140. See, e.g., *García-Asto v. Peru*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 137, ¶ 281 (Nov. 25, 2005); *De la Cruz-Flores v. Peru*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 115, ¶ 170 (Nov. 18, 2004).

141. See, e.g., *Gómez-Palomino v. Perú*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 136, ¶¶ 144–48 (Nov. 22, 2005) (the scholarships could be transferred to sons/daughters, if the

c. *Recognition of Responsibility and Apologies*

Since 1991, states have recognized their legal responsibility for the violations attributed to them before the Inter-American Court.¹⁴² In fact, in about a quarter of the total cases litigated before the Tribunal, states have accepted at least partial responsibility for the facts at issue.¹⁴³ After such an admission, the Court's Rules of Procedure allow it to continue the process as it sees fit, "bearing in mind its responsibility to protect human rights."¹⁴⁴ Thus, depending upon the characteristics of the state's declaration, the Court may examine the merits of the case notwithstanding, or proceed directly to the reparations stage. It is more common now for the Tribunal to present at least a brief assessment on the merits, well aware that such a discussion "constitutes a form of reparation for the victim and her next of kin and, in turn, is a way to avoid recidivism of [human rights violations]."¹⁴⁵ Even if the parties have arrived at a negotiated settlement including reparations, or if the State has fully accepted all the demands of the Commission and the victims as presented before the Court, the Tribunal will still consider whether such stipulations are consistent with the American Convention, possibly add and revise terms, and continue to supervise their fulfillment after the proceeding has concluded.¹⁴⁶

A state's recognition of responsibility is always welcome, as it expedites proceedings and brings victims closer to their due reparations. However, the statements per se may not provide much satisfaction to victims, because official declarations may be ambiguous, unremorseful, or even worse, made in bad faith to obtain strategic

beneficiary chose not to make use of it); *Gómez-Paquiyaauri Bros. v. Peru*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 237 (July 8, 2004).

142. *See Aloeboetoe v. Suriname*, 1991 Inter-Am. Ct. H.R. (ser. C) No. 11 (Dec. 4, 1991).

143. *See Gutiérrez-Soler v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶ 6 (Sept. 12, 2005) (separate opinion of Judge García-Ramírez).

144. PASQAULUCCI, *supra* note 60, at 402–03 (Article 54 of the Rules of Procedure of the Inter-American Court). For a good discussion concerning the Court's competence in this area, see *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 105, ¶¶ 2–21 (Apr. 29, 2004) (separate opinion of Judge García-Ramírez).

145. *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 116 (Nov. 25, 2003). *See also* *Montero-Aranguren v. Venezuela*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150 (July 5, 2006) (a judgment's chapters on the merits, proven facts and witness testimony all contribute to the "collective memory" and are forms of reparation); *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006).

146. Before the case is submitted to the Court, the Inter-American Commission presides over the proceedings and attempts to arrive at a settlement. Once the matter is presented to San José, however, the Court assumes complete control. *See* *Gutiérrez-Soler v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶ 14 (Sept. 12, 2005) (separate opinion of Judge García-Ramírez).

advantage.¹⁴⁷ On the other hand, there has been an increasing state practice of issuing an apology, *motu proprio*, to victims during public hearings, after accepting responsibility for the violations at issue.¹⁴⁸ Perhaps the most memorable instance occurred during the 2005 hearing of *Gutiérrez-Soler v. Colombia*, when each and every state representative arose, walked across the aisle, and personally requested forgiveness of the victim and his family. The State remarked that it understood its actions to constitute a measure of satisfaction directed to the “dignification of the victim” and his family members.¹⁴⁹

Personally asking a victim for forgiveness and blithely acknowledging facts that occurred under another government administration (often many years ago) are clearly quite different things. Yet the Court refused to order even the latter for many years, despite victims’ repeated requests for some official recognition of wrongdoing.¹⁵⁰ The year 2001 brought a sea change in this subject as well, however, when the Tribunal demanded that “the Peruvian State make a public apology to admit its responsibility” in *Cantoral-Benavides*.¹⁵¹ The formulation of the order has evolved since then, often requiring a more elaborate public ceremony, at times with the participation of high-level government authorities.¹⁵² *Moiwana Village v. Suriname* provides a current—and comprehensive—version of the remedy:

as a measure of satisfaction to the victims and in attempt to guarantee the non-repetition of the serious human rights violations that have occurred, the State shall publicly recognize its international responsibility for the facts of the instant case and issue an apology to the Moiwana community members. This public ceremony shall be performed with the participation of the

147. See *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶¶ 65–100 (Nov. 25, 2003) (gives an account of Guatemala’s many questionable changes in position before the Court).

148. These apologies first occurred in 2004 during the hearings for *Plan de Sánchez* and *Molina Theissen*. See *Molina-Theissen v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 108, ¶ 71 (July 3, 2004); *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 105, ¶ 9 (Apr. 29, 2004) (separate opinion of Judge García-Ramírez).

149. *Gutiérrez-Soler v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶ 59 (Sept. 12, 2005).

150. See, e.g., *Suárez-Rosero v. Ecuador*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 44 (Jan. 20, 1999) (a typical denial of this remedy). See also PASQUALUCCI, *supra* note 60, at 253–54.

151. *Cantoral-Benavides v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 81 (Dec. 3, 2001).

152. *Mack Chang* was first case to require the participation of high-ranking state officials. See *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 278 (Nov. 25, 2003).

Gaanman, the leader of the N'djuka people, as well as high-ranking State authorities, and shall be publicized through the national media.¹⁵³

While states are at times excused from carrying out such a ceremony if they have accepted responsibility during the proceedings before the Court,¹⁵⁴ the public recognition of wrongdoing has become a principal remedy in the Court's repertoire.¹⁵⁵

A related reparations order, which is also designed for the satisfaction of victims and the prevention of further violations, is the partial publication of the Court's judgment in national newspapers.¹⁵⁶ Remarkably, once this remedy was introduced, also in the watershed *Cantoral* judgment, the Tribunal has never looked back, requiring it in nearly every subsequent case—even when states publicly acknowledged responsibility for the violations. It is difficult to argue with the general approach, as it serves many purposes—including clearing the name of the victim, who often is much maligned in the public's perception—and is cost-effective.¹⁵⁷

Caution should be exercised, however, in some circumstances, such as where victims face persecution, humiliation or confront dangers of theft. Indeed, there is little justification to publicize the aspect of monetary awards at all.¹⁵⁸ On at least one occasion,

153. *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 216 (June 15, 2005).

154. Yet particular circumstances have required states accepting responsibility to undertake such a ceremony nevertheless. *See, e.g.*, *Montero-Aranguren (Detention Center of Caticia) v. Venezuela*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 150 (July 5, 2006) (not all victims were present at the hearing); *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 406 (July 1, 2006) (the "magnitude of the events" mandated another public recognition); *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 278 (Nov. 25, 2003) (ambiguous state declarations before Court).

155. *See, e.g.*, *Molina-Theissen v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 108, ¶ 87 (July 3, 2004); *Humberto Sánchez v. Honduras*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 179 (June 7, 2003); *Bámaca-Velásquez v. Guatemala*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 106 (Feb. 22, 2002).

156. Similarly, the order to publish Court judgments on state web sites is a recent development. *Yatama v. Nicaragua*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 252–53 (June 23, 2005) (the Court also ordered the broadcast of the judgment, in a variety of languages (including the relevant indigenous language), throughout the region where the petitioners live, as it was proven that radio is commonly used by the community to access information); *Serrano-Cruz Sisters v. El Salvador*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 195 (Mar. 1 2005).

157. As the noted psychiatrist Judith Herman writes, "remembering and telling the truth about terrible events are prerequisites both for the restoration of the social order and for the healing of individual victims." JUDITH HERMAN, *TRAUMA AND RECOVERY* 1 (1997).

158. *See* Marcie Mersky & Naomi Roht-Arriaza, *Guatemala*, in *VICTIMS UNSILENCED: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND TRANSITIONAL JUSTICE IN LATIN AMERICA* 7, 19–21 (Katya Salazar & Thomas Antkowiak, eds., 2007) (explaining the dangers that Guatemalan indigenous communities have encountered, after their Court awards are published).

sections of the judgment were ordered published, but victims' names were withheld in the interest of their safety.¹⁵⁹ In more recent cases, the Tribunal has demanded that the State publish the detailed proven facts section, in addition to its holding on the merits.¹⁶⁰ This is significant as the Court's chapter on proven facts is unique among judicial institutions, often providing an extensive account of the historical and social contexts from which the case's violations emerged.

d. Memorials and Commemorations

Depending upon their particular characteristics, the public ceremonies discussed above may commemorate the victims implicitly or explicitly, while they also seek to prevent the repetition of similar events in the future. The Court, again in 2001, also commenced a practice of requiring plaques, monuments—even a national day of remembrance on one occasion—in pursuit of these objectives. *Villagrán-Morales v. Guatemala*, the prominent “street children” case, ordered that Guatemala name a school after the five adolescents killed by state security forces, a requirement repeated in future cases involving young victims.¹⁶¹ The State was also obligated to install a plaque with the names of the victims on the school building. With these measures, the Court sought to “avoid the repetition of harmful acts such as those that occurred in the instant case” and to “keep the memory of the victims alive.”¹⁶²

In *Mack Chang v. Guatemala*, the State was ordered to establish an annual scholarship in honor of Myrna Mack Chang, a sociologist murdered by state agents after the Guatemalan government suspected her of “subversion.”¹⁶³ The Court also required that Guatemala name a street or square in Guatemala City after the vic-

159. *Children's Rehabilitation Institute v. Paraguay*, 2006 Inter-Am. Ct. H.R., ¶¶ 2–4 (in “Having Seen” section) (July 4, 2006) (Compliance with Judgment), available at http://www.corteidh.or.cr/docs/supervisiones/instituto_04_07_06_%20ing.pdf. Withholding victims' names or certain facts would also be necessary if publication may result in their humiliation or social ostracizing, such as in a rape case.

160. See, e.g., *Juvenile Reeducation Institute v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 315 (Sept. 2, 2004); *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 280 (Nov. 25, 2003).

161. See also *Gómez-Paquiyaui Bros. v. Peru*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 236 (July 8, 2004); *Molina-Theissen v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 108, ¶ 88 (July 3, 2004); *Trujillo-Oroza v. Bolivia*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 122 (Feb. 27, 2002).

162. *Villagrán-Morales (The Street Children Case) v. Guatemala*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 77, ¶ 103 (May 26, 2001).

163. *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶¶ 126, 146, 285 (Nov. 25, 2003).

tim, and “place a prominent plaque in her memory at the place where she died or nearby, with a reference to the activities she carried out.”¹⁶⁴ Monuments have been frequently ordered in the cases dealing with massacres of communities; in the best of these, the Court required consultation with the survivors as to the design, content and location.¹⁶⁵ Sensitivity to such factors restores a modicum of dignity to victims and family members and gives them a role in the recording of history.

2. Remedies Directed to Society as a Whole

a. *Reform of Legislation and Official Policies*

For years, when the Court received requests to order changes to national legislation and domestic policies, it demurred. At most the Tribunal would respond with a general statement reiterating the provisions of the American Convention’s Article 2: namely, that the states must undertake to adopt the necessary measures to give effect to the rights contained in that treaty.¹⁶⁶ As signaled above, however, this posture was revised in the 1999 case *Castillo-Petruzzi v. Peru*.¹⁶⁷ There, the Court held that “domestic laws that place civilians under the jurisdiction of the military courts are a violation of the principles of the American Convention”; consequently, it ordered Peru “to adopt the appropriate measures to amend those laws.”¹⁶⁸ This direct order to reform specific legislation was a first, and served as precedent for the well-known 2001 decision *Olmedo-Bustos v. Chile*.¹⁶⁹ *Olmedo-Bustos* required Chile to amend nothing less than its national constitution in order to prohibit prior censorship and, ultimately, to

164. *Id.* ¶ 286. While orders to name streets or plazas after victims are not common, the practice resurfaced in *Baldeón-García v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 205 (Apr. 6, 2006).

