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AN EMERGING MANDATE FOR  
INTERNATIONAL COURTS: VICTIM-CENTERED  
REMEDIES AND RESTORATIVE JUSTICE

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# AN EMERGING MANDATE FOR INTERNATIONAL COURTS: VICTIM- CENTERED REMEDIES AND RESTORATIVE JUSTICE

THOMAS M. ANTKOWIAK\*

*More than ever, international attention has been directed to the needs of those who have suffered human rights violations. Nevertheless, the chasm between what victims want and what they obtain is still vast. The Inter-American Court of Human Rights, unlike most tribunals, has sought to narrow this gap by ordering remedies that respond to victims' demands for recognition, restoration, and accountability.*

*In contrast, for decades the European Court of Human Rights has applied a restrictive remedial model. The European Court, inordinately concerned about its institutional integrity, curtails remedies—often delivering only declaratory relief and monetary damages. Since the Inter-American model is far more oriented towards the expressed preferences of victims, I will designate it “victim-centered,” while I conceptualize the European approach as “cost-centered.”*

*This Article will consider the development of the victim-centered approach in international law, test its feasibility, and then urge its application—by both the European Court and nascent human rights bodies searching for adequate remedial principles. To demonstrate the viability of this model, I will present a detailed analysis of state compliance with the remedies of the Inter-American Court.*

*I conclude that the European Court, the African Court on Human and Peoples' Rights, and the International Criminal Court have recently made progress towards a victim-centered paradigm. But the tribunals still have much terrain to cover, if they choose to follow the trail blazed by the Inter-American Court. The Inter-American Court has been able to convince states to implement its demanding remedies without losing their allegiance. While its approach is certainly not perfect, its record shows that a victim-centered*

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*model is attainable for international courts.*

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*The meaning of justice is associated with recognition, memory, and punishment . . . but also includes a vision of cultural change.*

— Carlos Beristain<sup>1</sup>

*Let it be clear that when those of us . . . who had already received an indemnization from the State . . . turned to [legal representation], we were seeking a full reparation, because we felt that, day to day, they continued violating our rights, that justice had not been done, that we wanted the truth. Because for us, the widows, it is clear that money is not everything.*

— Paola Martínez<sup>2</sup>

## I. INTRODUCTION

More than ever, international attention has been directed to the needs and preferences of those who have suffered human rights violations. Truth commissions the world over have interviewed survivors of serious abuses. Human rights courts, international envoys, and non-governmental organizations have documented the consequences of violations and noted demands for redress. While their voices have been increasingly heard, however, the chasm between what victims want and what they obtain is still vast.

The Inter-American Court of Human Rights has stated that “the objective of international human rights law is . . . to protect the victims and to provide for the reparation of damages.”<sup>3</sup> It follows this guiding principle by consistently ordering non-monetary remedies that respond to victims’ demands for recognition, restoration, and accountability. At least some degree of monetary compensation is also granted. The Court’s assertive approach, which risks incurring the wrath of respondent states, incorporates ancient practices of conflict resolution. These practices, which engage victims in crafting their own means to restoration, are today associated with the restorative justice movement.

In contrast, for decades the European Court of Human Rights has applied a restrictive remedial model that is common among tribunals. The European Court, inordinately concerned about its institutional integrity, curtails remedies—often delivering only declaratory relief and monetary damages. Since the European approach is driven by possible costs to credibility and authority, while the Inter-American model is more oriented towards the expressed preferences of victims, I will designate the former “cost-centered,” and the latter “victim-centered.”<sup>4</sup>

This Article will consider the development of the victim-centered approach in international law, test its feasibility, and then urge its application—by both the European Court and nascent human rights bodies searching for adequate remedial principles. In this way, Section II will examine the stated needs and preferences of victims, the resurgence of restorative justice concepts, and the international law of

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<sup>1</sup> 1 CARLOS M. BERISTAIN, *DIÁLOGOS SOBRE LA REPARACIÓN: EXPERIENCIAS EN EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS* 82–83 (2008) (translation by author).

<sup>2</sup> *Id.* at 84.

<sup>3</sup> *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 134 (July 29, 1988).

<sup>4</sup> The “cost-centered” and “victim-centered” concepts are developed in Section II(D), *infra*.

remedies. Sections III and IV will offer a detailed analysis of state compliance with the non-monetary remedies of the Inter-American Court. There, I will discuss key lessons of the Inter-American experience and recommend enhancements, such as a “participative approach,” to improve compliance rates. Finally, in Section V the Article will consider both why and how a victim-centered remedial model should be incorporated by the European Court, the African Court on Human and Peoples’ Rights, and the International Criminal Court. I will examine, in turn, the challenges of incorporation specific to each tribunal.

I conclude that the international courts discussed in this Article have recently made progress towards a restorative paradigm, where victims of human rights violations are empowered to obtain the redress they most need and deserve. But the tribunals still have much terrain to cover, if they choose to follow the trail blazed by the Inter-American Court. While the Court’s approach is certainly not perfect, its record demonstrates that a victim-centered model is attainable for international courts, despite their numerous limitations.

## II. TOWARD A VICTIM-CENTERED MODEL

### A. *The Preferences and Needs of Victims*

After state-sponsored abuses, victims have expressed that they want their suffering to be recognized and their dignity restored.<sup>5</sup> Public acknowledgment and government apologies are key means towards these ends; these actions also send an official message that the violations constituted a breach of the social contract.<sup>6</sup> In this way, victims will be more inclined to rejoin the society that spurned them.<sup>7</sup> Further symbolic reparations, including commemorations and memorials, are frequently demanded by victims as well.<sup>8</sup>

In any reparative approach, ongoing injustices, such as illegal detention or deprivation of ancestral lands, must of course come to a halt.<sup>9</sup> Victims also cite as

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<sup>5</sup> See, e.g., BERISTAIN, *supra* note 1, at 35–36, 82–84; M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 HUM. RTS. L. REV. 203, 231 (2006); Martien Schotsmans, *Victims’ Expectations, Needs and Perspectives after Gross and Systematic Human Rights Violations*, in OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS 114–115 (K. De Feyter et al. eds., 2005); Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT’L & COMP. L. REV. 157, 180 (2004); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 106 (1998) (referring to “burning needs for acknowledgement, closure, vindication and connection”).

<sup>6</sup> See, e.g., 2 CARLOS M. BERISTAIN, DIÁLOGOS SOBRE LA REPARACIÓN: EXPERIENCIAS EN EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS 57–58 (2008); Schotsmans, *supra* note 5, at 114; MINOW, *supra* note 5, at 112–14.

<sup>7</sup> See, e.g., Schotsmans, *supra* note 5, at 117; Bassiouni, *supra* note 5, at 231, 272; BERISTAIN, *supra* note 6, at 58–61.

<sup>8</sup> See, e.g., Bassiouni, *supra* note 5, at 272; BERISTAIN, *supra* note 6, at 113–146.

<sup>9</sup> Cessation of ongoing infringements of rights is an obligation that states have independent of victims; the right must be restored as soon as possible. See *infra*, Section V(A)(1). See also 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: 1979-2004, 43–44 (2005), available at <http://www.corteidh.or.cr/docs/libros/cuarto%20de%20siglo.pdf>.

essential measures of rehabilitation, such as medical and psychological care and educational opportunities.<sup>10</sup> A criminal investigation and the sanction of perpetrators are almost universally demanded after serious violations.<sup>11</sup> Finally, in cases of forced disappearance, the highest of priorities for next of kin is the most basic: the recovery of the loved one.<sup>12</sup>

Many psychologists, anthropologists, and other experts join this broad consensus, and emphasize the centrality of measures that will restore the victim's dignity, health and place in society.<sup>13</sup> Not surprisingly, they have also observed that the process by which such redress is delivered greatly influences its effectiveness. Cultural, historical, and political factors must be taken into account.<sup>14</sup> For example, in some transitional justice efforts, where states try to repair massive human rights abuses, indigenous leaders have called for traditional justice methods.<sup>15</sup> Such approaches may deliver reparation in a manner most meaningful to those community members. In other situations, however, a government may summarily exclude traditional justice rituals, or co-opt and change them substantially for the sake of expediency.<sup>16</sup>

Certainly, reparations efforts after human rights violations are delicate. Extreme caution must be taken to avoid re-victimization when pursuing redress.<sup>17</sup>

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<sup>10</sup> See, e.g., BERISTAIN, *supra* note 6, at 229–352; Brandon Hamber, *The Dilemmas of Reparations: In Search of a Process-Driven Approach*, in *OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS* 137–138; Lisa Magarrell, *Reparations for Massive or Widespread Human Rights Violations: Sorting Out Claims for Reparations and the Struggle for Social Justice*, 22 WINDSOR Y.B. ACCESS JUST. 85, 96–98 (2003).

<sup>11</sup> See, e.g., BERISTAIN, *supra* note 6, at 417–48; Fundación para el Debido Proceso Legal, *Después de Procesos de Justicia Transicional, ¿Cuál es la Situación de las Víctimas?: Los casos de Chile y Guatemala* 3–5 (2008) [hereinafter DPLF]; Bassiouni, *supra* note 5, at 231.

<sup>12</sup> See, e.g., BERISTAIN, *supra* note 6, at 353–61. Beristain interviewed several family members of disappeared victims. One, a relative of Ernesto Castillo-Páez, stated simply: “the Government’s only [settlement] offer was economic reparation, if we desisted from our suit. We made a counteroffer: that they deliver Ernesto to us.” *Id.* at 353.

<sup>13</sup> See, e.g., BERISTAIN, *supra* note 1, at 82–84; JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 1–4 (1997); Hamber, *supra* note 10, at 137–141; Nieves Gómez, *Psychosocial Reparation: Latin American Indigenous Communities*, in *REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 158 (Federico Lenzerini ed., 2008); MARGARET CHON ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001); *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 80(e) (June 15, 2005) (discussing Kenneth M. Bilby’s expert witness report that explained that the community most needed personal safety, the remains of the deceased, a recovery of traditional lands, and a criminal investigation into the attack that was suffered).

<sup>14</sup> See, e.g., Hamber, *supra* note 10, at 146–47; M. Brinton Lykes & Marcie Mersky, *Reparation and Mental Health*, in *THE HANDBOOK OF REPARATIONS* 614 (Pablo de Greiff ed., 2006); Gómez, *supra* note 13, at 155–59.

<sup>15</sup> See, e.g., Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP L. REV. 1, 17–26 (2006) (examining the role of traditional justice after massive human rights violations in Uganda, Mozambique, South Africa, Sierra Leone, and East Timor); Adrian Di Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?* 2 J. INT’L L. & INT’L REL. 25, 28 (2006) (Acholi leaders in Uganda have advocated for the use of traditional justice ceremonies).

<sup>16</sup> Waldorf critiques the celebrated Gacaca courts of Rwanda, which captured the imagination of many Western rights advocates. He argues that the Gacaca’s traditions have been warped by the State to deal with overwhelming criminal populations and, particularly in their current form, are ill-suited to produce truthful accounts, just convictions and victim redress. See Waldorf, *supra* note 15, at 48–85.

<sup>17</sup> See, e.g., DPLF, *supra* note 11, at 7; Hamber, *supra* note 10, at 146–147; Gómez, *supra* note 13, at 155–59.

When remedies and delivery processes are designed and implemented, then, commentators have urged constant consultation with victims and other stakeholders—from the initial planning to the last brick placed on the monument, and beyond.<sup>18</sup> If their views are not treated with utmost respect, the rupture between victim populations and society will only widen.<sup>19</sup>

Even if remedies are effectuated for victims, the road to recovery is strewn with obstacles. Nieves Gómez, a psychologist who works with indigenous survivors of massacres in Guatemala, attests that significant rehabilitation will be rendered impossible if the underlying situation does not change.<sup>20</sup> That is, if the State underplays its role in the atrocities and perpetrators roam free, psychological assistance will be of limited value.<sup>21</sup>

Doubtlessly, victims of serious rights abuse face enormous challenges. Creative and multifaceted remedies must be devised, in concert with the affected populations, to achieve the fullest remediation possible. Yet despite these complexities there are bedrock principles upon which courts, state officials, and others who wish to help can rely. As stated above, victims generally desire that violators perform an apology or recognition of responsibility, as well as restitutionary measures that will restore their dignity, health, and place in their community. Furthermore, these needs and preferences remain similar in response to a range of offenses, from the severe to the mundane.<sup>22</sup>

### B. *The Resurgence of Restorative Justice*

Monetary damages can provide funds for basic necessities. But commentators note that many civil plaintiffs want an apology above all else, and frequently only file a lawsuit when unsuccessful in obtaining one.<sup>23</sup> Several observe that cash damages are often “much less important than emotional or symbolic reparation” for litigants.<sup>24</sup> Monetary compensation does not aptly address a person’s need for “dignity, emotional relief, participation in the social polity, or institutional reordering.”<sup>25</sup> And a declaratory judgment “conveys little more to the

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<sup>18</sup> See, e.g., Gómez, *supra* note 13, at 155–159; BERISTAIN, *supra* note 6, at 23–26; Hamber, *supra* note 10, at 146.