165. *Mapiripán Massacre v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005), and *Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006), do not require such consultation with victims, while the following cases do mandate this measure: *Ituango Massacres v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006); *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005); *Nineteen Tradesmen v. Colombia*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109 (July 5, 2004).

166. *See, e.g.*, *Suárez-Rosero v. Ecuador*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 44, ¶ 87 (Jan. 20, 1999); *Loayza-Tamayo v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 171 (Nov. 27, 1998).

167. *Castillo-Petruzzi v. Peru*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 52 (May 30, 1999).

168. *Id.* ¶ 222.

169. *Olmedo-Bustos (The Last Temptation of Christ Case) v. Chile*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 73 (Feb. 5, 2001).

allow for the exhibition of the film *The Last Temptation of Christ*.¹⁷⁰

While the Court's current approach in this area is uneven,¹⁷¹ it does order legislative reform in a handful of circumstances. One such situation has involved the protection of the land rights of indigenous and ethnic communities, as in the pioneering *Mayagna Awas Tingni Community v. Nicaragua* judgment.¹⁷² In that case and its progeny, the Tribunal has called for the creation of "an effective mechanism for the delimitation, demarcation, and titling" of such communities' traditional territories.¹⁷³ These directives are far-reaching, as they may require a state to craft elaborate legislation and set up administrative agencies. Demarcation may be formidable if communities have competing land claims. The orders frequently include injunctions that prohibit the state or private parties from using the lands in question until they can be demarcated and titled.¹⁷⁴

Other recent orders under this category have required the State to conform its legislation and policies to international and Inter-American human rights standards in the matter at issue, such as the forced disappearance of persons,¹⁷⁵ due process rights,¹⁷⁶ military jurisdiction,¹⁷⁷ voting regulations,¹⁷⁸ and prison conditions.¹⁷⁹ These orders do not usually scrutinize specific laws, as in *Olmedo-Bustos*. Their scope is wider, and they will often be accompanied by brief guidelines and references to relevant international principles and case law, including Court jurisprudence. Such instructions impose extensive, if not at times sprawling and unrealistic, obligations upon the state. Nevertheless, they are preferable to the vague directives the Tribunal commonly issued in the past.¹⁸⁰

170. *Id.* ¶¶ 97–98.

171. See Thomas M. Antkowiak, *Moiwana Village v. Suriname: A Portal into Recent Jurisprudential Developments of the Inter-American Court of Human Rights*, 25 BERKELEY J. INT'L L. 268, 279–82 (2007).

172. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

173. *Id.* ¶ 164.

174. See *id.*; *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 211 (June 15, 2005).

175. See, e.g., *Gómez-Palomino v. Peru*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 136, ¶ 149 (Nov. 22, 2005).

176. See, e.g., *Herrera-Ulloa v. Costa Rica*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 198 (July 2, 2004).

177. See, e.g., *Palamara-Iribarne v. Chile*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, ¶¶ 256–57 (Nov. 22, 2005).

178. See, e.g., *Yatama v. Nicaragua*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127, ¶¶ 258–59 (June 23, 2005).

179. See, e.g., *Montero-Aranguren (Detention Center of Catia) v. Venezuela*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150, ¶¶ 145–46 (July 5, 2006); *Hilaire v. Trinidad & Tobago*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 217 (June 21, 2002).

180. See, e.g., *Bulacio v. Argentina*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 162(5).

In all cases, remedial orders must be clear enough to be understood and followed by frequently unenthusiastic bureaucrats, as well as concrete enough to be verifiable by the Court in the supervisory process. Yet a third element is also essential: they should be sufficiently flexible to allow the sovereign state some discretion, since an international tribunal cannot anticipate all of the country-specific complications that might arise in the course of implementation.

b. Training and Educational Programs for State Officials

Other national measures to prevent the repetition of violations include training and educational programs for state officials. This remedial scheme was debuted in *Caracazo v. Venezuela*, a 2002 case where Venezuelan security troops acted with disproportionate force to quell citywide protests.¹⁸¹ The Tribunal mandated imprecise programs to train police and military in human rights principles, particularly on the appropriate limits to the use of force. While programs addressed to state security forces are most common in the Court's case law, in recent years other groups have been targeted for training as well, such as prison officials, judges, prosecutors, and health professionals associated with state institutions.¹⁸² Those programs that have specified, to some degree, the curricula of such courses—or at least have identified relevant international legal norms to be studied—would seem to have a greater chance to effect change.

3. Remedies Directed at Discrete Communities

Distinct from the society-wide remedies discussed above, the

(Sept. 18, 2003) (providing that “the State must guarantee non-recidivism of facts such as those of the instant case, adopting such legislative and any other measures as may be necessary to adjust the domestic legal system to international human rights provisions”).

181. *Caracazo v. Venezuela*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 95, ¶ 127 (Aug. 29, 2002). There have been three disproportionate force cases where Venezuela has been ordered to train its military. Both *Blanco-Romero* and *Montero-Aranguren* have reiterated *Caracazo*, though with increasing specificity. *Montero-Aranguren v. Venezuela*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 148 (July 5, 2006); *Blanco-Romero v. Venezuela*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 138, ¶ 106 (Nov. 28, 2005). Unfortunately, the *Caracazo* judgment was issued after the facts of both *Blanco-Romero* and *Montero*, so its remedies would not have prevented the events anyway.

182. See, e.g., *Ximenes-Lopes v. Brazil*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 250 (July 4, 2006) (state health professionals); *Gutiérrez-Soler v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶¶ 106–10 (Sept. 12, 2005) (training for police, judges, prosecutors, and health professionals working in state institutions); *Tibi v. Ecuador*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 263 (Sept. 7, 2004) (same).

Court has increasingly ordered measures for the benefit of discrete communities.¹⁸³ *Aloeboetoe*, described previously, is the leading case in this area, though it was certainly an anomaly for its time.¹⁸⁴ Eight years passed until the Tribunal issued its decision in *Mayagna*, which, in addition to the orders protecting ancestral land, provided for a \$50,000 fund for “works or services of collective interest” for the community.¹⁸⁵ In contrast to the paternalistic approach used in *Aloeboetoe*, the Nicaraguan judgment required the community members’ participation in the design of the fund’s programs.¹⁸⁶

As stated in the introduction to this Article, in 2004 the Court was faced with repairing the consequences of a massacre in *Plan de Sánchez v. Guatemala*.¹⁸⁷ After this landmark judgment, four more massacre cases were heard in San José over two years, and some parameters have emerged for collective remedies in these circumstances. In the first two cases, *Plan de Sánchez* and *Moiwana v. Suriname*, developmental programs were ordered to be directed to health, housing, education and other areas.¹⁸⁸ While the Guatemalan judgment, after taking into account the victims’ numerous petitions, set more specific objectives to be achieved by the State, *Moiwana* featured a different methodology. It established a fund of \$1.2 million and an implementing committee, with victim and state representatives, that would determine how precisely to invest the re-

183. These are ethnic, indigenous, and/or “geographic” communities. There are nine such cases in total; seven since *Plan de Sánchez* of 2004. *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006); *Sawhoyamaya Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006); *Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006); *Mapiripán Massacre v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005); *Yakye Axa Indigenous Community v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005); *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116 (November 19, 2004); *Mayagna Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001); *Alboeboetoe v. Suriname*, 1993 Inter-Am. Ct. H.R. (ser. C) No. 15 (Sept. 10, 1993).

184. *Alboeboetoe v. Suriname*, 1993 Inter-Am. Ct. H.R. (ser. C) No. 15 (Sept. 10, 1993).

185. *Mayagna Awas Tingni Cmty. v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 173(6) (Aug. 31, 2001). Legal fees and expenses were awarded also. *Id.* ¶ 173(7).

186. The fund established in *Aloeboetoe* has many restrictions, depriving the beneficiaries of autonomy. See PASQUALUCCI, *supra* note 60, at 113.

187. *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116 (Nov. 19, 2004). Yet it is important to add that in *Plan de Sánchez* and *Moiwana*, the Court did not declare violations of the right to life, as the Tribunal had decided that it lacked *ratione temporis* jurisdiction over the massacres themselves. *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 70 (June 15, 2005); *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 7 (Nov. 19, 2004).

188. *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 214 (June 15, 2005); *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 105–10 (Nov. 19, 2004).

sources.¹⁸⁹

The last three massacre cases have scaled back developmental remedies: *Mapiripán v. Colombia* required no such scheme, and *Pueblo Bello v. Colombia* and *Ituango v. Colombia* barely sketched housing programs, without many operational details.¹⁹⁰ Nevertheless, this trend does not necessarily show that infrastructural orders have fallen out of favor with the Court. Two recent cases involving displaced indigenous populations in Paraguay followed the *Moiwana* approach closely, providing for funds and implementing committees to pursue similar objectives.¹⁹¹ Finally, it is notable that several of these cases involve communities that have fled from their villages, and possibly face ongoing persecution. As a consequence, the Tribunal has ordered measures to guarantee the victims' safety if they choose to return to their homes.¹⁹²

E. Conclusion

The Inter-American Court's jurisprudence has established new paradigms in international law for the redress of individuals and groups. The foregoing review demonstrates that the Tribunal now orders non-monetary remedies in every possible scenario, regardless of the size of the case or the human rights violations alleged; "gross" or "systematic" abuses are clearly not required. Of course, several of its approaches are controversial and invite scrutiny. The developmental programs stand as an obvious example: they are complex, intrusive upon state sovereignty, and possibly do not even qualify as true reparations since they may demand obligations the state appa-

189. The Tribunal required that the tripartite committee have one representative designated by the victims and another chosen by the State; the third member was to be agreed upon by both parties. See *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 215 (June 15, 2005).

190. *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R., (ser. C) No. 148, ¶ 407 (July 1, 2006); *Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 276 (Jan. 31, 2006); *Mapiripán Massacre v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005).

191. See *Sahoyamaya Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 224 (Mar. 29, 2006); *Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 205 (June 17, 2005). These two judgments order a range of other non-monetary remedies as well. *Sahoyamaya Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 248 (Mar. 29, 2006); *Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 242 (June 17, 2005).

192. See, e.g., *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 404 (July 1, 2006); *Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 275-76 (Jan. 31, 2006); *Mapiripán Massacre v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 313 (Sept. 15, 2005); *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 212 (June 15, 2005).

tus already owed to such communities.¹⁹³ Such considerations will be addressed in the following Section, which assesses in detail the normative model emerging from the Court's reparations jurisprudence.

IV. STRENGTHS AND LIMITATIONS OF THE INTER-AMERICAN COURT'S REMEDIAL MODEL

Given the proliferation of non-monetary remedies over the last decade at the Inter-American Court, as well as their wide potential impact, these measures have become a defining characteristic of the Inter-American Court's contemporary jurisprudence. The following Section considers the strengths and limitations of the Court's particular reparative approach, which generously mixes equitable remedies with compensation.

A. *General Advantages of Non-monetary Remedies*

The advantages of remedies ordering specific conduct, from restitution to negative injunctions to the exclusion of evidence, are familiar and discussed in the legal literature.¹⁹⁴ First of all, they terminate ongoing violations (such as ordering the liberation of detainees); the offender, then, is denied the possibility of paying damages and continuing illegal activity.¹⁹⁵ As opposed to just throwing cash at a problem, orders can be tailored to specific violations suffered by individual victims and even society at large. Such remedies are particularly appropriate in human rights cases, where many injuries cannot be quantified in terms of economic loss. In addition, collective reparations programs such as those ordered by the Inter-American Court—similar to structural reform injunctions in the U.S.—encourage experimentation, as the Court usually does not hand down detailed requirements. The programs allow for some trial and error, and give the Court and offending states, through the supervisory process, time to work out the proper formula for redress.¹⁹⁶

The inherent flexibility of an equitable system allows the Inter-American Court to build in victims' preferences. Considering

193. See Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 188 (2004); Hans Dieter Seibel, *Reparations and Microfinance Schemes*, in THE HANDBOOK OF REPARATIONS 686 (Pablo de Greiff ed., 2006).