<sup>19</sup> Cf. Pablo de Greiff, *Justice and Reparations*, in THE HANDBOOK OF REPARATIONS 451, 466 (Pablo de Greiff ed., 2006) (explaining that well-executed reparations will promote “civic trust”).

<sup>20</sup> See Gómez, *supra* note 13, at 154–55.

<sup>21</sup> See *id.*; Lykes & Mersky, *supra* note 14, at 615; Brandon Hamber, *Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition*, in THE HANDBOOK OF REPARATIONS 451, 562 (Pablo de Greiff ed., 2006).

<sup>22</sup> See Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT’L L. 351, 386–91 (2008) (victims consistently request these categories of remedies—albeit in different orders and proportions—in response to a range of violations, which is why the Inter-American Court reliably orders them in its judgments).

<sup>23</sup> See Brent T. White, *Say You’re Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1271–72 (2006).

<sup>24</sup> See *id.* at 1273 (citing John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1744 (1999)).

<sup>25</sup> ERIC YAMAMOTO, *INTER-RACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 156 (1999). Also, even in cases where U.S. courts grant injunctive relief, the injunction frequently stops the offending behavior and accomplishes nothing more.

public than who won the case,” while “apologies are . . . moral signifiers that convey clear messages of right and wrong, ones that even young children are taught to understand.”<sup>26</sup> Unfortunately, in legal systems such as the U.S., civil courts rarely venture beyond ordering compensation.<sup>27</sup>

Some criminal courts have occasionally required apologies.<sup>28</sup> Still, the emphasis on punitive solutions and the rigidity of the litigation framework led to a search for distinct models. As Martha Minow explains, conventional litigation “requires people to put aside their whole identities—their needs, their spirituality, their beliefs—in order to translate the conflict into specifically legal terms.”<sup>29</sup> Many arrived at restorative justice, which places the victim at the very center of the process. And in several respects, this journey followed a route back to ancient philosophies and practices. According to John Braithwaite, one of the foremost proponents, “restorative justice has been the dominant model of criminal justice throughout most of human history. . . among indigenous of Americas, Africa, Asia and the Pacific, restorative traditions have persisted into modern times.”<sup>30</sup>

Restorative justice practices are intended to heal at the individual and communal levels.<sup>31</sup> It is a process that “brings together all the parties affected by an incident of wrongdoing to collectively decide how to deal with the aftermath of the incident and its implications for the future.”<sup>32</sup> Even now, however, practitioners concede that it represents a philosophy more than a “uniform set of practices or processes.”<sup>33</sup> Still, Braithwaite is definitive about its “keystone”: “empowering victims to define the restoration that matters to them.”<sup>34</sup> Studies have shown that various incarnations of restorative justice practiced globally have resulted in high rates of satisfaction for victims, offenders and other participants.<sup>35</sup>

Victims have expressed gratification for processes that offer them little monetary compensation. This is because of the procedure’s “human aspects,” which may achieve accountability and apology, as well as other forms of redress.<sup>36</sup> Critics caution, however, that victims may be pressured into “forgiving” prematurely and offenders’ needs may be prioritized.<sup>37</sup> Since restorative justice

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<sup>26</sup> White, *supra* note 23, at 1283–84.

<sup>27</sup> *See id.* at 1262–63; John C. Jeffries, *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 262 (2000).

<sup>28</sup> White, *supra* note 23, at 1268–69 (referring to the US criminal justice system).

<sup>29</sup> Martha Minow, *Keynote Address at the Ninth Annual Stein Center Symposium on the Role of Forgiveness in the Law: Forgiveness and the Law* (Jan. 28, 2000), in 27 FORDHAM URB. L.J. 1347, 1395 (2000).

<sup>30</sup> JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* 5 (2002).

<sup>31</sup> Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. LAW SOC. SCI. 161–162 (2007).

<sup>32</sup> *See id.* at 163 (citing TONY F. MARSHALL, *RESTORATIVE JUSTICE: AN OVERVIEW* (1998)).

<sup>33</sup> *See id.* at 179; *see also* HARRY MIKA ET AL., *TAKING VICTIMS AND THEIR ADVOCATES SERIOUSLY: A LISTENING PROJECT* 12–13 (2002) [hereinafter *Listening Project*].

<sup>34</sup> *See* BRAITHWAITE, *supra* note 30, at 46.

<sup>35</sup> *See, e.g.,* John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1744 (1999).

<sup>36</sup> Menkel-Meadow, *supra* note 31, at 175.

<sup>37</sup> *See, e.g.,* LISTENING PROJECT, *supra* note 33, at 5; Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 STAN. L. REV. 751, 762 (2000); Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1273–76 (1994).



practices generally eschew legal formalities, others wonder what will happen to due process and associated rights.<sup>38</sup>

In any case, the restorative justice movement has joined with victims' rights campaigns and gained striking momentum, appearing in increasingly varied scenarios. It has been used in response to serious crimes such as murder and rape.<sup>39</sup> Now it is asserted that restorative justice has been adapted for the redress of massive human rights violations, such as genocide and crimes against humanity.

Predictably, stretching the paradigm to fit such extreme crimes alters its original shape. For example, restorative justice programs are intended to be purely voluntary and to involve all affected parties.<sup>40</sup> Yet these standards are not always met in the various situations around the globe where restorative justice is allegedly applied.<sup>41</sup> Surely when such efforts lose sight of the victim's perspective and needs they have strayed too far from the philosophy's essence.<sup>42</sup>

### C. *The United Nations and Restorative Remedies in Global Law*

Over the last quarter century, the United Nations has embraced restorative principles for victims. In 1985, the General Assembly adopted the "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power."<sup>43</sup> Three years later, the UN started work on 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").<sup>44</sup> While the Basic Principles were not approved by the General Assembly until 2005, they influenced other UN instruments and state policy during their development.<sup>45</sup> The Basic Principles assert that 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."<sup>46</sup>

These reparative elements also were fused into UN "hard law". To illustrate, in its section on remedies, the International Convention for the Protection

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<sup>38</sup> See, e.g., Delgado, *supra* note 37, at 759–61.

<sup>39</sup> See Menkel-Meadow, *supra* note 31, at 163.

<sup>40</sup> See *id.* at 168.

<sup>41</sup> For example, initiatives with victims have been combined with certain traditional justice mechanisms that some argue are too punitive to be considered "restorative." See Waldorf, *supra* note 15, at 6.

<sup>42</sup> Cf. BRAITHWAITE, *supra* note 30, at 203 (arguing that in transitional justice processes, "the following are minimum conditions of restorative justice: truth; loving social support; respect and attention from other citizens who listen to their story; a state that acknowledges their suffering; [forms of] compensation; and a hearing that takes seriously their ideas for suppressing permanently the politics that led to their victimization").

<sup>43</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, U.N. Doc. A/RES/40/34/Annex (Nov. 29, 1985).

<sup>44</sup> 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, U.N. Doc. A/RES/60/147, at 1, (Mar. 21, 2006) [hereinafter Basic Principles].

<sup>45</sup> See Bassiouni, *supra* note 5, at 278–79.

<sup>46</sup> Basic Principles, *supra* note 44, at p. 6 ¶ 18.

of All Persons from Enforced Disappearance provides for compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.<sup>47</sup> The Convention on the Rights of Persons with Disabilities calls for “all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities” in the event of exploitation, violence or abuse.<sup>48</sup>

The International Law Commission (“ILC”) reiterates these elements, affirming that “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.”<sup>49</sup> The UN Human Rights Committee, created pursuant to the International Covenant on Civil and Political Rights, has supported these principles through General Comments on the Covenant and various recommendations to states.<sup>50</sup> In response to individual petitions alleging human rights violations, the Committee has specifically requested that states implement the following measures: compensation; public investigation and prosecution; legal reform; restitution of liberty, employment or property; and medical care.<sup>51</sup>

Better known are the UN’s achievements concerning the International Criminal Court and its Rome Statute, which, as of this writing, boasts 114 ratifications.<sup>52</sup> Former Secretary General Kofi Annan “described victims’ concerns as the ‘overriding interest’ that should drive the Rome Conference, and many delegates heeded his call.”<sup>53</sup> As a result, some commentators state that the ICC stands not only for criminal accountability and deterrence, but also for “social welfare and restorative justice.”<sup>54</sup> Such sweeping claims refer to the Rome Statute’s

<sup>47</sup> International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, U.N. Doc. A/Res/61/177, art. 24 (Jan. 12, 2007).

<sup>48</sup> Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/Res/61/106, art. 16(4), (Jan. 24, 2007).

<sup>49</sup> 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, art. 34 (2001), *available at* [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [hereinafter ILC Articles]. It should be noted that the ILC separates from “reparation” the concepts of cessation of ongoing violations and “guarantees of non-repetition,” such as orders to investigate violations and reform legislation. This is done to clarify that cessation and guarantees of non-repetition are state obligations that are independent of victims; they must be carried out, as appropriate, when an offense is committed.

<sup>50</sup> *See, e.g.*, U.N. Human Rights Comm., Int’l. Covenant on Civil & Political Rights, General Comment No. 31 [80], 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) (affirming 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”).

<sup>51</sup> *See* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 184–185 (2d ed. 2005).

<sup>52</sup> ICC – *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited May 7, 2011).

<sup>53</sup> Alex Little, *Balancing Accountability and Victim Autonomy at the International Criminal Court*, 38 GEO. J. INT’L L. 363, 369–70 (2007).

<sup>54</sup> Emily Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience?*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 315, 315; *see also* Jenia Iontcheva Turner, *Legal Ethics in International Criminal Defense*, 10 CHI. J. INT’L L. 685, 695–96 (2010); Navanethem Pillay, *Isaac Marks Memorial Lecture: Equal Justice For Women: A Personal Journey*, 50 ARIZ. L. REV. 657, 671 (2008).

novel provisions, which require the establishment of “principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation,” oblige States Parties to establish a trust fund for the benefit of victims of those crimes within the Tribunal’s jurisdiction, and order the Court “to protect the safety, physical and psychological well-being, dignity and privacy of victims.”<sup>55</sup>

It is debatable whether the ICC, as designed, is the most appropriate forum to further restorative justice or to provide remediation for the millions of potential victims under the Court’s jurisdiction. Doubts aside, however, the Rome Statute is a testament to the successes of the restorative justice and victims’ rights movements. No other international criminal court has provided such agency to victims and such solicitude for their plight. And these provisions were ratified, as a binding international law, by well over 100 nations throughout the globe.

*D. A Tale of Two Remedial Approaches: “Victim-Centered” vs. “Cost-Centered”*

The remedial model advanced by the UN human rights institutions and the Rome Statute, then, comprises a number of mutually-reinforcing elements.<sup>56</sup> The Inter-American Court’s contemporary jurisprudence shares this approach, as the Tribunal regularly orders measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition, in conjunction with compensation. The Court’s model has drawn from the legal norms of the UN and the values of the restorative justice movement.<sup>57</sup> Moreover, it has in turn informed and refined the development of those principles. The Inter-American Court has now handed down over 115 reparations judgments to date, binding states throughout the Americas and elevating the status of this comprehensive remedial approach in international law.

The Court’s emphasis on non-monetary measures makes its methods popular with victims.<sup>58</sup> I have previously discussed other advantages to the Court’s

<sup>55</sup> Rome Statute of the International Criminal Court arts. 68(1), 75 (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.* at art. 68.

<sup>56</sup> Such a model seems consistent with *restitutio in integrum*, a familiar principle of international law. In the *Factory at Chorzów* judgment, the Permanent Court of International Justice 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.” *Factory at Chorzow* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at ¶ 125 (Sept. 13).

<sup>57</sup> See, e.g., *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, Judgment, 2002 Inter-Am. Ct. H.R. (ser. C) No. 91, 34 n. 84 (Feb. 22, 2002) (citing, among other documents, U.N. Special Rapporteur Theo van Boven’s report that eventually became 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. Special Rapporteur, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, Comm’n on Human Rights, Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, U.N. Doc E/CN.4/Sub.2/1993/8 (July 2, 1993) (by Theo van Boven), available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e1b5e2c6a294f7bec1256a5b00361173/\\$FILE/G9314158.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e1b5e2c6a294f7bec1256a5b00361173/$FILE/G9314158.pdf)); see also Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT’L L. 101, 116 (2008) (suggesting “that greater caution may be required in evaluating the suitability of imported norms as interpretations of the American Convention”).

<sup>58</sup> See, e.g., BERISTAIN, *supra* note 6, at 93 (noting that Luis Cantoral-Benavides, a petitioner

remedial paradigm.<sup>59</sup> For instance, equitable orders, as opposed to cash compensation, can be tailored to specific violations and thus are more effective at remediation.<sup>60</sup> In addition, non-monetary, forward-looking measures are generally more efficient and less expensive than lump-sum attempts at full economic compensation.<sup>61</sup>

Despite the numerous benefits of the reparations doctrine of the Inter-American and United Nations systems,<sup>62</sup> however, the European Court of Human Rights has historically favored monetary compensation and declaratory relief.<sup>63</sup> Some exceptions to this constrained approach have emerged during recent years. However, as will be discussed in a subsequent Section, these developments do not indicate a substantially-altered philosophy on remedies. Thus, reparations awarded to individual victims still principally consist of cash compensation.

A case of forced disappearance—where a victim is illegally detained, often tortured, and then extra-judicially killed—vividly distinguishes the two remedial approaches. Upon finding a state responsible for such facts, the European Court would declare rights violations and grant perhaps 50,000 Euros to the next of kin in non-pecuniary damages, as well as any applicable pecuniary damages and costs.<sup>64</sup> Under similar facts, the Inter-American Tribunal would generally award greater non-pecuniary sums,<sup>65</sup> and then order the state to: apologize, initiate a criminal investigation, locate the victim's remains, publish excerpts of the Court's judgment in national newspapers, and possibly grant psychological treatment to close family members of the deceased.<sup>66</sup> Since forced disappearances involve state denial of wrongdoing and the obstruction of justice, many of these non-monetary measures respond to the family's need to learn the truth about the victim's fate. The judgment's publication also removes the family's stigma, left by the death's unexplained circumstances, and transfers it to the state.

Paul Gewirtz's characterization of two "fundamentally different approaches" to remedies assists in understanding these two contrasting models.<sup>67</sup>

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before the Inter-American Court, said that the Court-ordered state apology was a "triumph" for him); DPLF, *supra* note 11, at 7 (Helen Mack, another petitioner before the Inter-American Tribunal, describes her positive experiences with process and remedies).

<sup>59</sup> Antkowiak, *supra* note 22, at 387–402.

<sup>60</sup> *See id.* at 387.

<sup>61</sup> *See id.* at 400.

<sup>62</sup> Note that the Inter-American Commission generally follows the Court's wide-ranging remedial approach in its recommendations to states. *See, e.g.*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT 2009, Chapter III, available at <http://www.cidh.oas.org/annualrep/2009eng/TOC.htm>.

<sup>63</sup> *See, e.g.*, DAVID HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 857 (2d ed. 2009).

<sup>64</sup> *See, e.g.*, Baysayeva v. Russia, 2007 Eur. Ct. H.R. ¶ 179.

<sup>65</sup> If one compares recent Inter-American Court cases concerning forced disappearance (for example, Gómez-Palomino v. Peru, Merits, Reparations and Costs, Judgment, 2005 Inter-Am. Ct. H.R. (ser. C) No. 136, ¶ 162 (Nov. 22, 2005); Ibsen-Cárdenas and Ibsen-Peña v. Bolivia, Merits, Reparations and Costs, Judgment, 2010 Inter-Am. Ct. H.R. (ser. C) No. 217, ¶ 283 (Sept. 1, 2010)) with recent European Court cases (e.g., Baysayeva v. Russia, 2007 Eur. Ct. H.R. ¶ 179; Magomadova v. Russia 2009 Eur. Ct. H.R. ¶ 181), non-pecuniary damages are not only higher at the Inter-American Tribunal, but they are also awarded to a wider range of individuals.

<sup>66</sup> *See, e.g.*, Gómez-Palomino v. Peru, Merits, Reparations and Costs, Judgment, 2005 Inter-Am. Ct. H.R. (ser. C) No. 136, ¶ 162 (Nov. 22, 2005).

<sup>67</sup> Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 591 (1983).

Gewirtz explains that, under a “Rights Maximizing” approach, “the only question a court asks once it finds a violation is which remedy will be the most effective for the victims, where ‘effectiveness’ means success in eliminating the adverse consequences of violations suffered by victims.”<sup>68</sup> On the other hand, with his “Interest Balancing” method, the effectiveness of a remedy for victims is “only one of the factors in choosing a remedy; other social interests are also relevant and may justify some sacrifice of achievable remedial effectiveness.”<sup>69</sup>

When considering the Inter-American and European models, the former appears to pursue more of a “Rights Maximizing” method. Still, it has been shown that even the Inter-American Court frequently reduces awards for moral damages in cases with large numbers of victims, although non-monetary remedies are unfailingly ordered.<sup>70</sup> That is, in multiple-petitioner cases, victims may receive less remediation in monetary terms than they would have in a smaller case. This is likely done to make the payment of reparations feasible for the defendant state.

In addition, when the Inter-American Tribunal orders community development programs or institutional reform, it will necessarily balance interests external to the case at hand.<sup>71</sup> Thus, the Court appears to permit remedial shortfall—at least of a monetary nature<sup>72</sup>—in some larger cases, and considers other legitimate social interests, especially in the formulation of its more complex remedial orders. As a consequence, its approach could not be strictly characterized as “Rights Maximizing.”

Nevertheless, while “Interest Balancing,” its model seems to use a different set of scales. As a result, I propose two categories of the “Interest Balancing” method, in an attempt to distinguish the objectives of the Inter-American and European courts. While the Inter-American Tribunal contemplates other social interests when determining remedies, it uniformly directs to victims individual and/or communal measures of restitution, satisfaction and rehabilitation. For this reason, I will call the Tribunal’s balancing approach to reparations “victim-centered.”

In contrast, internal and external costs appear to figure very prominently in the remedial calculations of the European Court. By generally refusing to order non-monetary remedies—and, on occasion, even cash compensation—the Court seems to be particularly worried about state disobedience, which would likely erode the Tribunal’s credibility and efficacy. While such “remedial deterrence” is perceived by nearly all courts,<sup>73</sup> one would expect it to be even more acute at the

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See Antkowiak, *supra* note 22, at 399–400.

<sup>71</sup> See Sonja B. Starr, *Rethinking “Effective Remedies”: Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 756 (2008).

<sup>72</sup> While I maintain that monetary damages are less important to petitioners than equitable remedies, I still believe that reducing them for victims who happen to be in larger cases is a compromised approach. Since victims are shortchanged in those instances, remedial shortfall occurs.

<sup>73</sup> Daryl Levinson describes “remedial deterrence” as “the threat of undesirable remedial consequences motivating courts to construct the right in such a way as to avoid those consequences.” Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 885 (1999). See also Starr, *supra* note 71, at 724 (“noncompliance could undermine the Tribunal’s credibility and effectiveness . . . . Such instances are examples of remedial deterrence, as the high potential cost of the remedial order - namely, the risk of noncompliance - discourages enforcement of

supranational level, where states still cite sovereign rights to reject holdings from international tribunals.<sup>74</sup>

Certainly, some remedies can be difficult, costly, and even humiliating for a state to implement. By requiring more expansive remedies, the European Court would be imposing extra costs upon state parties, as well as added potential risks to its institutional integrity.<sup>75</sup> To minimize these risks, the Tribunal has adopted a number of practices. Among them, the Court has held on occasion that a mere finding of a violation is sufficient “just satisfaction” for the injured party.<sup>76</sup> Pecuniary damages awarded to petitioners rarely reflect market value.<sup>77</sup> The Court refuses to order states to investigate violations,<sup>78</sup> a legal obligation of all states parties to the European Convention,<sup>79</sup> presumably for the intensive resources and political hazards such efforts would entail.<sup>80</sup> In delicate situations, the Strasbourg Tribunal will even decline to redress victims at all on public policy grounds.<sup>81</sup>

The European scales have only tipped in favor of equitable remedies in extreme conditions: flagrant cases of ongoing violations and proven legislative deficiencies—and only after the urging of key Council of Europe authorities.<sup>82</sup> The legislative reform orders, in fact, finally came about only in reaction to the Court’s crisis concerning its vastly overcrowded docket. Such measures could resolve thousands of pending applications of similarly-situated petitioners and, at the same time, reduce future complaints to the Tribunal.

The Inter-American Court, for its part, currently faces nowhere near the same pressures upon its docket,<sup>83</sup> yet it regularly orders legislative reform and other equitable remedies. Moreover, it confronts significant remedial deterrence. At times it has ordered measures that might not have even been strictly possible in the state’s domestic law, such as the reopening of legal proceedings. It also refused to

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the underlying right.”).

<sup>74</sup> See generally *Peru’s International Defiance*, N.Y. TIMES, July 14, 1999.

<sup>75</sup> Perhaps some Strasbourg judges also believe that the Committee of Ministers, a political body, is more appropriate for the policy decisions involved in the formulation of many non-monetary remedies.

<sup>76</sup> See, e.g., HARRIS ET AL., *supra* note 63, at 861.

<sup>77</sup> *Id.* at 859.

<sup>78</sup> See, e.g., Philip Leach, *Beyond the Bug River: New Approaches to Redress by the ECHR*, 10 EUR. HUM. RTS. L. REV. 148, 151 (2005).

<sup>79</sup> The European Court has interpreted Articles 2 and 3 of the Convention to contain a procedural obligation to carry out an effective investigation into alleged breaches of the substantive aspect of these provisions. E.g., *McCann and Others v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) ¶¶ 157–64 (1995); *Ergi v. Turkey*, 1998-IV Eur. Ct. H.R. 1751 ¶ 82; *Mastromatteo v. Italy*, 2002-VIII Eur. Ct. H.R., § 89; and *Assenov and Others v. Bulgaria*, 1998-VIII, §§ 101–06.

<sup>80</sup> See Sections III(D)(2) and IV(B), *supra*.

<sup>81</sup> See, e.g., *McCann and Others v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) ¶ 219 (“[H]aving regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court does not consider it appropriate to make [a damages] award”); see also HARRIS ET AL., *supra* note 63, at 861.

<sup>82</sup> See Section V(A), *supra*.

<sup>83</sup> The Inter-American Commission, on the other hand, is currently processing more than 1,450 individual petitions. But it submitted only twelve applications to the Court in 2009, nine in 2008, and fourteen in 2007. See *Applications Filed with the Inter-American Court of Human Rights*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <http://www.cidh.oas.org/demandasESP.htm> (last visited May 1, 2011).

back down when a few states challenged its competence.<sup>84</sup> In my estimation, then, the term “victim-centered” is deserved. I will designate the alternate approach, of both the European Tribunal and many national courts, as a “cost-centered” model.

The next section will examine compliance with the Inter-American Court’s remedial model. While this Article has extolled many of the approach’s virtues, it has yet to review whether states have actually obeyed equitable remedies that can be politically sensitive, technically complex, and resource intensive. Is such a wide-ranging model a feasible option for an international court?<sup>85</sup>

### III. A STUDY OF STATE COMPLIANCE RATES: THE NON-MONETARY REMEDIES OF THE INTER-AMERICAN COURT

#### A. Introduction

In an earlier article, I discussed the evolution of the Inter-American Court’s remedial model, and presented the general categories of non-monetary remedies now ordered by the Court, including restitution and cessation, rehabilitation, apologies, memorials, legislative reform, training programs for state officials, and community development schemes.<sup>86</sup> This Section will consider state compliance with these measures,<sup>87</sup> first studying remedies for individuals, then remedies directed at discrete communities, and finally those addressed to society as a whole.<sup>88</sup> The results consider all official information available as of this writing, pertaining to 88 cases in total.<sup>89</sup>

The Tribunal continues to supervise the majority of its judgments; during this cyclic process, it resolves disputes between the parties and issues binding instructions on how the reparations orders should be fulfilled.<sup>90</sup> Eleven cases have been closed due to full compliance.<sup>91</sup> A small fraction of judgments is no longer

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<sup>84</sup> Panama challenged the Court’s competence to supervise the implementation of remedies. *Baena-Ricardo et al. v. Panama, Competence, Judgment, 2003 Inter-Am. Ct. H.R. (ser. C) No. 104, ¶¶ 53–54 (Nov. 28, 2003)*. Two states, Trinidad and Tobago and Peru, withdrew from the Court’s jurisdiction; Peru has since returned.