194. See, e.g., D.R. Dobbs, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION (1993).

195. See SHELTON, *supra* note 9, at 45.

196. See Jeffries, *supra* note 6, at 113.

such preferences is simply necessary in circumstances that defy economic damage assessment: the victims themselves, together with psychological and perhaps other expert testimony, are in the best position to indicate how the *status quo ante* can be approximated in each context. In the absence of personalized information, seven privileged judges—however knowledgeable, analytical, and well-intentioned—are ill-equipped to help, for example, farmers psychologically and financially devastated by government persecution.

And victims generally prefer non-monetary remedies above all. An array of evidence, including testimony before the Inter-American Court itself, demonstrates that victims most demand that offenders make amends for violations.¹⁹⁷ Such reparations include an apology, a recognition of responsibility, and restitutionary measures that will restore their dignity, health, reputation, and place in society. On the other hand, cash compensation produces ambivalence among many victims, and is not often considered central to the healing process.¹⁹⁸ In this way, the Court's emphasis upon official apologies, the publication and circulation of its judgments, and rehabilitation is well placed.

Also atop a victim's list of demands is ending the impunity

197. Interview with Carlos Beristain, Professor, University of Deusto, Spain and coordinator of the report "Guatemala, Never Again," published by the Project for Recuperation of Historical Memory (REHMI), in Wash., D.C. (Nov. 4, 2007). Telephone Interview with Pablo Saavedra, Executive Secretary of the Inter-American Court of Human Rights (Dec. 10, 2007). See also Priscilla Hayner, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 147 (2001) (citing interview with psychiatrist Judith Herman, who stated that, "rather than monetary compensation from the state, victims want some kind of restitution . . . which is different from punishment"); Roht-Arriaza, *supra* note 192, at 180. There are numerous petitions before the Inter-American Court demanding non-monetary amends. To cite only a couple of examples, in the *Serrano-Cruz Sisters* case, the next of kin demanded that El Salvador officially accept responsibility for the human rights violations found in the judgment. After a state ceremony was held, which allegedly only expressed general regret as to the occurrence of the events, the victims' representatives protested to the Court. They argued that the official gesture was an inadequate form of reparation, as there was neither an explicit acknowledgement of responsibility nor an apology. See *Serrano-Cruz Sisters v. El Salvador*, 2006 Inter-Am. Ct. H.R., ¶ 4(v)(g) (Sept. 22, 2006) (Monitoring Compliance with Judgment), available at http://www.corteidh.or.cr/docs/supervisiones/serrano_%2022_09_06_%20ing.pdf. In *Gutiérrez-Soler v. Colombia*, a victim stated that it was unjust that one of his daughters was psychologically traumatized and demanded that her mental integrity be restored; another victim of the case insisted, in order to prevent the recurrence of these "atrocious things," that the State "teach the police and army how to respect human rights." *Gutiérrez-Soler v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶¶ 41(b)–42(b) (Sept. 12, 2005).

198. See, e.g., Telephone Interview with Pablo Saavedra, Executive Secretary of the Inter-American Court of Human Rights (Dec. 10, 2007); Priscilla Hayner, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 147 (2001); Roht-Arriaza, *supra* note 192, at 180 (citing a study by the Chilean organization CODEPU, which showed that "monetary compensation is controversial and problematic" and that "victims are much more ambivalent about monetary reparations").

surrounding the violations through an impartial criminal investigation and prosecution.¹⁹⁹ By holding perpetrators accountable, victims hope that others, including future generations, will not have to suffer as they did.²⁰⁰ Another forward-looking remedy that has emerged as important for petitioners is support for educational expenses, particularly for the children of the killed or disappeared. Again, the Tribunal has responded to these preferences in its case law: criminal measures are invariably ordered²⁰¹—with stress on ending impunity and locating and returning corpses—and some scholarships have been required.

B. *When Victims Negotiate Their Priorities*

Particularly instructive is to consider how victims, necessarily faced with a limited universe of remedial options, identify and negotiate their priorities with the defendant state. The settlements of *Barrios Altos*, *Durand*, and *Huilca-Tecse*, all against Peru, are useful to study in this regard because they followed an official acceptance of liability or the Inter-American Court's determination on the merits.²⁰² That is, the parties negotiated reparations agreements once Peru's responsibility for human rights violations was established in the three cases. As a result, the bargaining position of the victims was drastically changed: from alleging rights abuses one moment to working out remedial solutions with high-level government representatives the next. The Court's mere intervention—and in the case of *Durand*, its ruling on the merits—empowered the victims vis-à-vis the State, allowing for more level negotiations.²⁰³

All three settlements stipulated both compensation and equitable remedies. The non-monetary remedies are particularly expansive and detailed. All three agreements provide for a public state

199. See, e.g., Interview with Carlos Beristain, Professor, University of Deusto, Spain and coordinator of the report "Guatemala, Never Again," published by the Project for Recuperation of Historical Memory (REHMI), in Wash., D.C. (Nov. 4, 2007); Telephone Interview with Pablo Saavedra, Executive Secretary of the Inter-American Court of Human Rights (Dec. 10, 2007).

200. This statement has been voiced by many victims before the Inter-American Court. See, e.g., *Gutiérrez-Soler v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶ 42.

201. Yet, as discussed previously, criminal investigation and prosecution duties technically come from Article 1(1) of the American Convention, and thus are theoretically independent from reparation measures.

202. *Huilca Tecse v. Peru*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 121 (Mar. 3, 2005); *Barrios Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001); *Durand Ugarte v. Peru*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 68 (Aug. 16, 2000).

203. See generally Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1056 (2004).

apology, publication and circulation of the judgment,²⁰⁴ continuing efforts to prosecute responsible parties,²⁰⁵ and medical and psychological treatment for victims. Two of the three settlements establish memorials and commemorations. Of interest in *Barrios Altos*, which involved over a dozen persons gunned down by police forces and thus several more beneficiaries than the other two cases, is the detailed section on educational measures. The agreement grants scholarships and financial support for beneficiaries in primary, secondary and technical schools, including books, uniforms and other materials.

Certainly, *Barrios Altos* and *Durand* were signed at a fortuitous juncture: a new presidential administration was eager disassociate itself from high-profile abuses of the Fujimori regime. As a result, cynics may say the State would have granted almost all requests, especially symbolic measures that cost little and score political points. The agreements even provided substantial monetary compensation; the terms were very generous in comparison with typical Court judgments of the time.²⁰⁶ Nonetheless, it is maintained that the victims of *Barrios Altos* and *Durand* did not enjoy unlimited options for reparations, and they chose packages that dedicated substantial attention to non-monetary remedies—as victims would later in *Huilca-Tecse*, a situation of less political expediency, where the compensation awarded per person was lower.

What makes *Barrios Altos* and *Durand* more remarkable is that prior to these decisions the Court had not yet ordered official apologies, the publication of judgments, or medical and psychological treatment²⁰⁷ in its cases. Those precedents did not yet exist, still the victims demanded and obtained the remedies—paving the way for the breakthroughs noted in *Cantoral-Benavides v. Peru*,²⁰⁸ which was decided only days after *Barrios Altos*. Why did the Court finally

204. Settlements before the Court, once approved, effectively become judgments with full legal force.

205. The *Barrios Altos* settlement did not need to stipulate this, since it was already provided for in the Court's judgment on the merits.

206. Yet it is difficult to precisely compare the compensation awards for a few reasons. For instance, each family was just given a lump sum; damages were not individualized in the settlements. Also, monetary awards at the time were relatively low in comparison to today, and moral damages were granted with reticence. See, e.g., *Paniagua Morales v. Guatemala*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 76 (May 25, 2001) (no moral damages were awarded to the estates of deceased victims). For an example of a friendly settlement approved before the Court with surprisingly generous monetary terms, in addition to an official recognition of responsibility and other non-monetary provisions, see *Benavides-Cevallos v. Ecuador*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 38 (June 19, 1998).

207. The Court had only granted compensation for the future expenses of such treatment.

208. *Cantoral-Benavides v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88 (Dec. 3, 2001)

grant these orders in *Cantoral*?²⁰⁹ Perhaps it was because victims had spoken in a unified voice in *Barrios Altos* and presented a compelling case for the inherent value of such remedies. Or maybe the Court was simply more confident that such potentially humiliating orders would be followed, since Peru had already acquiesced in *Barrios Altos*. While the explanation likely lies within a combination of these and other factors, the important point is that these crucial remedies, expressions of the victims' real needs and preferences, were fully incorporated into the Court's case law.

C. Shortfalls to the Inter-American Court's Approach

Consideration of monetary compensation has thus far been limited in order to focus much-deserved attention upon equitable remedies. Yet moral and material compensation, which enjoy distinguished pedigrees in international law, are not met with disapproval in this Article. Although I maintain that non-monetary remedies can be tailored to remedy violations, are most demanded by victims, and are often less costly for a state, compensation still plays an important role.

While its most straightforward application results when damage can be assessed as a numeric value, in the case of material damages, compensation is commonly used in human rights tribunals as a substitute remedy for moral injury. Such practice has much precedent in international law;²¹⁰ furthermore, the award of moral damages has pragmatic points in its favor. First, since hard evidence of material loss is often scarce, material damages granted may be far insufficient, especially when victims have lost their main sources of economic support, or otherwise face financial crisis owing to the violations.²¹¹ Second, cash itself may have symbolic significance, based on an understanding that "in our system of justice, when damage occurs money is paid."²¹² Also, moral damages, inherently subjective, may be adjusted to the gravity of the abuse, serving a punitive function and acting as a deterrent for the future.²¹³

209. These remedies were requested by petitioners in *Cantoral* as well.

210. See SHELTON, *supra* note 9, at 306–07.

211. See Thomas M. Antkowiak, *Truth as Right and Remedy in International Human Rights Experience*, 977 MICH. J. INT. L. 1013, 1002.

212. Yael Danieli, *Justice and Reparation: Steps in the Process of Healing*, in REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS 303, 309 (Christopher C. Joyner ed., 1998).

213. Yet punitive damages may not be advisable in the Inter-American system. First, the perpetrator is never obligated to pay; rather, costs are absorbed by the state treasury. Also, since there is often a long lag time before a case finally makes it to the Court, subse-

The Inter-American Court's reparative model nearly always includes a blend of the pecuniary and the equitable. A standard recitation with respect to moral damages goes as follows:

for purposes of comprehensive reparation to victims, the Court must turn to other alternatives: first, payment of an amount of money or delivery of goods or services that can be estimated in monetary terms, which the Court will establish through reasonable application of judicial discretion and equity; and second, public acts or works that seek, *inter alia*, to commemorate and dignify victims, as well as to avoid the repetition of human rights violations.²¹⁴

A remedial methodology that seeks to restore the *status quo ante* by integrating monetary and non-monetary measures, while taking into account victims' preferences, seems well-crafted in principle. Yet the Tribunal has faced its share of difficulties in applying its equitable powers, as well as in satisfactorily balancing injunctions and compensation.

1. Applying Equitable Powers: Common Issues

The Court at times faces the same degree of suspicion encountered when U.S. courts engage in public law injunctions. Worries emerge when the Tribunal imposes a detailed order that overly meddles with a state's sovereignty. And eyebrows are justifiably raised when an international human rights court sets out broad programs dictating policy decisions, with limited information before it and even less democratic participation.

The Court, then, struggles with many of the same theoretical issues as domestic courts of equity. On the operational side it is no different: court orders may be inappropriate for the facts of the case, or suffer a lack of clarity. It is true that the repetition of certain non-monetary measures, case after case, could be justifiable—rehabilitation measures for victims, for example, since a high percentage of cases result in some degree of psychological trauma.²¹⁵ But as a general rule, there should be no general rule, and context must govern. Even ordering the publication of judgments should not be automatic, as noted above, since it may endanger certain individu-

quent government administrations would likely be "punished" by the punitive damages.

214. *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 191 (June 15, 2005).

215. This is hardly surprising given the significant number of cases involving forced disappearance, extra-judicial killings, torture, and inhuman treatment.

als or stir up social resentment.²¹⁶ Another harmfully repetitive aspect to Tribunal judgments is found in the section on investigation and prosecution, which invariably contains a misplaced discussion on impunity, access to justice, and the right to the truth. While these concepts are of fundamental importance, they belong in the merits analysis. By relegating them to the reparations chapter, they are not only deemphasized, but they are also clumsily mixed with precise requirements the Court is setting out for the criminal investigation, such as relevant technical standards and orders to protect witnesses. This makes it difficult for the State to discern its obligations in this crucial area.

Straddling the line between excessive vagueness and ironclad rigidity requires finesse. The Court often gives appropriate deference to national mechanisms for the determination of economic loss. Yet it will also omit essential guideposts for training or educational programs, perhaps supplying in their place a condescending lecture on good governance.²¹⁷ At the other extreme, the Tribunal's fixed criteria may be uncalled for. In *Plan de Sánchez*, the Court set aside \$25,000 for the restoration and maintenance of a community chapel.²¹⁸ This measure, expensive for Guatemalan standards, was ordered as a means to commemorate the victims of the massacre and to prevent the recurrence of such events. However, it was apparently not requested by the victims. The petitioners may have instead chosen to direct scarce state resources toward the developmental programs also provided—which they did ask for—while spending much less on their own notion of a fitting memorial.

Here, a useful model may be offered by “experimentalist regulation” in U.S. public law litigation. In this approach, parties are given discretion to achieve particular goals set by a court.²¹⁹ Rather than specifying the precise way to carry out its orders, the tribunal leaves the task to the stakeholders and mandates their cooperation. Since the balance of power changes between the victims and the state after a determination of liability, and the Inter-American Court supervises compliance with its judgments, such a democratic arrangement is both feasible and attractive. The Court's developmental programs that provide overarching objectives and require collaboration between the victims and state officials, for both design and imple-

216. See *Girls Yean & Bosico v. Dominican Republic*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005).

217. See *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶¶ 281–84 (Nov. 25, 2003).

218. *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 104 (Nov. 19, 2004).

219. See *Sabel & Simon*, *supra* note 202, at 1017–20.

mentation of projects, imitate this approach.

2. Exceeding the Scope of Violations with Society-wide Orders?

Clearly, fashioning remedies is not a science. As it is difficult to fit the order to the injury with a high degree of precision, often injunctions are criticized for exceeding the scope of the violation. As we have seen, the Inter-American Court is no longer shy about requiring society-wide reparations, including legislative and institutional reform, even in cases involving a sole litigant. These orders have generally been issued in two circumstances: a) when a national law violates the American Convention; or b) when illegal practices of state agents or institutions are proven before the Tribunal. Such an approach seems justified, as remedies with a national reach are proportional to a systemic domestic problem or impermissible legislation.

As noted previously, some of the Court's directives for reform have been very ambiguous; they might order "adopting such legislative and any other measures as may be necessary to adjust the domestic legal system to international human rights provisions" ²²⁰ While such overly broad mandates overshoot the specific violations at issue, the reality is that under-enforcement of human rights results. It is no surprise that these orders have provoked little action by way of state compliance: states do not know where to begin and, in any event, the order's fulfillment would not be readily verifiable by the Court. ²²¹ Despite a grandiose scope, then, without a real chance for enforcement, these vague orders are barely remedies at all. The underlying rights are diminished in these cases, or even flaunted entirely, if they are not enforced with complementary remedies. ²²²

If such orders are only quasi-remedies at best, perhaps there would be no objection if the Court included them in judgments where no laws or practices were shown to be in contravention of the American Convention. After all, such statements in their most basic form

220. *Bulacio v. Argentina*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 162(5) (Sept. 18, 2003).

221. For example, more than five years after the Court vaguely ordered Guatemala in *Bámaca-Velásquez* to "conform" national laws to international human rights standards, the State still had not provided even minimal information concerning its compliance. *Bámaca-Velásquez v. Guatemala*, 2007 Inter-Am. Ct. H.R., ¶ 8(c) (in "Considerando" section) (July 10, 2007) (Monitoring Compliance with Judgment), available at http://www.corteidh.or.cr/docs/supervisiones/bamaca_16_01_08.pdf (available in Spanish).

222. See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 685–86 (2006) ("[t]he more extensive and potent the enforcement mechanisms, the more valuable a right becomes").

are merely reiterations of a State Party's duty to give the Convention's norms domestic legal effect pursuant to Article 2 of that treaty. Curiously, though, in some recent decisions the Court has gone a step further: it has handed down *detailed* national orders *without* evidence of society-wide illegal laws and practices.²²³ And some of these cases did not involve groups of victims, which might suggest a more generalized illegal practice.

Daniel Tibi was illegally detained for nearly twenty-eight months in an Ecuadoran prison, where guards burned and beat him fiercely, and subjected him to electrical shocks.²²⁴ The *Tibi v. Ecuador* judgment declared several rights violations with respect to Mr. Tibi, although it did not contain any proven facts referring to society-wide practices of prisoner abuse in Ecuador. The court nonetheless ordered, among other measures, that the State establish a national training program for judges, prosecutors, police, and prison staff (including guards and medical personnel) concerning the proper treatment of prisoners.²²⁵

There is no doubt that Ecuador, once its liability is found, has the duties to repair the violations described, and to prevent their recurrence in its jurisdiction. Yet the Court's order for a serious and impartial criminal investigation may have been a proportional "guarantee of non-repetition" in the circumstances. By requiring an elaborate national training program for an apparently isolated case of abuse, the Court has placed a very high premium on the treatment of state detainees. While such a posture may be sympathetic in light of the case's egregious facts, it was surely excessive if Tibi's case was not part of a broader problem. It is possible that the Court overreacted because it has grown accustomed, as a regional human rights tribunal, to receiving "emblematic cases" that are representative of a particular country's abusive practices, which often necessitate general reforms. Also, the fact that Mr. Tibi was scorned by the Ecuadoran justice system and made it all the way to the Court may itself be indicative of wider troubles concerning prisoner abuse and impunity. But it may also simply show that Mr. Tibi was an unpopular figure, an accused drug trafficker in fact, whose petitions fell on deaf ears.²²⁶

Added to the above factors, the Court must certainly feel the

223. See, e.g., *Gutiérrez-Soler v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶¶ 106–10 (Sept. 12, 2005); *Tibi v. Ecuador*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, ¶¶ 263–64 (Sept. 7, 2004).

224. *Tibi v. Ecuador*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114 (Sept. 7, 2004).

225. See *id.* ¶¶ 263–64.

226. This likely would constitute a different human rights violation, requiring a different remedy.

temptation “to get it right this time,” since it receives limited cases and may not hear another one regarding, for example, rights of detainees in Ecuador for years. Clearly these are treacherous waters for a Tribunal with sweeping remedial powers. While it is necessary to have society-wide components in its remedies to prevent the recurrence of violations, the Court must strive for proportionality so that its authority is not ultimately undermined.

3. Group Cases and a Precarious Balance

Since its very first cases, *Velásquez-Rodríguez* and *Godínez-Cruz*, the Court has instructed states on their legal duties with respect to their jurisdictions as a whole—regardless of whether the case involved two victims or two thousand. And for almost fifteen years now, it has ordered collective remedies of a varying nature, as a result of a wide reparations competence, liberal standing requirements that admit group petitions, and several other flexible procedural rules.²²⁷ In this way, the Tribunal has acted to redress harms on individual, communal, and structural levels. However, the group cases present particular challenges for the Court’s reparative model, as it must struggle to forge a proper balance between non-monetary measures and compensation.

While compensation for material damage lends itself more to objective assessment,²²⁸ moral damages are determined “in equity” by the Tribunal, taking into account the particular circumstances causing moral suffering in each case.²²⁹ Still, one would expect moral damages for similar facts to be roughly congruent over time. In the multiple victim cases, however, victims are often granted lower moral compensation awards than what they would receive in smaller cases for similar violations.²³⁰ Yet there seems to be an im-

227. See William J. Aceves, *Actio Popularis? The Class Action in International Law*, 2003 U. CHI. LEGAL F. 353, 386–91 (2003); Antkowiak, *supra* note 170, at 275–77.

228. See *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶¶ 14–17 (Nov. 19, 2004) (separate opinion of Judge García-Ramírez). However, for a description of the European Court of Human Rights’ “impressionistic” approach to material damages, see GRAY, *supra* note 6, at 158.

229. See, e.g., *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 191–96 (June 15, 2005).

230. Additional factors also are influential on the determination of moral compensation amounts. Several of the recent group cases assessed in this section also contained official acceptances of responsibility before the Court. Among the cases with “direct” Article 4 violations, this recognition appears to reduce moral damages awarded to next of kin, but does not affect the amounts granted directly to the victims’ estates. With respect to “indirect” violations of the right to life, the state acceptance does not seem to influence either of the amounts, perhaps because they are already quite low. Reducing the moral damages awarded to the next of kin after a state recognition of liability could be considered reasonable, as the

portant exception to this tendency. Of the dozen recent group cases assessed in this Section, all but two involved massacres or violations of the right to life, Article 4 of the American Convention. Moral damages awarded per person were quite low when the Article 4 violation was “indirect”—that is, when the state is held liable for *not* having adopted *positive* measures to protect the victims’ lives.²³¹ In contrast, when authorities were actively involved in the deaths, the Court granted individual moral compensation comparable to its smaller cases.²³² That is, when heinous crimes were pinned directly on state agents, the Court still ordered full compensation.

This exception aside, the Tribunal often minimizes individual moral compensation in large cases. The most straightforward explanation for this practice is simply to make reparations economically feasible for the state in such circumstances. Yet a darker possibility also comes to mind: could such results derive from paternalistic attitudes? Court judgments have never awarded substantial individual moral damages to members of indigenous and ethnic communities; the judges have preferred to assign cash to developmental funds or programs.

There is insufficient evidence to draw definitive conclusions, since the cases involving the members of such communities nearly always incorporate collective rights—and thus would demand some degree of collective remedies. Furthermore, there are many variables at play that complicate direct comparisons. For example, of a dozen recent group cases, four judgments dealt with indigenous and ethnic communities, but not one actually declares a “direct” right to life violation. In the judgments of *Yakye Axa* and *Sawhoyamaxa*, Paraguay was held responsible for failing to adopt measures to provide members of indigenous communities with adequate living conditions.²³³ The communities lived in temporary settlements without basic sanitation or means of subsistence, reaching a level of “extreme misery,” while they waited for the State to process their land claims.²³⁴ The

statement may have in fact served to ameliorate their suffering. Moreover, the practice may incentivize states to concede liability, if appropriate, and thus expedite proceedings that have dragged on for years.

231. No individual damages were ordered at all in *Yakye Axa Indigenous Community. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005).

232. It is worth noting that in two “indirect” cases, the victims were executed in the same brutal fashion as in “direct” ones, except by paramilitary thugs instead of regular army troops. Differentiating moral damages in this fashion is not satisfactory, since the victims all suffered deliberate killings under circumstances that were just as anguished.

233. In *Sawhoyamaxa*, the Court additionally ruled that the State was liable for eighteen deaths occurring at the camps due to the conditions of hardship. *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006).

234. *Yakye Axa Indigenous Cmty. v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 164 (June 17, 2005).

other pair of cases, *Plan de Sánchez* and *Moiwana*, avoid Article 4 rulings altogether, despite both involving massacres, since the deaths took place before the respective states had accepted the Court's jurisdiction.²³⁵

Just as impermissible as paternalism is any resistance to award community members individual damages simply because they are members of a group. Granting them only collective measures when they have suffered violations independent of that status would be discriminatory, regardless of whether the group is defined by ethnic, economic, geographic, or any other characteristic. In *Moiwana*, the victims fled their village after watching family members die at the hands of advancing soldiers. Though the events of the attack fell out of the Court's competence, the survivors subsequently were forced to endure exile, dire poverty, as well as ongoing impunity for the killings. While they were granted extensive community measures to provide their safe return and restore land rights, the *Moiwana* victims were only given ten thousand dollars each for moral damages, manifestly disproportionate to their moral travails and Inter-American jurisprudence.²³⁶ The suffering was intensely personal, compromising their rights to psychological integrity, among others, and deserved a personalized damage award of an adequate dimension.²³⁷ In contrast, if the rights litigated in *Moiwana* had only been communal in nature, such as their collective claim to property, individual awards may well have been dispensable.