<sup>85</sup> Some commentators, such as Pablo de Greiff, are skeptical of the capacity of courts to redress widespread human rights violations. *See de Greiff, supra* note 19, at 458–59.

<sup>86</sup> *See Antkowiak, supra* note 22, at 365–387.

<sup>87</sup> Note that some of the remedies have resulted from Court-approved settlements, which the Tribunal now supervises. *See, e.g., Barrios Altos v. Peru, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Aug. 4, 2008)*.

<sup>88</sup> The categories are adopted for the sake of convenience; it is not claimed that they are mutually exclusive.

<sup>89</sup> The Court’s official information on compliance, fully examined for the present study, is available at <http://www.corteidh.or.cr/supervision.cfm>. Almost all orders are available in Spanish (except for some orders corresponding to the few cases whose official language is English). Many orders, but not all, have also been translated into English.

<sup>90</sup> For the Court’s assessment of its supervisory competence, *see Baena-Ricardo et al. v. Panama, Competence, Judgment, 2003 Inter-Am. Ct. H.R. (ser. C) No. 104 (Nov. 28, 2003)*.

<sup>91</sup> The closed cases are the following: *Acosta-Calderón v. Ecuador, Merits, Reparations and Costs, Judgment, 2005 Inter-Am. Ct. H.R. (ser. C) No. 129 (June 24, 2005)*; *Aloeboetoe et al. v. Suriname, Reparations and Costs, Judgment, 1993 Inter-Am. Ct. H.R. (ser. C) No. 15 (Sept. 10, 1993)*; *Claude-Reyes et al. v. Chile, Merits, Reparations and Costs, Judgment, 2006 Inter-Am. Ct. H.R. (ser.*

supervised because of demonstrated state obduracy. In these instances, the Court has decided, in the absence of further information from the States, to “apply Article 65” of the American Convention and indicate in its annual reports to the OAS General Assembly that the lack of compliance persists.<sup>92</sup>

The following study uses only the Court’s official decision that a measure has been fulfilled, a determination that is exacting. If a particular remedy has been ordered multiple times in a single judgment, such as distinct types of legislative reform required of a state, it is accordingly counted more than once. If the deadline for the remedy, generally six months to one year, has not yet expired, the measure was not counted for the tally.

## B. Remedies for Individuals

### 1. Restitution and Cessation

Reflecting a tragic history of forced disappearances in the Americas, the state is commonly ordered to find missing corpses and return them to next of kin. In fact, this was one of the Tribunal’s first remedies directed to individual petitioners, after monetary compensation and declaratory relief.<sup>93</sup> The measure eludes categorization, incorporating elements of restitution, cessation, rehabilitation, and satisfaction, among others. It is included here for its strong conceptual ties to cessation: without a corpse, according to international human rights law, the violation of forced disappearance continues in time.<sup>94</sup>

Within the wide range of circumstances studied by the Court, there is none more heartrending than the family that cannot locate the remains of a loved one. Family members are denied the possibility of reaching closure.<sup>95</sup> It is unfortunate, then, to report that the crucial “find and return” measure has been poorly

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C) No. 151 (Sept. 19, 2006); *Fairén-Garbi and Solís-Corrales v. Honduras*, Merits, Judgment, 1989 Inter-Am. Ct. H.R. (ser. C) No. 6 (Mar. 15, 1989); *Gangaram-Panday v. Suriname*, Merits, Reparations and Costs, Judgment, 1994 Inter-Am. Ct. H.R. (ser. C) No. 16 (Jan. 21, 1994); *Genie-Lacayo v. Nicaragua*, Merits, Reparations and Costs, Judgment, 1997 Inter-Am. Ct. H.R. (ser. C) No. 30 (Jan. 29, 1997); *Godínez-Cruz v. Honduras*, Reparations and Costs, Judgment, 1989 Inter-Am. Ct. H.R. (ser. C) No. 8 (July 21, 1989); *Mayagna (Sumo) Awas Tingni Cmty v. Nicaragua*, Merits, Reparations and Costs, Judgment, 2009 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001); *Olmedo-Bustos et al. v. Chile*, Merits, Reparations and Costs, Judgment, 2001 Inter-Am. Ct. H.R. (ser. C) No. 73 (Feb. 5, 2001); *Ricardo Canese v. Paraguay*, Merits, Reparations and Costs, Judgment, 2004 Inter-Am. Ct. H.R. (ser. C) No. 111 (Aug. 31, 2004); *Velásquez-Rodríguez v. Honduras*, Reparations and Costs, Judgment, 1989 Inter-Am. Ct. H.R. (ser. C) No. 7 (July 21, 1989).

<sup>92</sup> Applicability of Article 65 of the American Convention on Human Rights, Monitoring Compliance with Judgment, Order of the Court, ¶ 9 (Inter-Am. Ct. H.R. June 29, 2005), available at [http://www.corteidh.or.cr/docs/supervisiones/general\\_29\\_06\\_05\\_ing.doc](http://www.corteidh.or.cr/docs/supervisiones/general_29_06_05_ing.doc).

<sup>93</sup> In the 1996 judgment *Neira-Alegria v. Peru*, the State was ordered to “do all in its power to locate and identify the remains of the victims and deliver them to their next of kin.” *Neira-Alegria et al. v. Peru*, Reparations and Costs, Judgment, 1996 Inter-Am. Ct. H.R. (ser. C) No. 29, ¶ 69 (Sept. 19, 1996).

<sup>94</sup> See, e.g., 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>.

<sup>95</sup> See *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 29 (Feb. 22, 2002); *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 80 (June 15, 2005).



implemented by states. Ordered twenty-four times, it has only been fulfilled in four cases.<sup>96</sup> While the proceedings from three other judgments show substantial progress, one of those cases, *Neira-Alegria v. Peru*, is already thirteen years old.<sup>97</sup>

Also frequently before the Tribunal are cases involving due process violations. Measures ordered to provide restitution in this regard have enjoyed greater success. For example, five judgments required the expungement of criminal records and all five were complied with by Ecuador, Peru and Argentina.<sup>98</sup> States have reversed convictions from military and civilian criminal courts in two cases out of five.<sup>99</sup> And all three orders to waive fines or cancel debts have been followed.<sup>100</sup> Without a doubt, the most spectacular success under this heading was Peru's release of Elena Loayza-Tamayo, whose conviction for terrorism was riddled with due process abuse.<sup>101</sup>

In death penalty matters, the Court has required stays on executions in three cases; two have been obeyed by Guatemala.<sup>102</sup> In one of these judgments, *Fermín Ramírez*, the Tribunal ordered a new trial, which was granted.<sup>103</sup> In the other, *Raxcacó-Reyes*, Guatemala followed the Court's instructions to commute the death sentence to a lesser penalty.<sup>104</sup>

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<sup>96</sup> Juan Humberto Sánchez v. Honduras, Monitoring Compliance with Judgment, Order of the Court, 2007 Inter-Am. Ct. H.R. (Nov. 21, 2007); Las Palmeras v. Colombia, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (Feb. 3, 2010) (being one of two orders that achieved compliance); Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, 2007 Inter-Am. Ct. H.R. (Nov. 27, 2007); Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Jan. 27, 2009).

<sup>97</sup> See *La Cantuta v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 20, 2009); *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 17, 2009); *Neira-Alegria et al. v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Jan. 19, 2009).

<sup>98</sup> *Acosta-Calderón v. Ecuador*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Feb. 7, 2008); *Cantoral-Benavides v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 20, 2009); *Chaparro-Álvarez and Lapo-Iñiguez v. Ecuador*, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (May 19, 2010); *Kimel v. Argentina*, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (May 18, 2010); *Suárez-Rosero v. Ecuador*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Mar. 20, 2009).

<sup>99</sup> *Cantoral-Benavides v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 20, 2009); *Palamara-Iribarne v. Chile*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Sept. 21, 2009).

<sup>100</sup> *Berenson-Mejía v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2006 Inter-Am. Ct. H.R. (Sept. 22, 2006); *Cantos v. Argentina*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (July 6, 2009); *Suárez-Rosero v. Ecuador*, Monitoring Compliance with Judgment, Order of the President of the Court, 2009 Inter-Am. Ct. H.R. (Mar. 20, 2009).

<sup>101</sup> *Loayza-Tamayo v. Peru*, Merits, Judgment, 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. See *Castillo-Pertruzzi et al. v. Peru*, Merits, Reparations and Costs, Judgment, 1999 Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 221 (May 30, 1999). The Court has not issued an order for release in another case.

<sup>102</sup> *Fermín Ramírez v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (May 9, 2008); *Raxcacó-Reyes v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (May 9, 2008).

<sup>103</sup> *Fermín Ramírez v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (May 9, 2008).

<sup>104</sup> *Raxcacó-Reyes v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court,

In 2001, the Court ambitiously pursued the restitution of 270 state jobs in *Baena-Ricardo v. Panama*.<sup>105</sup> As an alternative to employment, it allowed the State to provide the victims monetary compensation.<sup>106</sup> While the process has not yet concluded, the parties reached an agreement on compensation amounts and payments have been made.<sup>107</sup> In a 2006 case of nearly the same size, *Dismissed Congressional Employees (Aguado-Alfaro v. Peru)*, the Tribunal mandated that Peru establish “an independent and impartial body” with binding authority to determine

whether or not [the employees] were dismissed in a justified and regular manner from the Congress of the Republic, and to establish the corresponding legal consequences, including, if applicable, the relevant compensation based on the specific circumstances of each individual.<sup>108</sup>

This matter has not yet been resolved.<sup>109</sup>

The Court has sought to restore lost employment in two other instances, *Loayza-Tamayo* and *De la Cruz-Flores*. Peru complied with this measure in the case of Dr. De la Cruz-Flores, whose staff position in a state institution was restored.<sup>110</sup> After a ten-year wait, Ms. Loayza-Tamayo still has not received complete redress—although two of her three teaching positions have been reestablished.<sup>111</sup> Furthermore, on two occasions, the Court ordered, unsuccessfully as of yet, that victims be reinstated in their respective retirement pensions.<sup>112</sup>

The Inter-American jurisprudence has also dealt with the restitution of property, from ancestral lands (see Section III(C), *supra*) to intellectual property. In *Ivcher-Bronstein v. Peru*, 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.<sup>113</sup> While it is true that this requirement poses complexities, Peru has been unable to conclude the matter since the 2001 judgment.<sup>114</sup> Argentina, on the other hand, complied with a

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2008 Inter-Am. Ct. H.R. (May 9, 2008).

<sup>105</sup> *Baena-Ricardo et al. v. Panama*, Merits, Reparations and Costs, Judgment, 2001 Inter-Am. Ct. H.R. (ser. C) No. 72, ¶ 214 (Feb. 2, 2001).

<sup>106</sup> *Id.*

<sup>107</sup> See *Baena-Ricardo et al. v. Panama*, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (May 28, 2010).

<sup>108</sup> *Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment, 2006 Inter-Am. Ct. H.R. (ser. C) No. 158, ¶ 163 (Nov. 24, 2006).

<sup>109</sup> See *Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 20, 2009).

<sup>110</sup> *De la Cruz-Flores v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2007 Inter-Am. Ct. H.R. (Nov. 23, 2007).

<sup>111</sup> *Loayza-Tamayo v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Feb. 6, 2008). For further discussion of this case, see Section IV(C)(2), *supra*.

<sup>112</sup> See *Acevedo-Jaramillo et al. v. Peru*, Monitoring Compliance with Judgments, Order of the President of the Court, 2009 Inter-Am. Ct. H.R. (Dec. 18, 2009); *Loayza-Tamayo v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Feb. 6, 2008).

<sup>113</sup> *Ivcher-Bronstein v. Peru*, Merits, Reparations and Costs, Judgment, 2001 Inter-Am. Ct. H.R. (ser. C) No. 74, ¶ 191 (Feb. 6, 2001).

<sup>114</sup> See *Ivcher-Bronstein v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2009

requirement “to lift the attachments, general property encumbrances and other measures that were ordered against the properties and business assets” of Mr. José María Cantos.<sup>115</sup>

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.<sup>116</sup> Chile followed the Court’s orders to provide redress by offering to publish 1,000 new copies of the work, a proposition that was accepted by Mr. Palamara-Iribarne.<sup>117</sup>

## 2. Rehabilitation

State compliance with rehabilitation measures, such as medical and psychological treatment, scholarships, and vocational assistance, has been poor. To begin, medical and/or psychological treatment required through state institutions has been mandated twenty-eight times with only two cases of full compliance.<sup>118</sup> However, this “state provider” approach should be distinguished from the Court’s practice of awarding future medical expenses, which has been fulfilled by states at much higher rates.<sup>119</sup>

The state provider model is often used in elaborate efforts to serve multiple victims. In some judgments beneficiaries number into the hundreds, or even reach thousands in *Juvenile Reeducation Institute v. Paraguay*.<sup>120</sup> While meaningful progress has been noted in select cases,<sup>121</sup> states have had difficulty with this approach even in situations concerning single victims.