Lately, those most disadvantaged—at least in an economic sense—by litigating in a group case format may actually be non-ethnic/indigenous populations. In the last three Colombian massacre

235. In support of a paternalistic hypothesis, it is tempting to posit that the Tribunal innovated the “indirect” violation of Article 4 as a means to reduce individual damage awards in cases involving ethnic communities. After all, the “indirect” violation has gained prominence only recently, as matters concerning such communities have multiplied before the Court. Yet, a closer look shows that the Court has in reality expanded its notion of Article 4 over the years so that it may hold a state responsible for failing to provide vulnerable groups—inter alia, street children and the Paraguayan indigenous populations—a *vida digna* or worthy living conditions. Furthermore, the “indirect” violation was actually introduced in the Colombian massacre cases to link brutal paramilitary activity with the state apparatus, and thus to enhance protections for civilian populations. Still, a reluctance on the part of the Court to award significant moral compensation to individual members of ethnic communities has not been disproved.

236. *Moiwana Cmty v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 96 (June 15, 2005). By way of comparison, the Court recently awarded a victim of freedom of expression violations \$35,000 for moral damages. See *Canese v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 207 (Aug. 31, 2004).

237. See Jaime Malamud-Goti & Lucas Grosman, *Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies*, in THE HANDBOOK OF REPARATIONS 539, 554–55 (Pablo de Greiff ed., 2006) (emphasizing the individuality of each victim contributes to the restoration of lost dignity).

cases, those primarily awarded damages were next of kin of the killed, along with the victims' estates. But many survivors did not receive moral damages at all; for example, the Court did not grant individual monetary awards to the hundreds of displaced victims in *Ituango v. Colombia*.²³⁸ Moreover, community measures were sparse in the Colombian cases: as noted above, two judgments ordered ill-defined housing programs and one supplied no developmental scheme at all. This of course begs the question why non-ethnic groups would be less worthy of development programs in the aftermath of large-scale state attacks.

In sum, although it is possible that a victim or next of kin will receive compensation on par with his or her counterpart in a smaller case, it is unlikely. Except in the most extreme situations, such as a state agent committing murder, the Inter-American Court cuts corners when awarding moral compensation in large cases—whether or not ethnic/indigenous populations are involved. If there are many victims, individual damages will frequently be minimized, and community reparations may even be trimmed down as well.²³⁹

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An analogous situation is found in the transitional justice context, where many victims claim reparations from a state that has recently shed authoritarian rule. Clearly, governments face strict resource constraints in this scenario; even if there is political will to initiate a collective reparations program, only meager individual damages are a practical possibility. In these circumstances, the Court's remedial model suggests a functional approach. This approach, not always followed by the Tribunal itself, provides: a) at least a minimal amount of economic compensation, which may help the victims restore some dignity to their lives and rejoin their communities; and b) individual and communal measures of satisfaction and rehabilitation, as well as society-wide guarantees of non-repetition. It cannot be emphasized enough that equitable measures

238. *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 22 (July 1, 2006) (separate opinion of Judge García-Ramírez). Similarly, in *Juvenile Reeducation Institute* no monetary compensation was granted for the thousands of juvenile detainees suffering nightmarish conditions. *Juvenile Reeducation Inst. v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 112 (Sept. 2, 2004).

239. Consider the result of *Mapiripán v. Colombia*, where the State accepted responsibility for forty-nine "direct" violations of the right to life after a village-wide massacre. Since high compensation awards were unavoidable for the killings, the Court omitted community development measures entirely from the judgment (although several non-monetary remedies remained). *Mapiripán v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005).

are unfailingly ordered by the Court, even if monetary measures must be scaled back.

Critics will respond that an international tribunal must not temper its economic reparations with considerations about the limited financial resources of offending states. An international consensus, including the Court itself, holds that justice requires *restitutio in integrum*; thus, compensation awards could not merely be a function of the number of victims in a case.²⁴⁰ Yet full remediation is rarely achieved even in the domestic context, which presumably approximates the *restitutio in integrum* ideal best.²⁴¹ Indeed, in the domestic arena, while compensation awards may increase, often non-monetary measures are greatly deemphasized or ignored completely. In an imperfect world where rights may never be fully restored, all courts necessarily must make difficult decisions factoring in priorities and practical limitations.²⁴² It is in this setting that the Inter-American Court's approach has hedged its bets on equitable remedies, to be supplemented whenever possible with meaningful compensation.

To reiterate, this is not a purely economic strategy: if the Court's first concern were mitigating a state's financial burden, it would not be demanding costly prosecution efforts, rehabilitation schemes, and developmental programs. Nevertheless, as large cases continue to flow to San José, national treasuries need not go bankrupt and the Inter-American System need not be undermined by states refusing to pay large bills. The remedial model weighted toward non-monetary, forward-looking measures likely will be less expensive than lump-sum attempts at full economic compensation,²⁴³ and will always do more to provide victim satisfaction, prevent recurrence of violations, and foster social reconciliation.

D. *But How much Cash Is Appropriate?*

The consequences of economic scarcity should not be borne disproportionately by victims, either in individual cases or transitional justice contexts.²⁴⁴ Rather, the state must show that victims are a priority—or at least equal in importance—compared to other

240. See Pablo de Greiff, *Introduction* to THE HANDBOOK OF REPARATIONS 1, 13 (Pablo de Greiff ed., 2006).

241. See Jeffries, *supra* note 6, at 87–92 (citing cases implicating constitutional rights in the United States).

242. See *id.* at 109 (in a world of limited resources, “the question will often be not whether we should redress both past and future injuries, but whether we can redress injury at all”).

243. See *id.* at 109.

244. See Malamud-Goti & Grosman, *supra* note 236, at 548.

urgent demands upon the national budget.²⁴⁵ This message can be communicated by designating an appropriate sum to improve the survivor's quality of life, which is necessarily accompanied by non-monetary measures that will most serve their preferences for restitution and amends.²⁴⁶ Experts have stated that the sum should not be presented as an exact compensation for suffering, since in these terms it will be doomed to disappoint.²⁴⁷

In all likelihood, the Inter-American Court is weighing these factors in its determinations for compensation. Still, with regard to precise values, there can be no hard and fast rule for every context and economy. To better ensure adequacy, a superior method would allow the victims themselves to propose an amount, in the context of the experimental model mentioned above, rather than leaving it to the Tribunal. Much like *Barrios Altos* and *Durand*, the victims would head to official negotiations armed with a merits decision in their favor. The petitioners, whether they are a handful or several hundred, would first arrive at a consensus that balances remedies in way that is meaningful and satisfactory to them. Then, they would negotiate the proposal with state authorities; any resulting agreement would most likely be rubber-stamped by the Court.

While it is unfortunate that monetary compensation may be compromised in multiple victim cases,²⁴⁸ for many litigants before the Court this is the first time they are offered any redress at all for their injuries. It should also be noted that the San José Tribunal's reparations are not exclusive: its President has affirmed that states may later supplement the remedies ordered for a number of reasons.²⁴⁹ Since victims need not fear *res judicata* consequences for themselves, family or community members, collective litigation before the Court should continue as a necessary means for abandoned segments of society to procure urgent remedies.

Clearly, there is worry that the Tribunal's patchwork reparations programs drain substantial resources—and incentive—that could be directed toward integrated national schemes, especially in those countries that have suffered massive rights abuses. And it is true that the Court's larger programs are expensive. But they are ultimately justified for at least two reasons. First, they order desper-

245. *See id.*

246. *See* Pablo de Greiff, *Justice and Reparations*, in *THE HANDBOOK OF REPARATIONS* 451, 466 (Pablo de Greiff ed., 2006).

247. *See id.*

248. It may not always be "compromised": consider if victims only requested high amounts of cash compensation.

249. *See* *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 22 (July 1, 2006) (separate opinion of Judge García-Ramírez).

ately needed remedies for proven victims of serious human rights abuses. Second, they put states on notice—countries that probably have not progressed substantially towards national redress measures—and spur them to design broader reparations programs so that they do not have to make another costly appearance before the Court.²⁵⁰

V. SHIFTING THE COURT'S REMEDIAL MODEL TOWARD A MORE PARTICIPATIVE APPROACH

Specific criticism of the Court's remedial model has been offered throughout much of this Article. I have also advanced more structural recommendations, borrowing from the experimentalist paradigm in U.S. public law litigation. The present discussion seeks to clarify and briefly elaborate upon those broader recommendations.

A. *Participation and Restorative Justice*

The Court's approach could benefit significantly from an overall shift toward an experimentalist model. This primarily implies a procedural adaptation: the Tribunal should return to its short-lived practice of issuing a merits decision and then obligating the parties to negotiate remedial solutions.²⁵¹ A difficulty encountered originally was that there was little precedent, either in the Inter-American system or elsewhere, to serve as a basis for negotiations.²⁵² Now the Tribunal has explored, and approved, many paths to compensation, restitution, satisfaction, and rehabilitation. Just as importantly, a regional custom has emerged of states actually providing these varied forms of redress to victims, whether in fulfillment of Court judgments, settlement agreements, Commission recommendations, or

250. See Mersky & Roht-Arriaza, *supra* note 157, at 27 (Guatemala has sought to get its national reparations program underway to avoid more costly cases and settlements before the Inter-American system).

251. See, e.g., Garrido v. Argentina, 1996 Inter-Am. Ct. H.R. (ser. C) No. 26, ¶ 28–30 (Feb. 2, 1996); Neira-Alegria v. Peru, 1995 Inter-Am. Ct. H.R. (ser. C) No. 20, ¶ 90 (Jan. 19, 1995); El Amparo v. Venezuela, 1995 Inter-Am. Ct. H.R. (ser. C) No. 19, ¶ 21 (Jan. 18, 1995). Note that the “parties” now formally include the victims, whereas before the petitioners lacked standing before the Court. For this reason, the Court would often order a negotiation only between the State and the Inter-American Commission, with input from the representatives of victims.

252. See PASQUALUCCI, *supra* note 60, at 68–69. While clear precedent is not strictly necessary—see this Article's discussion regarding the cases of *Barrios Altos* and *Durand*—it does facilitate reparations settlements.

otherwise.²⁵³

The analogy to the U.S. public litigation context is straightforward: stakeholders negotiating with officials of under-performing government institutions. Following a finding of liability and general objectives set out by a court, the parties, their experts, and other interested entities deliberate and devise remedial solutions, though the facilitation of a special master or mediator. The result, once approved by the tribunal, is “a regime of rolling or provisional rules that are periodically revised in light of transparent evaluations of their implementation.”²⁵⁴ This collaborative approach fosters democratic involvement, transparency, and accountability, and allows complex structural reform to be tackled in phases. Clearly, it gives much more legitimacy to the court’s eventual reparations judgment, since the remedial solutions are expressly formulated by the stakeholders and experts, after much study and discussion.

The Inter-American Court, like its domestic counterparts, lacks the range of information and depth of control to be able to design complex programs on its own, such as developmental schemes. Furthermore, even decisions on compensation amounts, as noted above, and symbolic measures would be best left to victims—who can assemble and propose the most suitable redress package for their particular injuries. This does not mean that essential measures required by international law, including cessation orders and assurances of non-repetition, could be left out of settlements, even if the victims did not specify them. In this regard, the Court would continue its crucial practice of reviewing agreement terms and supervising their execution to ensure that all requisite exigencies are met.