A review of compliance with scholarships brings more disappointing results. Nine judgments have required assistance for learning—ranging from

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Inter-Am. Ct. H.R. (Nov. 24, 2009).

<sup>115</sup> Cantos v. Argentina, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (July 6, 2009).

<sup>116</sup> Palamara-Iribarne v. Chile, Merits, Reparations and Costs, Judgment, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135 (Nov. 22, 2005).

<sup>117</sup> Palamara-Iribarne v. Chile, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Sept. 21, 2009).

<sup>118</sup> Aloeboetoe et al. v. Suriname, Monitoring Compliance with Judgment, 1997 Inter-Am. Ct. H.R. (Feb. 5, 1997); Plan de Sánchez Massacre v. Guatemala, Monitoring Compliance with Judgment, 2009 Inter-Am. Ct. H.R. (July 1, 2009). Note that several additional states have complied with orders to provide future medical expenses, but *Aloeboetoe* and *Plan de Sánchez* appear to contain the only equitable remedies related to healthcare that have been deemed fulfilled.

<sup>119</sup> See, e.g., Mack-Chang v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, 2005 Inter-Am. Ct. H.R. (Sept. 12, 2005); Molina-Theissen v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, 2007 Inter-Am. Ct. H.R. (July 10, 2007); Tibi v. Ecuador, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (July 1, 2009).

<sup>120</sup> “Juvenile Reeducation Inst.” v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, 2004 Inter-Am. Ct. H.R. (ser. C) No. 112 (Sept. 2, 2004).

<sup>121</sup> See, e.g., Baldeón-García v. Peru, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Apr. 3, 2009); García-Asto and Ramírez-Rojas v. Peru, Monitoring Compliance with Judgment, Order of the Court, 2007 Inter-Am. Ct. H.R. (July 12, 2007); Gutiérrez-Soler v. Colombia, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (June 30, 2009); “Juvenile Reeducation Inst.” v. Paraguay, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 19, 2009); Raxcacó-Reyes v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (May 9, 2008).

literacy programs and primary school, to university studies and opportunities to update professional skills.<sup>122</sup> Not a single measure has been fully completed. A sweeping program to provide vocational training for over 3,000 former detainees of a juvenile detention center has likewise advanced slowly, though the Court has acknowledged positive developments.<sup>123</sup> The sparse rehabilitation orders in Inter-American case law for adult prisoners have not yet met with full success either.<sup>124</sup>

### 3. *Recognition of Responsibility and Apologies*

For years states have recognized at least partial responsibility before the Inter-American Court for human rights violations.<sup>125</sup> In singular instances, they have even provided, on their own motion, apologies to victims and family members during public hearings.<sup>126</sup> Yet the Court did not actually order the State to acknowledge blame and ask forgiveness until 2001.<sup>127</sup>

Since that time, this has become one of the Tribunal's most prominent and successful remedies, ordered twenty-eight times and fulfilled on seventeen occasions.<sup>128</sup> Considering that states are often required to send high-ranking

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<sup>122</sup> See, e.g., Cantoral-Benavides v. Peru, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 20, 2009); Cantoral-Huamani and García-Santa Cruz v. Peru, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Sept. 21, 2009); García-Asto and Ramírez-Rojas v. Peru, Monitoring Compliance with Judgment, Order of the Court, 2007 Inter-Am. Ct. H.R. (July 12, 2007); Gómez-Palomino v. Peru, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (July 1, 2009).

<sup>123</sup> See "Juvenile Reeducation Inst." v. Paraguay, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 19, 2009).

<sup>124</sup> See, e.g., Raxcacó-Reyes v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (May 9, 2008) (noting some progress concerning the State's implementation of "the educational, work-related and other measures necessary to ensure the social readaptation of Mr. Raxcacó Reyes," but not declaring fulfillment).

<sup>125</sup> See Gutiérrez-Soler v. Colombia, Merits, Reparations and Costs, Judgment, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶ 6 (Sept. 12, 2005) (separate opinion of Judge García-Ramírez).

<sup>126</sup> These apologies first occurred in 2004 during the hearings for *Plan de Sánchez* and *Molina-Theissen*. See Molina-Theissen v. Guatemala, Reparations and Costs, Judgment, 2004 Inter-Am. Ct. H.R. (ser. C) No. 108, ¶ 71 (July 3, 2004); Plan de Sánchez Massacre v. Guatemala, Merits, Judgment, 2004 Inter-Am. Ct. H.R. (ser. C) No. 105, ¶ 9 (Apr. 29, 2004) (separate opinion of Judge García-Ramírez).

<sup>127</sup> The Tribunal demanded that "the Peruvian State make a public apology to admit its responsibility." Cantoral-Benavides v. Peru, Reparations and Costs, Judgment, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 81 (Dec. 3, 2001).

<sup>128</sup> To date, the cases demonstrating compliance are the following: 19 Tradesmen v. Colombia, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (July 8, 2009); Bámaca-Velásquez v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Jan. 27, 2009); Cantoral-Benavides v. Peru, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 20, 2009); Case of the Plan de Sánchez Massacre v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, 2007 Inter-Am. Ct. H.R. (Nov. 28, 2007); Escué-Zapata v. Colombia, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (May 18, 2010); Gómez-Paquiyaui Brothers v. Peru, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (May 3, 2008); Heliodoro-Portugal v. Panama, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (May 28, 2010); Huilca-Tecse v. Peru, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Feb. 7, 2008); La Cantuta v. Peru, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 20, 2009); Mack-Chang v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, 2005 Inter-Am. Ct. H.R. (Sept. 12, 2005); Moiwana Cmty. v. Suriname, Monitoring Compliance with Judgment, Order of the Court, 2007 Inter-Am. Ct. H.R. (Nov. 21, 2007); Molina-Theissen v. Guatemala, Monitoring Compliance with Judgment,

officials to ceremonies and broadcast the proceedings on national media, this is an impressive accomplishment. Indeed, presidents and vice-presidents have participated in these public events.<sup>129</sup> To offer a fine example, in 2004 the President of Guatemala, “in name of the State, asked forgiveness of the Mack-Chang family and the people of Guatemala for the murder of the young anthropologist.”<sup>130</sup>

In *Tibi v. Ecuador*, a matter involving an expatriate who had suffered violations in Ecuador and then returned to his native France, the State was required to “make public” in France a written apology by its “high authorities.”<sup>131</sup> To date it has not complied with the directive.<sup>132</sup> The Court’s second order for a written apology, which also called for publication of the statement, has been fulfilled in the case of *Barrios Altos v. Peru*.<sup>133</sup>

Distinct from published apologies, the Court has on numerous occasions ordered states to publish selections from its judgments. A typical formulation is that a state publish, in the official government newspaper and in another newspaper of national circulation, the “proven facts” as well as the “operative part” of the judgment.<sup>134</sup> A version of this remedy has been ordered fifty-one times, ranking it second among the Tribunal’s non-monetary measures. It has enjoyed a 69 percent rate of compliance. Three times states were ordered to publish the judgment on government web sites, which they accomplished without difficulty.<sup>135</sup>

However, states have not yet completed directives to broadcast judgments by radio and/or television. As radio is a common means of communication within ethnic and indigenous communities appearing before the Court, this remedy continues to be requested. States have made progress: Paraguay reached an agreement with victims concerning transmissions,<sup>136</sup> and Nicaragua has already

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Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 16, 2009); *Pueblo Bello Massacre v. Colombia*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (July 9, 2009); *Serrano-Cruz Sisters v. El Salvador*, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (Feb. 3, 2010); *Servellón-García et al. v. Honduras*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Aug. 5, 2008); *Yakye Axa Indigenous Cmty. v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Feb. 8, 2008); *Zambrano-Vélez v. Ecuador*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Sept. 21, 2009).

<sup>129</sup> See, e.g., *Mack-Chang v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2005 Inter-Am. Ct. H.R. (Sept. 12, 2005); *Moiwana Cmty. v. Suriname*, Monitoring Compliance with Judgment, Order of the Court, 2007 Inter-Am. Ct. H.R. (Nov. 21, 2007); *Plan de Sánchez Massacre v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2007 Inter-Am. Ct. H.R. (Nov. 28, 2007).

<sup>130</sup> *Mack-Chang v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2005 Inter-Am. Ct. H.R. (Sept. 12, 2005).

<sup>131</sup> *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 280 (Sept. 7, 2004).

<sup>132</sup> *Tibi v. Ecuador*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (July 1, 2009).

<sup>133</sup> *Barrios Altos v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Aug. 4, 2008).

<sup>134</sup> E.g., “*Juvenile Reeducation Inst.*” v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Judgment, 2004 Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 340 (Sept. 2, 2004).

<sup>135</sup> *Barrios Altos v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Aug. 4, 2008); *Palamara-Iribarne v. Chile*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Sept. 21, 2009); *Yatama v. Nicaragua*, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (May 28, 2010).

<sup>136</sup> *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Feb. 8, 2008).

begun broadcasts in at least four locally-spoken languages.<sup>137</sup> Guatemala has followed the Tribunal's instructions to translate into Maya both the *Plan de Sánchez v. Guatemala* judgment and the text of the American Convention on Human Rights.<sup>138</sup>

#### 4. *Memorials and Commemorations*

The Court has frequently ordered measures to commemorate both individuals and communities. Its instructions have often followed the requests of petitioners, requiring that streets, plazas, and schools carry the names of victims. Public ceremonies offering apologies, such as those described above, also serve to honor the fallen. The Tribunal has additionally ordered the establishment of memorial scholarships<sup>139</sup> and human rights courses.

States have complied with these directives 13 out of 25 times.<sup>140</sup> Orders to name streets and schools are the most commonly fulfilled; schools, as might be expected, primarily memorialize children who have lost their lives.<sup>141</sup> *Serrano-Cruz v. El Salvador* features a powerful commemoration for child victims: through a 2007 decree from its national legislature, El Salvador complied with the Court's instruction by designating March 29<sup>th</sup> as the "Day Dedicated to the Boys and Girls Who Disappeared During the Armed Conflict."<sup>142</sup>

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<sup>137</sup> *Yatama v. Nicaragua*, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (May 28, 2010).

<sup>138</sup> Yet the State has not carried out directions to distribute these texts within the town of Rabinal, site of the case's massacre, nor has it delivered them directly to the survivors. *Plan de Sánchez Massacre v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (July 1, 2009).

<sup>139</sup> These should be distinguished from scholarships awarded directly to victims, falling under the "rehabilitation" heading.

<sup>140</sup> To date, the cases demonstrating compliance are the following: *Baldeón-García v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Apr. 3, 2009); *Benavides-Cevallos v. Ecuador*, Monitoring Compliance with Judgment, Order of the Court, 2003 Inter-Am. Ct. H.R. (Nov. 27, 2003); *Gómez-Paquiyaui Brothers v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (May 3, 2008); *La Cantuta v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 20, 2009); *Mack-Chang v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 16, 2009); *Molina-Theissen v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 16, 2009); *Plan de Sánchez Massacre v. Guatemala*, Monitoring Compliance with Judgment, 2009 Inter-Am. Ct. H.R. (July 1, 2009); *Serrano-Cruz Sisters v. El Salvador*, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (Feb. 3, 2010); *Servellón-García et al. v. Honduras*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Aug. 5, 2008); "Street Children" (*Villagrán-Morales et al.*) *v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Jan. 27, 2009); *Trujillo-Oroza v. Bolivia*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 16, 2009).

<sup>141</sup> See, e.g., *Gómez-Paquiyaui Brothers v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (May 3, 2008); "Street Children" (*Villagrán-Morales et al.*) *v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Jan. 27, 2009).

<sup>142</sup> *Serrano-Cruz Sisters v. El Salvador*, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (Feb. 3, 2010).

*C. Remedies Directed to Discrete Communities*

The Tribunal has mandated that states ensure the rights of indigenous and tribal communities to their collective properties. The orders might simply require that the state “identify the lands and deliver them in a gratuitous manner,” or entail the creation of national legislation and administrative mechanisms. In this sense, this measure also relates to the category below concerning society-wide remedies, as its consequences may extend across a nation. To date, these orders have been complied with once out of four times; the sole success thus far was achieved in the leading case on the subject, *Mayagna (Sumo) Awas Tingni v. Nicaragua* of 2001.<sup>143</sup>

In four cases involving massacres, the Tribunal found that members of indigenous and tribal communities had not returned to their homes out of fear.<sup>144</sup> As of yet, states have not fully complied with the ensuing orders to “guarantee the safety” of returning members.<sup>145</sup> Also troubling are the results from two judgments, *Yakye Axa* and *Sawhoyamaxa*, concerning displaced indigenous populations in Paraguay. The State was required to supply them basic services “necessary for their subsistence” while they were unable to access their traditional lands; however, it has not complied in either instance.<sup>146</sup> At the very least, in *Sawhoyamaxa* Paraguay established a system of communication, following the express instructions of the Tribunal, so that community members could readily contact health authorities in cases of emergency.<sup>147</sup>

Remedies for communities are among the most elaborate and demanding, as the Tribunal seeks to rehabilitate villages that have often been decimated by government-sponsored attacks. Five judgments have ordered funds to be directed towards health, housing, education and other programs; two other judgments have ordered more limited housing initiatives.<sup>148</sup> Of these seven cases, two judgments have attained full compliance: *Mayagna (Sumo) Awas Tingni v. Nicaragua* and *Escué Zapata v. Colombia*.<sup>149</sup>

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<sup>143</sup> *Mayagna (Sumo) Awas Tingni Cmty v. Nicaragua*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Apr. 3, 2009).

<sup>144</sup> *Ituango Massacres v. Colombia*, Merits, Reparations and Costs, Judgment, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 404 (July 1, 2006); *Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, 2009 Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 313 (Sept. 15, 2005); *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 212; *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, 2009 Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 275 (Jan. 31, 2006).

<sup>145</sup> *E.g.*, *Moiwana Cmty. v. Suriname*, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (Nov. 22, 2010).

<sup>146</sup> *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Feb. 8, 2008); *Yakye Axa v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Feb. 8, 2008).

<sup>147</sup> *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Feb. 8, 2008).

<sup>148</sup> *See, e.g.*, *Ituango Massacres v. Colombia*, Merits, Reparations and Costs, Judgment, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 407 (ordering a limited housing program); *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 214 (requiring a large fund for multiple developmental initiatives).

<sup>149</sup> Yet Nicaragua only had to pay \$50,000 to complete its obligations, and Colombia \$40,000, while other States have been required to invest nearly \$1 million or more. *Mayagna (Sumo) Awas Tingni Cmty v. Nicaragua*, Merits, Reparations and Costs, Judgment, 2009 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 167 (Aug. 31, 2001); *Escué-Zapata v. Colombia*, Monitoring Compliance with Judgment,

*Plan de Sánchez v. Guatemala* shows notable progress in this category. Following the Court's directives, the State launched a health center that provides the affected community both medical and psychological attention.<sup>150</sup> In *Aloeboetoe v. Suriname*, the State reopened a small school and staffed it with personnel, and brought a local medical clinic back into operation.<sup>151</sup>

#### D. Remedies Addressed to Society as a Whole

##### 1. Legal Reform, Human Rights Training and Other Measures

Those new to the Inter-American system are often surprised to learn that states have reformed their constitutions in response to a charge from the Court. In total, states have altered their laws eleven out of forty times.<sup>152</sup> In a handful of instances, executive branches have proposed bills for congress and currently await the results.<sup>153</sup> Yet the Court is not satisfied with such efforts and will only declare compliance when the bill becomes law.<sup>154</sup>

The Tribunal, then, has achieved some success with legislative reform despite its own rigorous standards. It could have closed a point "to adopt the legislative and any other measures required to adapt the Guatemalan legal system to international human rights norms and humanitarian law" from the *Bámaca-Velásquez v. Guatemala* judgment.<sup>155</sup> Such vague language would have permitted

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Order of the Court, 2010 Inter-Am. Ct. H.R. (May 18, 2010).

<sup>150</sup> *Plan de Sánchez Massacre v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (July 1, 2009).

<sup>151</sup> *Aloeboetoe et al. v. Suriname*, Monitoring Compliance with Judgment, 1997 Inter-Am. Ct. H.R. (Feb. 5, 1997). Trust funds were also established by this judgment; however, they served as compensation for moral and material damages. The funds were not established for village development projects, unlike other community cases. See *Aloeboetoe et al. v. Suriname*, Reparations and Costs, Judgment, 1993 Inter-Am. Ct. H.R. (ser. C) No. 15, ¶¶ 99-108 (Sept. 10, 1993).

<sup>152</sup> To date, the cases demonstrating compliance are the following: *Barrios Altos v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Aug. 4, 2008); *Chaparro-Alvarez and Lapo-Íñiguez v. Ecuador*, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (May 19, 2010); *Claude-Reyes v. Chile*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Nov. 24, 2008); *Kimel v. Argentina*, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (May 18, 2010); *Mayagna (Sumo) Awas Tingni Cmty v. Nicaragua*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Apr. 3, 2009); *Olmedo-Bustos et al. v. Chile*, Monitoring Compliance with Judgment, Order of the Court, 2003 Inter-Am. Ct. H.R. (Nov. 28, 2003); "Street Children" (*Villagrán-Morales et al.*) *v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Jan. 27, 2009); *Trujillo-Oroza v. Bolivia*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 16, 2009); *Zambrano-Vélez v. Ecuador*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Sept. 21, 2009).

<sup>153</sup> See, e.g., *Goiburú et al. v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 19, 2009); *Gómez-Palomino v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (July 1, 2009).

<sup>154</sup> The only exception surfaces in *Barrios Altos*, which contained a negotiated settlement between the State and victims that was subsequently approved by the Court. That settlement stipulated only "to initiate the procedure" for the ratification of a UN treaty. *Barrios Altos v. Peru*, Reparations and Costs, Judgment, 2001 Inter-Am. Ct. H.R. (ser. C) No. 87, ¶ 50 (Nov. 30, 2001).

<sup>155</sup> *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, Judgment, 2002 Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 82 (Feb. 22, 2002).



the Tribunal to conclude that a range of recent efforts sufficiently “adapted” the State’s legal framework, as Guatemala argued in supervision proceedings.<sup>156</sup> Nevertheless, the Tribunal insisted upon precise information on legislative reform directly related to forced disappearances, the subject matter of the case.<sup>157</sup>

Another society-wide remedy that has achieved noteworthy results is the human rights training program. The Tribunal has demanded training courses for state officials in a variety of countries, and they have been successfully completed on ten of twenty opportunities.<sup>158</sup> Moreover, in three other cases the Court has found significant progress towards compliance on this point.<sup>159</sup> The programs are commonly oriented toward security forces, but government employees in other disciplines have also been targeted for instruction.

In contrast, the Court’s directives to better the conditions of prison systems and detention practices have been ineffective. While a few advances have been recorded,<sup>160</sup> not a single case of nine has reached completion. This category includes orders to create national registries for detainees, to reform detention practices, and to improve even single prisons.

Equally unproductive have been the Tribunal’s efforts to strengthen states’ capacity to investigate and solve cases of forced disappearances, particularly the disappearances of children. The Court has creatively required states to establish: a genetic database (on two occasions);<sup>161</sup> a web page to facilitate searches for missing children;<sup>162</sup> a national committee charged with finding disappeared youth;<sup>163</sup> a

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<sup>156</sup> *Bámaca-Velásquez v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Jan. 27, 2009).*

<sup>157</sup> *See id.*

<sup>158</sup> To date, the cases demonstrating compliance are the following: *Claude-Reyes v. Chile, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Nov. 24, 2008)*; *Goiburú et al. v. Paraguay, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 19, 2009)*; *Gutiérrez-Soler v. Colombia, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (June 30, 2009)* (two separate orders were complied with by Colombia); *Ituango Massacres v. Colombia, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (July 7, 2009)*; *Mack-Chang v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, 2005 Inter-Am. Ct. H.R. (Sept. 12, 2005)*; *Mapiripán Massacre v. Colombia, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (July 8, 2009)*; *Servellón-García et al. v. Honduras, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Aug. 5, 2008)*; *Trujillo-Oroza v. Bolivia, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 16, 2009)*; *Zambrano-Vélez v. Ecuador, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Sept. 21, 2009).*

<sup>159</sup> *See La Cantuta v. Peru, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 20, 2009)*; *Tibi v. Ecuador, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (July 1, 2009)*; *Ximenes-Lopes v. Brasil, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (May 17, 2010).*

<sup>160</sup> *See, e.g., Gutiérrez-Soler v. Colombia, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (June 30, 2009)*; *Juan Humberto Sánchez v. Honduras, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (May 22, 2009)*; *López-Álvarez v. Honduras, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Feb. 6, 2008)*; *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 17, 2009)*; *Raxcacó-Reyes v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (May 9, 2008).*

<sup>161</sup> *Molina-Theissen v. Guatemala, Reparations and Costs, Judgment, 2004 Inter-Am. Ct. H.R. (ser. C) No. 108, ¶ 91(b) (July 3, 2004)*; *Serrano-Cruz Sisters v. El Salvador, Merits, Reparations and Costs, Judgment, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 193 (March 1, 2005).*

<sup>162</sup> *Serrano-Cruz Sisters v. El Salvador, Merits, Reparations and Costs, Judgment, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 189.*

“unified registry” among all state institutions investigating violent deaths of children,<sup>164</sup> and a campaign to create “awareness in the Honduran society regarding the importance of the protection of children.”<sup>165</sup> Only the order for the “unified registry” has been accomplished to date.<sup>166</sup>

## 2. *Criminal Investigation and Prosecution*

The most frequent order issued by the Tribunal is for states to investigate, identify, and prosecute perpetrators of human rights violations. These requirements, according to the Court, are not technically reparations; they originate in a state’s general obligation to respect and ensure human rights, as set out in the American Convention’s Article 1(1).<sup>167</sup> Thus, investigation and prosecution are independent from a state party’s duty to redress individual victims, which is found in the Convention’s Article 63.<sup>168</sup> Since they serve an essential public function, to deter future violations and uphold the rule of law, they have been included among this Section’s society-wide measures.

Of the 54 judgments that have demanded investigation and prosecution, only one has been deemed fulfilled, *Castillo-Páez v. Peru*.<sup>169</sup> This includes cases as longstanding as *Caballero-Delgado y Santana v. Colombia* from 1995.<sup>170</sup> What explains such bleak results—has the Court been too strict in its compliance determinations? After all, governments have obtained significant outcomes in some cases, even multiple convictions.<sup>171</sup> In 2009, Alberto Fujimori himself, former President of Peru and mastermind of killings examined by the Court, was sentenced to 25 years of prison.<sup>172</sup>

One explanation is that the Court demands a great deal of states. It generally requires the prompt investigation and prosecution of “all” those responsible for crimes, including any accessories, in cases that implicate numerous perpetrators.<sup>173</sup> Another major factor is that Latin American criminal justice

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<sup>163</sup> *Id.* at ¶¶ 183-88.

<sup>164</sup> *Servellón-García et al. v. Honduras*, Merits, Reparations and Costs, Judgment, 2006 Inter-Am. Ct. H.R. (ser. C) No. 152, ¶ 203 (Sept. 21, 2006).

<sup>165</sup> *Id.* at ¶ 201.

<sup>166</sup> *Servellón-García et al. v. Honduras*, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (Aug. 5, 2008).

<sup>167</sup> *E.g.*, *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 ¶¶ 166-67, 178-81 (July 29, 1988).

<sup>168</sup> While the International Law Commission and others share this conceptual view, one cannot deny that the punishment of perpetrators also has a crucial reparative function for the individual victim.

<sup>169</sup> *Castillo-Páez v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Apr. 3, 2009).

<sup>170</sup> *Caballero-Delgado and Santana v. Colombia*, Merits, Judgment, 1995 Inter-Am. Ct. H.R. (ser. C) No. 22 (Dec. 8, 1995).

<sup>171</sup> *See, e.g.*, *Las Palmeras v. Colombia*, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. (Feb. 3, 2010) (noting three convictions); *Mack-Chang v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 16, 2009).

<sup>172</sup> *La Cantuta v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 20, 2009).