In many respects, the Inter-American system is well suited for a version of the experimentalist approach. There are liberal intervention standards for experts, and more importantly, the Inter-American Commission already possesses years of experience in the realm of victim-state mediation. Furthermore, because of the Commission’s deep knowledge of the human rights challenges of the region, it is in a good position to contribute to the process by recommending society-wide remedial measures. It is also significant that U.S. cases using the experimentalist model have not required a lot of judicial intervention during the implementation phase.²⁵⁵ This is generally because the inclusive process that devised the reparations programs has already created a local network committed to the measures and

253. See *id.* at 8–9.

254. Sabel & Simon, *supra* note 202, at 1062.

255. See *id.* at 1073.

their future success.²⁵⁶ Less need for micromanagement would be welcomed by the Court, which despite its small staff must supervise the execution of all its judgments.²⁵⁷

The experimental regulation model, of course, cannot be fully transferred, since it focuses on institutional reform, not the redress of individual victims and communities. Many stakeholders in public law litigation have not had their personal lives irrevocably altered by the state institution they seek to transform.²⁵⁸ Victims of human rights abuses in most cases have faced traumatic suffering; thus, all litigation and negotiation procedures adopted must be sensitive to that reality. To begin, no victim would be obligated to deal with states personally, and all proceedings before the Court—including the negotiation phase—should afford victims opportunities for support and psychological counseling.²⁵⁹ It may also be important that the state representatives travel to petitioners' communities for negotiations; victims are often located in remote areas, and limited resources prohibit frequent trips to the capital. Clearly, in these instances states should send unarmed civilian delegations to avoid intimidating the petitioners.

Both the Commission and the Court would need to take active steps to guarantee high levels of victim participation (at least through their representatives), particularly in negotiations involving many petitioners, or the remedies proposed would lose legitimacy.²⁶⁰ After a reasonable time period such as six months, the Court would conclude the negotiations and closely scrutinize any remedial agreement. If no consensus is reached among victims, or between the victims and the state, the Commission should summarize competing positions, recommend a solution, and then the Court—with full access to the vic-

256. *See id.* Rosenberg believes that the creation of such social support is necessary for the implementation of unpopular remedies. *See* GERALD ROSENBERG, *THE HOLLOW HOPE* 336–43 (1991).

257. The Court's judgments are also becoming increasingly more complicated owing to a greater load of multiple victim cases.

258. Compare hypothetical litigants in a U.S. school finance case with victims of a massacre case before the Inter-American Court. Also to be noted is that, in addition to private plaintiff classes, a governmental body may initiate public suits in the United States; for example, the Department of Justice in school desegregation cases.

259. *Cf.* Rome Statute, *supra* note 56, art. 68(1) (“The [International Criminal] Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 2, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.”).

260. *See* Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U. CHI. LEGAL F. 279, 345 (2003) (“Courts and class counsel must also ensure that individual claimants can sufficiently and meaningfully oversee the conduct of litigation and be actively involved in the prosecution of their claims.”).

tims' petitions—would ultimately decide. In larger cases, if groups of victims have presented distinct reparations packages to which the State consents, the Court would proceed to approve the separate agreements.²⁶¹

The negotiation process itself, if conducted in good faith, could be the start of the healing process for the victims—especially if the state recognizes responsibility for the violations at issue. In fact, bringing parties together to agree on the best ways to repair harm, and granting victims a central place in the process, constitutes the very methodology of restorative justice. This theory of criminal justice, informed by traditional indigenous practices, employs conferences where the victim, offender, and concerned community members establish how the offender will be held accountable and make amends.²⁶²

In the negotiations of large cases, a significant level of personal interaction is unrealistic. In any event, dealings with state representatives may not prove nearly as valuable as an encounter with actual perpetrators.²⁶³ Still, an experimentalist approach will allow restorative justice elements—such as personalized apologies, restitutionary remedies, and full victim participation in implementation—to be integrated into the reparations ordered, if victims so desire. Considering that restorative justice parallels the values and practices of many indigenous and tribal cultures of the Americas,²⁶⁴ remedies with these characteristics will be in increasing demand due to the growing Court caseload involving such communities.²⁶⁵

Thus, the adaptations proposed to the Court's model incorporate, to a greater degree, fundamental aspects of restorative justice and the U.S. experimentalist approach. At the core is a broad mandate for victim participation: involvement before the Court (liberal group standing requirements and limited *res judicata* concerns), full participation in the design of remedies, and significant engagement in the implementation thereof. This participative model puts victims squarely at the center of the process, increasing the likelihood that

261. Should the Court divide larger cases if petitioners cannot come to an agreement about legal representation? This is a separate issue from dividing reparations packages after the same merits decision.

262. See John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?*, 46 *UCLA L. REV.* 1727, 1743 (1999).

263. Yet such an encounter could also be inappropriate if it risks (re)traumatizing the victim.

264. See, e.g., *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 86(6)–86(10) (June 15, 2005) (discussing relevant aspects of the N'djuka culture of Suriname); BOTTIGLIERO, *supra* note 6, at 32–34 (referring to North American indigenous traditions).

265. See Antkowiak, *supra* note 170, at 269–70.

remedies designed will provide them satisfaction and restoration.

B. Accountability to Victims

It is true that victims' engagement with the Inter-American system has greatly expanded in recent years, although they still cannot independently present cases to the San José Court.²⁶⁶ Since the reforms of 2000, petitioners have been allowed to participate fully in all phases of the proceedings before the Court—whereas before they could only act through the Commission, until reaching the reparations stage. Now, victims may express their legal arguments and petitions independently from the submissions of the Commission.²⁶⁷ However, the larger the cases grow before the Tribunal, the greater the worries that advocacy organizations are not accountable to their clients. These organizations are overworked and understaffed, yet are now litigating cases comprising hundreds if not thousands of victims. While some remedial measures may obviously serve large populations, such as an injunction for better prison conditions in a matter concerning thousands of inmates, many circumstances require sustained interaction with victims and much deliberation before submitting petitions to the Court.

A primary way the Court can ensure that victims' wishes are best represented is the most basic: collecting the most powers of attorney possible. Although the Tribunal always requests this documentation when a case is presented, its absence does not prevent a judgment from being issued. This is because the Court has held that “[an] individual’s access to the Inter-American system . . . cannot be restricted based on the requirement for a legal representative,” reasoning that “‘formalities that characterize . . . domestic law do not apply to international human rights law, whose principal and determining concern is the . . . complete protection of those rights.’”²⁶⁸ While relaxed rules involving powers of attorney provide conveniences, the downside is evident as well: advocates may be presenting their own ideas for reparations, not those of their clients. In large cases especially, accountability to victims may be sacrificed to expe-

266. Former Inter-American Court Judge and President Antônio Cançado-Trindade argues for reforms so that victims may finally submit their cases independently before the Inter-American Court. See Cançado-Trindade, *supra* note 8.

267. Also, facts regarding their situation are fully set out in the judgment, and even their testimonies are published, giving them an opportunity to revise official histories that suppress accounts of widespread rights abuse.

268. *Yatama v. Nicaragua*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 82 (June 23, 2005).

diency and efficiency concerns.²⁶⁹ Thus, even with an experimental approach, the danger of misinformed remedies and paternalism continues, although it is shifted from the court to the lawyers.

The Court's good judgment in this regard will be crucial. Formal powers of attorney may not be as indispensable in smaller cases, since petitions and circumstances often will be directly expressed during the court proceedings and the Tribunal will consequently be in a better position to reject a reparations agreement that seems inconsistent. In matters involving multiple victims that do not seek individualized or complex measures—for example, a petition for the repeal of certain legislation—an overwhelming amount of documentation would also be less necessary. However, in cases that involve a variety of victims, violations, and factual situations,²⁷⁰ the Court should strive to obtain as many powers of attorney or alternative modes of accreditation as possible. In cases involving indigenous or tribal communities, remedial negotiations should include the leaders such communities have selected.²⁷¹

In sum, while this participative model may slow the proceedings (though a deadline for victim-state negotiations should always be set by the Court), it will achieve more involvement with victims and, hopefully, contextualized remedial solutions. If a state is intransigent, or the victims cannot agree among themselves, the Tribunal will simply order remedies that draw from its case law. Finally, it should be recalled that, as with the U.S. experimentalist model, the negotiated settlement need not spell out the more complex reparative programs in detail. The key is to establish objectives and guidelines, which would begin the remedial processes as soon as possible, yet leave some flexibility for the adaptation to future obstacles.

VI. APPLICATION OF THE COURT'S REMEDIAL MODEL TO OTHER CONTEXTS

At times, then, the remedial scheme the Court orders, invariably a blend of non-monetary and monetary measures, will be disproportionate and ill-fitted to the circumstances of the case. The partici-

269. It is common for relatively few powers of attorney to be submitted before the Court, such as in the cases of *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005), and *Juvenile Reeducation Inst. v. Paraguay*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 112 (Sept. 2, 2004).

270. *E.g.* *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006).

271. And in the worst case scenario, legal representatives will have at least obtained such a leader's consent before proposing and negotiating remedies.

pative approach discussed would introduce procedural reforms to calibrate remedies more precisely to the victim's situation and necessities. Yet, regardless of whether the Court ultimately adopts such changes, its reparative model will still be a victim-conscious fusion of equitable orders and economic compensation. This model, reaffirmed in each new judgment handed down by the Tribunal, has revamped standards for victim redress in international law. The international courts and domestic institutions considered below should follow this general approach, insofar as it seeks to provide: a) individual and/or communal measures of restitution, satisfaction and rehabilitation, as well as society-wide assurances of non-repetition; and b) economic compensation that will help victims restore dignity to their lives.

A. *European Court of Human Rights*

The textual basis for the European Court's reparations competence is restricted. To review, Article 41 provides that upon the finding of a violation, if domestic law "allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."²⁷² Furthermore, the Tribunal's own interpretation of the term "just satisfaction" has been criticized as far too narrow. Shelton explains that the term "satisfaction" in international practice has never been restricted to monetary compensation, and argues that the Court can rely on the "inherent powers of international tribunals" to provide victims a range of remedies.²⁷³ Nevertheless, until recently the European Court only ordered declarative relief, material and moral compensation, and costs.²⁷⁴

This long-held practice has finally begun to evolve since crisis has set upon the Strasbourg Court. A dramatic increase in the

272. European Convention, *supra* note 10, art. 41. Yet the Tribunal interprets the domestic law provision broadly: national means for reparation generally will not preclude its compensation awards, as long as the case was declared admissible, a violation was found, and reparations were requested. See Tom Barkhuysen & Michiel L. van Emmerik, *A Comparative View on the Execution of Judgments of the European Court of Human Rights*, in EUROPEAN COURT OF HUMAN RIGHTS: REMEDIES AND EXECUTION OF JUDGMENTS 1, 3–5 (Theodora Christou & Juan Pablo Raymond eds., 2005).

273. See SHELTON, *supra* note 9, at 280–81 (also notes that the drafting history of European Convention indicates only that the European Court has no power to annul directly a national act).

274. While a state is free to choose the means by which to comply with the European Court's judgment, this freedom is not unlimited. In the judgment *Vermeire v. Belgium*, 214 Eur. Ct. H.R. (ser. A) 74, 76 (1991), the Court deemed it necessary for a national court to take action when the legislature would take too long in implementing the European Tribunal's decision.

number of applications submitted before the Tribunal and diminished success in the execution of judgments have led to alarm in the Council of Europe.²⁷⁵ In 2000, the Council's Parliamentary Assembly stated that "the execution of some [Court] judgments is causing considerable problems that threaten to undermine what has been achieved over the fifty years during which the [European] Convention has operated."²⁷⁶ While the Assembly placed much blame upon apathetic states, it stated that "the Court, whose judgments are sometimes not sufficiently clear, and the Committee of Ministers, which does not exert enough pressure when supervising the execution of judgments" share the responsibility.²⁷⁷ Among other recommendations, the Court was urged "to indicate in its judgments to the national authorities concerned how they should execute the judgment so that they can comply with the decisions and take the individual and general measures required."²⁷⁸

The mandate to issue explicit directions was taken up slowly by the Tribunal. While it indicated restitution of property as an appropriate remedy in the 2001 case *Brumărescu v. Romania*, the State was still offered the option of providing compensation instead.²⁷⁹ In 2004 the Court required, for the first time, an applicant's release from

275. According to the Protocol 14 Explanatory Report, the "increase [in cases] is due not only to the accession of new States Parties (between the opening of Protocol No. 11 for signature in May 1994 and the adoption of Protocol No. 14, thirteen new States Parties ratified the Convention, extending the protection of its provisions to over 240 million additional individuals) and to the rapidity of the enlargement process [of the Council of Europe], but also to a general increase in the number of applications brought against states which were party to the Convention in 1993." Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report ¶ 6, *opened for signature* May 13, 2004, Council Europ. T.S. 194, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm> [hereinafter Explanatory Protocol]. Decisions from the European Court of Human Rights are available from <http://www.echr.coe.int/echr/>.