<sup>173</sup> *E.g.*, *Mack-Chang v. Guatemala*, Merits, Reparations and Costs, Judgment, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 301(5) (Nov. 25, 2003).

systems often have feeble conviction rates.<sup>174</sup> Moreover, those responsible for abuses were, at times, high-ranking military officials or influential state agents. Many are still powerful, even decades after the crimes, and fiercely defend their impunity.<sup>175</sup> As a result, individuals who have assisted state investigations, including family members of victims and their attorneys, have withstood attacks upon their lives.<sup>176</sup>

Not every scenario before the Court has involved societal powerbrokers or officials in the armed forces. But nearly all of these cases point to breakdowns in investigative capacity, resources, and the will of governments to prosecute sensitive cases from the past.<sup>177</sup> These are problems that reveal structural fissures in Latin American states; as long as this is the case, a broad order to investigate and prosecute will not be resolved without concerted and sustained efforts.<sup>178</sup>

#### IV. AN ANALYSIS OF COMPLIANCE WITH THE INTER-AMERICAN COURT'S JUDGMENTS

##### A. Introduction

The above study demonstrates that states have complied with the Inter-American Court's reparations orders across a range of categories. Some categories have attained only a very modest "partial" compliance, while other results should surprise skeptics. When evaluating these rates, it first should be recalled that the Inter-American Court has exacting standards for compliance. Bills introduced to congress by the executive branch are not sufficient for the Court. One or two convictions often do not amount to adequate criminal sanctions. Community development orders frequently have numerous elements; if even one aspect is not completed, the entire order is still considered unfulfilled.

If the Court adopted the permissive criteria of its European counterpart,

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<sup>174</sup> See, e.g., Mark Shaw, Jan van Dijk and Wolfgang Rhomberg, Determining Global Trends in Crime and Justice: An Overview of Results from the United Nations Surveys of Crime Trends and Operations of Criminal Justice Systems, 3 F. CRIM. & SOC'Y 35, 51-54 (2003); AMNESTY INTERNATIONAL, LATIN AMERICA: CRIME WITHOUT PUNISHMENT: IMPUNITY IN LATIN AMERICA (1996), available at <http://www.amnesty.org/en/library/info/AMR01/008/1996/en>.

<sup>175</sup> In *Mack-Chang*, the Tribunal has not declared the prosecutions complete because one of the perpetrators, a former army colonel, has eluded capture for years. See *Mack-Chang v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 16, 2009).

<sup>176</sup> See, e.g., *Carpio-Nicolle et al. v. Guatemala*, Provisional Measures, Order of the Court, "Considering," ¶ 7 (Inter-Am. Ct. H.R. July 6, 2009), available at [http://www.corteidh.or.cr/docs/medidas/carpio\\_se\\_14\\_ing.pdf](http://www.corteidh.or.cr/docs/medidas/carpio_se_14_ing.pdf).

<sup>177</sup> Indeed, this is why many cases come to the Inter-American Court in the first place: the investigative and judicial processes have stagnated.

<sup>178</sup> Upon closing the point in *Castillo-Páez*, the Court recognized Peru's superb achievements to strike down amnesty laws and to establish a criminal justice "sub-system" specialized in human rights. *Castillo-Páez v. Peru*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. ¶ 16 (Apr. 3, 2009). It should also be noted that some states in the Americas are federations and certain criminal justice functions fall under the jurisdiction of their constituent states. This adds an additional layer of complexity to compliance with Court judgments. See, e.g., *Garrido and Baigorria v. Argentina*, Reparations and Costs, Judgment, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, ¶ 46 (August 27, 1998).

compliance rates in the Americas would improve substantially. The European Court generally leaves non-monetary measures to the discretion of the offending states. The Strasbourg Tribunal has repeatedly held that, “subject to monitoring by the Committee of Ministers,” a political body without binding authority over compliance, “the respondent State remains free to choose the means by which it will discharge its legal obligation . . . provided that such means are compatible with the conclusions set out in the Court’s judgment.”<sup>179</sup> The Committee of Ministers, as a result, has accepted a range of measures as acceptable forms of compliance.<sup>180</sup>

Given this context, Latin American states have responded notably to the Inter-American Tribunal’s detailed requirements.<sup>181</sup> This also includes respectable compliance with orders for monetary damages. According to one recent analysis, states fully paid moral and material damages between 40 and 50 percent of the time; another study estimated as high as 80 percent compliance with such orders.<sup>182</sup> The results are particularly significant if one considers the many extenuating circumstances in the region. States face meager national budgets, faltering human development indexes, and volatile governments.<sup>183</sup> The Organization of American States (“OAS”), the Court’s parent organization, has not effectively fostered compliance with judgments.<sup>184</sup> It routinely declines to exert sufficient pressure upon derelict nations; moreover, at least until recently, it has not funded the Commission and the Court at sufficient levels, forcing them to seek resources abroad.<sup>185</sup>

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<sup>179</sup> Scozzari and Giunta v. Italy, 2000-VIII Eur. Ct. H.R. 471, 528.

<sup>180</sup> COUNCIL OF EUROPE, COMMITTEE OF MINISTERS, Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements Rule 6 (2006), available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=999329&Site=CM> (“taking into account the discretion of the High Contracting Party concerned to choose the means necessary to comply with the judgment”); HARRIS ET AL., *supra* note 63, at 874 (explaining that states have the freedom to choose the means to execute judgments, preserving “respect for different national cultures”). Hawkins and Jacoby write that, owing to the immense amount of judgments that the Committee of Ministers must currently supervise, it is likely that states now have even more freedom than before to design their own remedies. See Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights*, Paper presented at 2008 Annual Meeting of the American Political Science Association (Aug. 28–31, 2008), at 24, available at <http://www.stevendroper.com/ECHR%20Hawkins%20and%20Jacoby%20APSA%202008.pdf>.

<sup>181</sup> Commentators such as Douglass Cassel and Jo Pasqualucci have lauded states’ compliance levels with Court judgments. See Douglas Cassel, *The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights*, in *OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS* 214; JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 289–90 (2003).

<sup>182</sup> See Hawkins & Jacoby, *supra* note 180, at 45; INTER-AMERICAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2010 12, available at <http://www.corteidh.or.cr/informes.cfm> (estimating “approximately” 80 percent state compliance with orders for monetary damages).

<sup>183</sup> For example, two of the states most frequently before the Court, Colombia and Peru, have faced political violence and instability for decades. Their respective “human development indexes” are only 77th and 78th in the world. The human development index is created by the United Nations Development Programme and “measures a country’s average achievements in three basic aspects of human development: health, knowledge, and income.” U.N. Development Program, *The Human Development Index*, <http://hdr.undp.org/en/statistics/hdi/> (last visited May 5, 2011).

<sup>184</sup> See OPEN SOCIETY JUSTICE INITIATIVE, FROM JUDGMENT TO JUSTICE: IMPLEMENTING INTERNATIONAL AND REGIONAL HUMAN RIGHTS DECISIONS 89 (2010) (noting ineffectual resolutions by the OAS General Assembly) [hereinafter *Judgment to Justice*].

<sup>185</sup> See Manuel Ventura-Robles, *La Corte Interamericana de Derechos Humanos: La Necesidad Inmediata de Convertirse en un Tribunal Permanente*, in *La Corte Interamericana de Derechos Humanos: Un Cuarto de Siglo: 1979–2004* 271, 289–302 (2005), available at

In addition, the Court's conservative determinations (and lower compliance rates as a consequence) do not adequately convey its impact upon Latin American states.<sup>186</sup> If governments have fully reformed their laws and constitutions 28 percent of the time, and national security forces have received human rights training at a 50 percent rate, this means that the Tribunal is enacting society-wide changes.<sup>187</sup> Similarly, the constant, high-profile public ceremonies and the nationwide publication of judgments officially acknowledge state abuses; as a result, victims are vindicated, history is recorded accurately, and society becomes better prepared to prevent the recurrence of such violations. By ordering remedies with the potential for lasting effect and victim satisfaction, the Inter-American Court is aiming far higher than its European counterpart, and its effectiveness should be evaluated accordingly.<sup>188</sup>

### B. Understanding Compliance with Court Judgments in Latin America

Despite these accomplishments, compliance with non-monetary orders could be substantially improved, thus unlocking the full potential of the Inter-American remedial paradigm. Toward this end, a rich and complex literature examines why states comply with international rules.<sup>189</sup> It has been summarized into three broad categories—international enforcement, management, and domestic politics.<sup>190</sup> While there are a number of nuances and additional factors to contemplate,<sup>191</sup> these three headings offer a useful approach for present purposes.

In Latin America, international enforcement from the OAS as such is

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<http://www.corteidh.or.cr/docs/libros/cuarto%20de%20siglo.pdf> (describing the Court's assigned budget as inadequate and referring to the "necessity" of establishing a permanent compliance body within the OAS); James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. OF INT'L L. 768, 782–84 (2008) ("throughout its existence, the Court has received relatively meager financial and political support from the OAS"); INTER-AMERICAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2009 20–21, available at [http://www.corteidh.or.cr/docs/informes/eng\\_2009.pdf](http://www.corteidh.or.cr/docs/informes/eng_2009.pdf) (indicating significant financial contributions from Norway and Spain); INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT 2009 at para. 115, available at <http://www.cidh.oas.org/annualrep/2009eng/Chap.II.eng.htm#G>. (citing contributions from several European nations).

<sup>186</sup> See Yuval Shany, *Compliance with Decisions of International Courts as Indicative of Their Effectiveness: A Goal-Based Analysis* (Int'l Law Forum Research Paper No. 04-10, October 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1697488](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697488); JUDGMENT TO JUSTICE, *supra* note 184, at 63 (describing the Court's "tremendous and positive impact on the . . . region").

<sup>187</sup> *But see* discussion in Section IV(C)(2) *infra*, regarding training programs.

<sup>188</sup> See Shany, *supra* note 186, at 13 (explaining that the Inter-American Court's lower compliance rates do not indicate that it is less effective than the European Court, especially since its remedies are "deeper" and more demanding).

<sup>189</sup> See, e.g., Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002) (assessing competing international relations theories); Ryan Goodman & Derek Jinks, *Incomplete Internalization and Compliance with Human Rights Law*, 19 EUR. J. INT'L L. 725 (2008); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

<sup>190</sup> See Hawkins & Jacoby, *supra* note 180, at 6.

<sup>191</sup> For example, Helfer and Slaughter develop detailed criteria to assess the effectiveness of supranational tribunals. See Helfer & Slaughter, *supra* note 189, at 298–336.

minimal, owing to its limited powers and deferential practices.<sup>192</sup> Still, states are concerned with their reputations, both within their regions and throughout the globe; reputation could lead to a form of international enforcement: material rewards or sanctions.<sup>193</sup> Respect for human rights and the rule of law may foster foreign investment and assistance, as well as international trade.

Little evidence exists, however, that these incentives and penalties are explicitly tied to compliance with Inter-American Court judgments.<sup>194</sup> Yet if domestic human rights advocates are savvy, they can of course amplify the effects of international enforcement. By linking with international groups and media, they could direct global attention to a state's noncompliance with specific rulings. But without such focused efforts, reputational concerns and international enforcement would seem to have a limited—while generally positive—effect on compliance with individual Court judgments.<sup>195</sup>

Management and domestic politics, in contrast, appear to be more integral to compliance with Tribunal orders. The Executive Secretary of the Inter-American Commission on Human Rights, Santiago Canton, and the author of a leading study on the Inter-American System, Carlos Beristain, agree, remarking that institutional capacity and political will are determinative in the Americas.<sup>196</sup> These two variables seem to explain many of the results of the above compliance study.

Clearing a petitioner's criminal record or waiving a fine, for example, has been accomplished without fail by states. Little coordination between governmental entities and scant resources are needed for such tasks. The procedure for compliance would also seem straightforward. The same could be said for publishing a judgment on an official government web site, or even in a national newspaper. Of course, the latter actions require a very public recognition of state responsibility, and thus political will must overcome worries about reputational effects. However, many of the human rights violations recognized in these situations have occurred under previous administrations, so fingers do not point directly to incumbent officials.<sup>197</sup> In fact, such public announcements could signal a

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<sup>192</sup> However, the OAS took the rare step to suspend Honduras after the 2009 coup. *See, e.g.,* Ginger Thompson and Marc Lacey, *O.A.S. Votes to Suspend Honduras Over Coup*, N.Y. TIMES, July 4, 2009, at A6.

<sup>193</sup> *See, e.g.,* Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819, 819 (2000) (accepting international obligations “raises expectations about behavior that, once made, are reputationally costly for governments to violate.”).

<sup>194</sup> Contrast with Pub. L. No. 104-107, § 582, 110 Stat. 751 (1996), whereby the U.S. Congress authorized sanctions against states that failed to cooperate with the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Still, the U.S. State Department has referenced Inter-American Court decisions in its country reports. *See, e.g.,* U.S. STATE DEP'T, 2009 HUMAN RIGHTS REPORTS: GUATEMALA (2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136114.htm>.