276. Eur. Parl. Ass., *Execution of Judgments of the European Court of Human Rights*, 30th Sess., Res. 1226 (2000), ¶ 5, available at <http://assembly.coe.int/main.asp?link=http://assembly.coe.int/documents/adoptedtext/TA00/ERES1226.htm> [hereinafter Eur. Parl. Ass., *Execution of Judgments*]. See also Eur. Parl. Ass., *Implementation of Judgments of the European Court of Human Rights*, 24th Sess., Res. 1516 (2006), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/ERES1516.htm> [hereinafter Eur. Parl. Ass., *Implementation of Judgments*].

277. Eur. Parl. Ass., *Execution of Judgments*, *supra* note 275, ¶ 6.

278. *Id.* ¶ 11(B)(ii). See also Eur. Parl. Ass., Committee on Legal Affairs and Human Rights, *Execution of Judgments of the European Court of Human Rights Report*, Doc. No. 8808 (2000) (Rapporteur Mr. Erik Jurgens) [hereinafter *Jurgens Report*], available at <http://assembly.coe.int/Documents/WorkingDocs/Doc00/EDOC8808.htm> ("If the Convention's machinery is to operate smoothly, the Court needs to take an interest in action on its judgments and give sufficient reasons to make it clear to states what reforms are needed to avoid the violations the Court has found.")

279. *Brumărescu v. Romania* (Just Satisfaction), 2001-I Eur. Ct. H.R. 155, 163, 165. This was a repeat of the property case *Papamichalopoulos v. Greece*, 330 Eur. Ct. H.R. (ser. A) 45 (1995).

custody for the State's violation of the right to liberty. Nevertheless, the *Assanidze v. Georgia* judgment did not demonstrate any more enthusiasm for equitable remedies in general. The Court reiterated its case law: it is for the State concerned to choose the means to discharge its legal obligations, while conceding that "by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it."²⁸⁰

Meanwhile, the Court's caseload continued to multiply at an unsustainable pace, resulting in a "threat to the future effectiveness of the Convention machinery."²⁸¹ Since many of these cases were repetitive and derived from the same systemic flaws, the Committee of Ministers instructed the Court a month after *Assanidze* "to identify, in its judgments . . . what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments."²⁸²

The Court quickly responded with the "pilot judgment" procedure in the *Broniowski v. Poland* decision; this innovation was employed again in the *Hutten-Czapska v. Poland* judgment of 2006.²⁸³ In both cases, the Tribunal found "the existence of an underlying systemic problem connected with a serious shortcoming in the domestic legal order," which was capable of affecting many thousands of persons.²⁸⁴ Thus, while the cases were presented by individual applicants, the Court decided "to examine [them] also from the perspective of the general measures that need to be taken in the interest of

280. *Assanidze v. Georgia*, 2004-II Eur. Ct. H.R. 220, 263, 264.

281. *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1, 76.

282. Eur. Parl. Ass., *Resolution of the Committee of Ministers on Judgments Revealing an Underlying Systemic Problem*, 114th Sess., Res. 2004(3) (2004), available at <https://wcd.coe.int/ViewDoc.jsp?id=743257&Lang=en>.

283. *Hutten-Czapska v. Poland*, 2006 Eur. Ct. H.R., <http://www.echr.coe.int/echr/> (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then search "case title" for "Hutten-Czapska"; then follow "CASE OF HUTTEN-CZAPSKA v. POLAND" with date of 19/06/2006 hyperlink); *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1. The pilot judgment procedure appears to have been a proposal of the European Court itself. See Eur. Parl. Ass., *Response of the European Court of Human Rights to the CDDH Interim Activity Report prepared following the 46th Plenary Administrative Session*, CDDH-GDR(2004)001 (2004), available at [http://www.coe.int/t/f/droits_de_l'homme/CDDH-GDR\(2004\)001%20E%20Response%20of%20Court%20to%20CDDH%20Interim%20Report.asp](http://www.coe.int/t/f/droits_de_l'homme/CDDH-GDR(2004)001%20E%20Response%20of%20Court%20to%20CDDH%20Interim%20Report.asp). For criticism of the pilot procedure, see Eur. Parl. Ass., *Implementation of Judgments*, *supra* note 275, ¶ 21 ("[The Assembly] notes, however, with some concern that this procedure has been conducted in respect of certain complex systemic problems on the basis of a single case which may not reveal the different aspects of the systemic problem involved.").

284. *Hutten-Czapska v. Poland*, 2006 Eur. Ct. H.R. ¶¶ 235–36 (see note 282 for website instructions); see also *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1, 74–75.

other potentially affected persons”²⁸⁵ In *Broniowski*, the Tribunal ruled that Poland must either, “through appropriate legal and administrative measures, secure the . . . realisation of the entitlement in question in respect of the remaining . . . claimants” or, failing that, it must “provide them with equivalent redress in lieu.”²⁸⁶ In *Hutten-Czapska*, Poland was required, “through appropriate legal and/or other measures, [to] secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords, . . . and the general interest of the community”²⁸⁷

In this way, the Strasbourg Court has now expressly ordered national legal and administrative reform to remedy violations and prevent their recurrence.²⁸⁸ Not surprisingly, it shows more deference to states than the Inter-American Court. Both pilot judgments repeated the refrain that “it is not for the Court to specify what would be the most appropriate way of setting up such remedial procedures,” and “the State remains free to choose the means by which it will discharge its obligations arising from the execution of the Court’s judgments.”²⁸⁹ Still, the European Court may have already started to narrow the gap with its Inter-American counterpart, as it “observed in passing” possible measures that could be adopted by Poland in *Hutten-Czapska*,²⁹⁰ and noted relevant compensation principles in *Broniowski*.²⁹¹

Such society-wide measures will not become commonplace if the Tribunal requires situations as rampant as those found in *Hutten-Czapska* and *Broniowski*. Both cases saw many similarly-situated petitioners with applications pending before the Court, exerting additional pressure to order expansive “general” remedies. Rather, the determination of non-monetary measures will continue to fall to the Committee of Ministers, which can only issue non-binding recommendations. There have been efforts to make the proceedings before the Committee more transparent, and its resolutions have offered

285. *Hutten-Czapska v. Poland*, 2006 Eur. Ct. H.R. ¶ 238 (see note 282 for website instructions).

286. *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1, 77.

287. *Hutten-Czapska v. Poland*, 2006 Eur. Ct. H.R. ¶ 239 (see note 282 for website instructions).

288. *Cf. X and Y v. Netherlands*, 91 Eur. Ct. H.R. (ser. A) (1985). The Court indicated that a penal law needed to be adapted and that suits in civil law did not give sufficient protection. But this case and its progeny do not give any remedial instructions with regard to those laws in the operative paragraphs.

289. *Hutten-Czapska v. Poland*, 2006 Eur. Ct. H.R. ¶ 239 (see note 282 for website instructions); see also *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1, 26.

290. *Hutten-Czapska v. Poland*, 2006 Eur. Ct. H.R. ¶ 239 (see note 282 for website instructions).

291. See *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1, 58–60, 68, 73–74, 77.

more detailed supervision in recent years.²⁹² However, the Committee's process is greatly overburdened by cases, and has been generally characterized as vague and too deferential with respect to the states concerned.

There is little expectation that the Court will become much more involved in the remedial process, even with the introduction of Protocol 14 to the European Convention (not yet in force), which seeks to adapt the straining system to current demands. For example, a revised Article 46 would grant the Court competence to interpret those of its judgments that present problems during the execution stage. Yet according to the Explanatory Report to the Protocol, "[t]he aim of the [amendment] is to enable the Court to give an interpretation of a judgment, not to pronounce on the measures taken by a High Contracting Party to comply with that judgment."²⁹³

A failure to issue authoritative guidelines on legislative schemes and other measures to prevent recurrence of violations, both on the part of the European Court and the Committee of Ministers, has greatly contributed to the present overwhelming case docket.²⁹⁴ It is not suggested that the Strasbourg Court, like the San José Court, involve itself directly with supervision—as it presently lacks the jurisdiction and resources to do so.²⁹⁵ Yet both international law and practical necessity prompt the European Tribunal to incorporate non-monetary measures into its model for just satisfaction.²⁹⁶ This would

292. See Ed Bates, *Supervision the Execution of Judgments Delivered by the European Court of Human Rights: Challenges Facing the Committee of Ministers*, in EUROPEAN COURT OF HUMAN RIGHTS: REMEDIES AND EXECUTION OF JUDGMENTS 49, 60–61 (Theodora Christou & Juan Pablo Raymond eds., 2005); Murray Hunt, *State Obligations Following from a Judgment of the European Court of Human Rights*, in EUROPEAN COURT OF HUMAN RIGHTS: REMEDIES AND EXECUTION OF JUDGMENTS 25, 37 (Theodora Christou & Juan Pablo Raymond eds., 2005).

293. Eur. Parl. Ass., *Explanatory Report*, *supra* note 274, ¶ 97.

294. Note, however, that the Parliamentary Assembly is becoming actively involved in the process. See Eur. Parl. Ass., *Implementation of Judgments*, *supra* note 275, ¶ 3 (“[T]he Assembly has increasingly contributed to the process of implementation of the Court’s judgments. Five reports and resolutions and four recommendations specifically concerning the implementation of judgments have been adopted by the Assembly since 2000. In addition, various implementation problems have been regularly raised by other means, notably through oral and written parliamentary questions. A number of complex implementation issues have been solved with the assistance of the Assembly and of the national parliaments and their delegations to the Assembly.”).

295. Except, through Protocol 14, when the European Court will be able to decide whether a state has complied with its judgment, after receiving a referral from the Committee of Ministers (amended Article 46). Yet the Court’s role even then is only to make a simple determination; all supervision will be accomplished through the Committee.

296. Cf. *Jurgens Report*, *supra* note 277, ¶ 87 (“The Court should, as from now, find ways, without overstepping its judicial powers, of including in its judgments all the information needed to enable national authorities to comply with the judgment and take the necessary legislative, regulatory or other measures as well as the measures required in relation to

not only include assurances of non-repetition to stem the raging flow of cases to Strasbourg, but also victim-specific measures of restitution, rehabilitation and satisfaction. The latter measures are especially warranted now that the Court hears a higher number of cases involving very grave abuses that require multiple and nuanced remedies.²⁹⁷ If the Court does not provide such individualized directives in its judgments, the Committee of Ministers will not likely take up the charge: in supervision proceedings, victims and non-governmental organizations are not even given standing to submit petitions for redress or to otherwise comment on State (in)action.

B. *African Court on Human and Peoples' Rights*

No other tribunal will be able to benefit more from the Inter-American experience than the new African Court on Human and Peoples' Rights. Both Africa and Latin America share, in their past and present, harsh realities of civil strife, brutal dictatorships, and significant displaced populations. The Inter-American Court's relatively extensive case law on disappearances, military and paramilitary attacks on civilians, torture, forced displacement, and indigenous rights, among other subjects, will be extremely relevant for the African Court. Also, it is expected that the African system will prioritize those cases dealing with massive violations of rights.²⁹⁸ In this way, a consideration of the Inter-American Court's pioneering treatment of groups and communities would be essential for the African Tribunal, particularly its procedural flexibility with respect to multiple victims.

individuals.”).

297. See Bates, *supra* note 291, at 55. To illustrate, the Russian Federation ratified the European Convention on Human Rights in 1998. From 2002 to 2006, the European Court of Human Rights found Russia responsible for nine violations of the right to life, seven violations of the prohibition of torture, twenty-one violations of the prohibition of inhuman or degrading treatment or punishment, and forty-two violations of the right to liberty and security. Yet this is merely the beginning, as Russia had 19,319 cases pending before the Court as of December 31, 2006, nearly 9000 more cases than the next state, Romania. See EUROPEAN COURT OF HUMAN RIGHTS, ANNUAL REPORT, 108–15 (2006), available at <http://www.echr.coe.int/echr/> (follow “Reports” hyperlink; then follow “2006” hyperlink).

298. While “massive violations” have been thought to be a requirement for petitions before the African Commission, see African Charter, *supra* note 22, art 58(1), the Commission has rejected such arguments, and remarked that its own practice has evolved to include individual complaints. *Jawara v. Gambia*, Communication 147/95, 149/96 in AFR. COMM’N ON HUMAN AND PEOPLES’ RIGHTS, 13TH ANN. ACTIVITY REPORT, annex V, at 98, ¶ 12 (1999–2000), available at http://www.achpr.org/english/activity_reports/activity13_en.pdf. There may be restrictions for groups to have direct access to the African Court, but they could always present their petitions through the African Commission. See Frans Viljoen, *A Human Rights Court for Africa, and Africans*, 30 BROOK. J. INT’L L. 1, 40 (2004).

These factual and legal parallels should lead to comparable remedies,²⁹⁹ especially since the African Court's reparations competence shares significant attributes with its Inter-American peer. Article 27 of the Protocol to the African Charter provides: "if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."³⁰⁰ The language gives ample room for equitable remedies, in addition to compensation, with regard to both individuals and collectivities. As its Inter-American counterpart, the African Court would do well to take into account local cultural considerations to integrate tribal and customary elements into orders for satisfaction, rehabilitation, and prevention of future violations.³⁰¹

The African Tribunal's powers, however, will not rise to the level of the San José Court, since it may not supervise the execution of its judgments. Instead, cases will be referred to the Council of Ministers for monitoring on behalf of the Assembly of Heads of State and Government of the OAU.³⁰² Hopefully, the African System has taken note of the European difficulties outlined above, and the Court will provide—from the very beginning—adequate detail in its remedial orders, with full consideration of victims' preferences. In this way, sensitive and complicated solutions will not be left to a political organ bereft of binding authority. Finally, the African Council of Ministers, whatever its precise role becomes, should adopt a demanding and transparent supervision procedure.

C. *International Criminal Court*

One would not expect that the reparations jurisprudence of a human rights tribunal, which sits in judgment of states, would be so directly relevant for a criminal court. Yet the International Criminal Court's innovative provisions on reparations for victims—individuals or collectivities—place the Inter-American Tribunal's jurisprudence on center stage. According to Article 75 of the Rome Statute, "[t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilita-

299. See Levinson, *supra* note 5, at 857 (rights and remedies are "interdependent and inextricably intertwined").

300. Protocol to the African Charter, *supra* note 26, art. 27.

301. See Antkowiak, *supra* note 170, at 271–72 (explaining the Inter-American Court's use of cultural context as a lens to assess the petitioners' legal and factual circumstances).

302. Protocol to the African Charter, *supra* note 26, art. 29.

tion.”³⁰³ Remedial orders, which “shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States,” may be made directly against the convicted person, or through the Trust Fund.³⁰⁴

As explained in this Article, the Inter-American Court is the primary international body to redress serious human rights violations and international crimes with not only compensation, but also equitable remedies such as restitution and rehabilitation. As such, its case law should serve as a preeminent source for the ICC’s reparations “principles.” Measures of satisfaction appropriate to the criminal context, such as apologies and acceptances of responsibility, should also be incorporated from the Inter-American experience. As the Court’s remedial model finds its way into the ICC judgments, it will also shape the legislation and practices of nations far beyond Latin America and the Caribbean. Indeed, many countries have already introduced into their domestic legislation specific clauses from the Rome Statute to implement the victim’s right to reparation and to ensure proper cooperation with the ICC in the enforcement of orders for reparation, fines and forfeiture.³⁰⁵ The Inter-American Court’s remedial approach, as expressed through the ICC’s reparations orders, will serve as a constant source of influence and refinement for these evolving legal frameworks at the national level.

The Trust Fund, in addition to granting simple compensation, must provide essential resources and programs for the rehabilitation of victims. Yet the ICC cannot stop there: orders demanding constructive actions by the perpetrator should accompany use of the Fund. While the lackluster experience of ATCA litigation (see below), does not inspire much confidence with respect to direct economic restitution, there are other possibilities. If victims agree to an apology or personal exchange of some nature, which could be motivated by a slightly reduced sentence for the perpetrator, the positive results of restorative justice could be reproduced at The Hague. Indeed, the benefits for victims could far surpass those of an apology before the Inter-American Court, since the actual perpetrator, not a state representative, would be requesting forgiveness.

D. National Reparations Programs

After a transition to democracy, governments face extraordi-

303. Rome Statute, *supra* note 56, art. 75(1).

304. *Id.* art. 75(3).

305. See BOTTIGLIERO, *supra* note 6, at 243.

nary difficulties in redressing widespread human rights abuse. While the Inter-American Court's cases are getting larger and larger (there is talk of a case involving 25,000 victims),³⁰⁶ the sheer scale and heterogeneity of victims and violations within the transitional justice context generally far surpass matters before the Court. In addition, transitional justice is a completely ad hoc process: there is no pre-existing compliance structure, backed by an international treaty and political pressure, driving the establishment of adequate national schemes.³⁰⁷ To the contrary, domestic reparations programs require substantial coalition building to be raised from the ground, yet they often must serve members of the weakest sectors of society.³⁰⁸ This helps explain why so few truth commission recommendations concerning victim reparations have been implemented across the globe: a critical mass of political support often fails to gather around marginalized victims, despite the dictates of international law.

Some authors have dismissed applying the Court's remedial approach to national reparations schemes, since its precedents for monetary damages would lead to prohibitively high economic awards.³⁰⁹ However, the focus of that argument is misplaced, as it fails to take into account the centrality of non-monetary measures within the Court's current remedial model. It is also somewhat inaccurate, as discussed above, since judgments recently have reduced individual economic awards, for better or worse, in the larger cases.³¹⁰

The Tribunal's case law is not only critically relevant in the context of transitional justice, it may be directly binding, depending upon whether the nation in question belongs to the Inter-American human rights system.³¹¹ The Court unmistakably places an obliga-

306. The Court's provisional measures can be very expansive as well, sometimes ordering protection for entire communities. See, e.g., *Peace Cmty. of San José de Apartadó v. Colombia*, 2000 Inter-Am. Ct. H.R. (Nov. 24, 2000) (Order on Provisional Measures), available at http://www.corteidh.or.cr/docs/medidas/apartado_se_02_ing.pdf.

307. See Falk, *supra* note 8, at 485.

308. Victims frequently come from social groups that have long suffered marginalization owing to economic, cultural, and political factors. See, e.g., Alexander Segovia, *Truth Commissions in El Salvador and Haiti*, in THE HANDBOOK OF REPARATIONS 154, 168–69 (Pablo de Greiff ed., 2006) (describing a fatal lack of coalition-building to serve victim populations in the two countries).

309. See, e.g., de Greiff, *supra* note 245, at 451.

310. Although this is not always the case; for example, *Mapiripán Massacre v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 (Sept. 15, 2005), still granted high individual amounts for moral damages.

311. Some nations, such as Chile and Peru, clearly reflect the Court's remedial principles in their reparations efforts. See Arturo J. Carrillo, *Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past*, in THE HANDBOOK OF REPARATIONS 504, 506, 530 (Pablo de Greiff ed., 2006) (also stating that the Court's growing use of "broad nonpecuniary measures . . . holds great potential for the transitional

tion on states to provide, without exception, guarantees of non-repetition and measures of restitution, satisfaction, and rehabilitation. While at least a minimal amount of economic compensation should be granted to restore dignity to victims' lives, the Inter-American emphasis is now weighted toward equitable, forward-looking (and generally more economically efficient) measures. And according to many commentators, these are the remedies most needed by these devastated societies.³¹²

E. *The United States: A Postscript*

In the United States, victims of crimes and human rights violations have few options for redress. As in other common law nations, a victim cannot participate in criminal proceedings as a *partie civile*, and thus cannot recover his or her losses through the criminal system.³¹³ The only avenue for redress is suing in tort, which frequently promises only monetary compensation. For example, if state or federal agents violate the constitutional rights of an individual, an injunction will very rarely issue, as U.S. courts deem equitable remedies unacceptable in most circumstances.³¹⁴

This monolithic approach has been rightly criticized because it fails to differentiate between the rights violated, giving “the same remedial answer to every constitutional question.”³¹⁵ Jeffries and others argue that remedies ordered should be tailored to the situation—that is, damages should be integrated with the occasional systemic injunction, criminal procedure measures (exclusion of evidence, reversal of convictions), and other applicable forms of redress, such as a court-ordered apology.³¹⁶ Such an approach, closer aligned with the Inter-American Court’s model, would provide fuller remediation and better enforcement of constitutional rights.

justice field”).

312. Juan Méndez, for example, outlines four “core obligations” for state transitional justice programs: “a full exploration of the truth”; prosecution of human rights abuses; reparations that take into account available resources, but also respect the “inherent dignity of each beneficiary”; and reforms of offending state institutions. Juan E. Méndez, *Lessons Learned*, in VICTIMS UNSILENCED: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND TRANSITIONAL JUSTICE IN LATIN AMERICA 191, 198–99 (2007).

313. Compare with the substantial number of benefits and recourses available to victims within several domestic systems of Europe. See BOTTIGLIERO, *supra* note 6, at 25–32.

314. See, e.g., ROSENBERG, *supra* note 255, at 343 (“American courts . . . were designed with severe limitations”); Fallon, *supra* note 221, at 654.

315. John C. Jeffries, *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 262 (2000).

316. See *id.* at 262, 281–92.

In Alien Tort Claims Act (ATCA)³¹⁷ litigation, it is very rare for victims to collect even compensation. This statute and the related Torture Victim Protection Act³¹⁸ have permitted aliens and U.S. citizens to sue for violations of the “laws of nations,” including torture, summary executions and forced disappearances. Very large class actions have even proceeded under the ATCA. However, despite skillful advocacy and the creative judicial procedures developed to manage these proceedings, the foreign defendants routinely evade damage awards by transferring their assets out of the court’s jurisdiction.³¹⁹ Several argue that the intensive efforts of such litigation is not in vain, as a favorable judgment brings other benefits, such as judicial “condemnation” of human rights violations, increased pressure for accountability at home, immigration penalties for the defendant, and the development of international law principles.³²⁰ Still, as long as the U.S. tort system emphasizes monetary damages, victims of human rights violations who litigate in that forum will, at best, find only limited satisfaction.

VII. CONCLUSION

Constantly faced with a wide spectrum of human rights violations, the Inter-American Court has generally chosen to emphasize equitable remedies, to be supplemented whenever possible with meaningful compensation. While it is true that the Court has a wider reparations competence than many other tribunals, its extensive case law, emerging international legal principles, victims’ preferences, and even pragmatic concerns all make a convincing case that other courts and institutions should employ non-monetary remedies to a far greater extent.

There are difficulties inherent to an equitable approach. The Inter-American Court in particular has ordered overly broad and ill-defined schemes on occasion, which is why a more participative model has been proposed in this Article. In any case, the San José Tribunal must exercise caution moving forward. If its remedial ap-

317. 28 U.S.C. § 1350 (2000).

318. Pub. L. No. 102-256, 106 Stat. 73 (1992).

319. See BOTTIGLIERO, *supra* note 6, at 62–64; Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 15 (2002).

320. See, e.g., BETH STEVENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 236 (1996); Stephens, *supra* note 318, at 15, 38–39. Benefits like refining international legal norms may be overstated when compared to the gravity of the violations—that most often remain unremedied—and the enormous resources devoted to this type of litigation.

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proach becomes too wide-ranging, the Court will not only generate resistance from those states directly ordered to follow its judgments, but it will also set unattainable standards for national and international institutions developing their own reparative frameworks. Yet the Tribunal's point has been made, though it is still not well appreciated throughout the international community: victims of human rights violations need far more than monetary compensation, and a court can contribute significantly to provide them fuller remediation.