<sup>195</sup> Reputation seems to be a primary motivator for a state's public recognition of responsibility, whether before the Inter-American Court or subsequent to a judgment. The problem is that these acts, while often complying with a Court order, may be strategic posturing by the state and not lead to compliance with additional Tribunal remedies. *See infra*, note 198 and accompanying text.

<sup>196</sup> *See* Santiago Canton, *Conference: Reparations in the Inter-American System: A Comparative Approach*, 56 AM. U.L. REV. 1375, 1454 (2007); BERISTAIN, *supra* note 1, at 531–532; *see also* Emilie Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44 J. PEACE RES. 407, 409 (2007) (noting that “political will” and “national capacities for reform” are both important).

<sup>197</sup> To illustrate, the recognitions of responsibility concerning the cases of *Moiwana*, *Plan de*

break from the past, and garner positive media attention for the government.<sup>198</sup>

When managerial and technical demands increase, compliance rates start to fall off. Training programs for state officials require a degree of expertise and an investment of resources; still, such initiatives would seem to risk little political capital. In many Latin American countries, security forces are distrusted, if not openly reviled, so public opposition to their training in human rights principles would be minimal.<sup>199</sup> As a result, Court orders under this heading enjoy moderate success.

Scholarships and professional courses for victims and next of kin seem relatively uncontroversial, but states have fallen short in all nine cases. A closer look at *Cantoral-Benavides* shows that these matters can pose numerous logistical complications.<sup>200</sup> Mr. Cantoral-Benavides had fled to Brazil, and Peru resisted paying for his education in that country. Delays ensued; myriad disputes then broke out concerning fees, living expenses and interest on payments, leading to additional lags.<sup>201</sup> While Mr. Cantoral-Benavides has now completed his degree in law, underwritten by Peru, the Court has not declared the point resolved because of some lingering bills.<sup>202</sup>

Even in simpler scholarship cases states show ineptitude from an operational point of view. In this way, it is not surprising that insufficient progress has been made implementing much more complex requirements for health care programs.<sup>203</sup> Similar troubles are found when the Court orders community development initiatives, the improvement of prisons, or the restitution of multiple jobs.<sup>204</sup> These efforts likely require high levels of institutional coordination, technical knowledge, and financial resources. And even if all of these elements are in place, the projects will still require significant time for completion.

Thus, there appear to be two important axes for understanding compliance in Latin America:<sup>205</sup> management and domestic politics. When easily-managed reparations are not accomplished, one would expect domestic political actors to hold the blame. Moreover, as remedial orders require increasingly unpopular or

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*Sánchez Massacre, Cantoral-Benavides, and Mack-Chang* all occurred under subsequent governmental administrations.

<sup>198</sup> Frank La Rue, President of the Presidential Commission of Human Rights in Guatemala (a governmental entity), has praised Guatemala's new state policy of recognizing the alleged facts of cases before the Inter-American system. Guatemala had been "hiding from human rights issues," but he claims that now the nation is "at the forefront of human rights policy." Frank La Rue, *Conference: Reparations in the Inter-American System: A Comparative Approach*, 56 AM. U.L.REV. 1375, 1461–1462 (2007).

<sup>199</sup> Latinobarómetro, a non-profit organization based in Chile, carried out over 20,000 interviews in eighteen Latin American countries for its 2009 Report, which demonstrated, among many other points, that there is very low public confidence in the police. CORPORACIÓN LATINOBARÓMETRO, REPORT 2009, 35 (2009), available at <http://www.latinobarometro.org/latino/LATContenidos.jsp>.

<sup>200</sup> See *Cantoral-Benavides v. Peru, Monitoring Compliance with Judgment, Order of the Court*, 2009 Inter-Am. Ct. H.R. "Considering," ¶¶ 7–10 (Nov. 20, 2009).

<sup>201</sup> See *id.*

<sup>202</sup> *Id.*

<sup>203</sup> See Section III(B)(2), *supra*.

<sup>204</sup> See Section III, *supra*.

<sup>205</sup> While the Court's jurisdiction also covers some states in the Caribbean, there is much more data on Latin American nations. See *Jurisprudence: Monitoring Compliance with Judgments*, INTER-AMERICAN COURT OF HUMAN RIGHTS, <http://www.corteidh.or.cr/supervision.cfm> (last visited May 5, 2011).

complex state action, delays with compliance invariably follow. For this reason, two of the least successful Court remedies are criminal investigations and finding/returning “disappeared” corpses. Searching for missing remains is as threatening to a society’s power structure as any other form of investigation into a suppressed, violent past.<sup>206</sup> These efforts require forensic expertise,<sup>207</sup> as well as persistence and courage: while leads and witnesses have long vanished, threats and attacks remain commonplace.<sup>208</sup>

### C. *Improving Compliance with Court Judgments in the Americas*

#### I. *Recommendations for States and the OAS*

There are clear measures to be taken in Latin America, if political will and institutional capacity are among the primary factors influencing state compliance. First, it is evident that states must develop standing mechanisms, which span across governmental agencies and enjoy high-level authority, to respond expeditiously to the orders of the Court.<sup>209</sup> It is intolerable that victims have had to attend scores of meetings, with different officials each time, and still see no progress years after the issuance of a Court judgment.<sup>210</sup>

As indicated in the foregoing Section, consistent categories for the Court’s remedies have emerged.<sup>211</sup> Consequently, a state can expect the types of measures that will be ordered in most judgments, and so can create its governmental commission accordingly. For example, since rehabilitation measures figure prominently, a health minister should permanently serve on the compliance committee. An illustrious human rights attorney or victims’ advocate should also be appointed.

There are other important characteristics for such a committee. It must not only be transparent in its functioning and accountable to victims with clear deadlines, but must also work collaboratively with these groups. While it is conceded that constant consultation with victims may slow the pace of

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<sup>206</sup> See Section III(D)(2), *supra*.

<sup>207</sup> See BERISTAIN, *supra* note 6, at 382–85 (discussing the many technical demands concerning the exhumation and identification of remains); see also Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, E.S.C. Res. 1989/65, U.N. Doc. E/1989/89 (May 24, 1989).

<sup>208</sup> See, e.g., *Report of the Working Group on Enforced or Involuntary Disappearances*, U.N. Doc. A/HRC/13/31 (Dec. 21, 2009), para. 655 (“The Working Group notes a pattern of threats, intimidation and reprisals against victims of enforced disappearances, including family members, witnesses and human rights defenders working on such cases and calls upon States to take specific measures to prevent such acts.”).

<sup>209</sup> Peru and Colombia, two frequent defendants in the Inter-American system, have pursued such mechanisms. See Canton, *supra* note 184, at 1455; JUDGMENT TO JUSTICE, *supra* note 184, at 85–88.

<sup>210</sup> See BERISTAIN, *supra* note 6, at 673 (describing a case in supervision before the Court, “*Juvenile Reeducation Institute*” v. *Paraguay*, where the victims have had approximately 20 frustrating meetings with varying state representatives).

<sup>211</sup> These remedies include restitution and cessation, rehabilitation, apologies, memorials, legislative reform incorporating human rights standards, training programs often involving security forces, and community development schemes.



implementation, such methodology will provide benefits of restorative justice. That is, both the remedies achieved and the implementation process itself will take forms most meaningful and helpful to the victims.<sup>212</sup> The Court and the Inter-American Commission might even produce guidelines on structuring the state committee, which would strive to uphold victims' rights to access to justice, as well as to physical and mental integrity—given the stresses and dangers resulting from the compliance process.

Furthermore, the actions of compliance committees will be greatly constrained if domestic law does not continue to progress. Latin American amnesty legislation, often established by dictatorships and military regimes, has been widely eliminated.<sup>213</sup> Still, these laws remain on the books in some countries, preventing governments from complying with Court orders to prosecute. In addition, certain serious crimes such as torture continue to have statutes of limitations, in contravention of international law and Inter-American jurisprudence.<sup>214</sup> Other international crimes, like forced disappearance, are not even defined in some domestic penal codes.<sup>215</sup> Finally, various jurisdictions prohibit judgments and investigations from being reopened, which may be necessary, among other reasons, to remedy due process abuses.<sup>216</sup>

In a similar vein, the training of judges, prosecutors, security forces, and other state officials is fundamental for enhanced compliance. Such efforts will work along both axes: strengthening institutional and technical capabilities, as well as creating allies in domestic politics who will incorporate international standards into national law and practice. More judges must be informed of Inter-American jurisprudence that forbids statutes of limitations for heinous crimes.<sup>217</sup> Police investigators and medical examiners must be instructed in globally-approved techniques to detect signs of torture.<sup>218</sup> Of course, such training will not only allow

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<sup>212</sup> Braithwaite discusses important factors for a restorative process. Among them, victims should be provided: full opportunities for participation and their views should “count”; information about the processing and outcome of their case; fair and respectful treatment; and material and emotional restoration, including an apology. BRAITHWAITE, *supra* note 30, at 46.

<sup>213</sup> For one account of these developments, see Larry Rohter, *After Decades, Nations Focus on Rights Abuses*, N.Y. TIMES, Sept. 1, 2005, at A4.

<sup>214</sup> See, e.g., U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* Dec. 16 1968, 754 U.N.T.S. 73; Gómez-Paquiyaqui Brothers v. Peru, Merits, Reparations and Costs, Judgment, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 233 (July 8, 2004) (“[A]ll amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture . . .”).

<sup>215</sup> See, e.g., *Report of the Working Group on Enforced or Involuntary Disappearances*, U.N. Doc. A/HRC/13/31 (Dec. 21, 2009), para. 649 (“States should also take specific measures under their criminal law to define enforced disappearances as an autonomous criminal offence”); *Heliodoro-Portugal v. Panama*, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. “Considering,” ¶ 34 (May 28, 2010) (asserting that neither torture nor forced disappearance has been defined as a criminal offense to the satisfaction of the Court).

<sup>216</sup> See, e.g., *Canton*, *supra* note 196, at 1454.

<sup>217</sup> E.g., *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 167.

<sup>218</sup> See, e.g., U.N. Office of the High Commissioner for Human Rights, *The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶¶ 104–106, U.N. Doc. HR/P/PT/8/Rev.1 (Aug. 9, 1999), available at [www.ohchr.org/Documents/Publications/training8Rev1en.pdf](http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf) (also known as the “Istanbul Protocol”).

for compliance with pending remedial orders, it will also help prevent various human rights violations from occurring again.

Additionally, it is crucial that the OAS's governing bodies, the Permanent Council and the General Assembly, take a more assertive stance on compliance.<sup>219</sup> While not many weapons are in its arsenal, the OAS must marshal more political force to sanction any state that chronically disregards the Court.<sup>220</sup> In fact, a specific political mechanism to support the Court's supervision of judgments will likely become more necessary as its docket expands.<sup>221</sup> It is true that the Court's thorough approach to supervision has achieved successes. But such micromanagement will become impracticable if the hundreds of backlogged petitions at the Commission finally reach the Tribunal.

## 2. *Recommendations for the Inter-American Court*

The Court must fine-tune its own methods in order to enhance compliance levels. The Tribunal is only now starting to assess patterns of compliance difficulties and react to them.<sup>222</sup> One promising response has been increased outreach, such as establishing relationships with domestic high courts and sponsoring training activities and seminars for a variety of participants.<sup>223</sup> Another recent strategy is to convene closed hearings for problematic cases.<sup>224</sup> In instances where private hearings are ineffective, the Court has shown a willingness to open them to the public.<sup>225</sup> It appears that these assertive tactics have been beneficial.<sup>226</sup>

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<sup>219</sup> See Cavallaro & Brewer, *supra* note 185, at 783–784; Judgment to Justice, *supra* note 184, at 89.

<sup>220</sup> See *OAS General Assembly: An Opportunity to Focus on Human Rights*, AMNESTY INTERNATIONAL (June 5, 2000), [http://www.amnesty.org.uk/news\\_details.asp?NewsID=13711](http://www.amnesty.org.uk/news_details.asp?NewsID=13711). The General Assembly should regularly make specific recommendations to states on compliance with Court judgments.

<sup>221</sup> Cf. Judgment to Justice, *supra* note 184, at 78 (describing failed efforts to establish “a permanent mechanism to monitor and promote compliance”).

<sup>222</sup> See, e.g., INTER-AMERICAN COURT OF HUMAN RIGHTS, ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 2009, 12 (2009), *available at* [http://www.corteidh.or.cr/docs/informes/eng\\_2009.pdf](http://www.corteidh.or.cr/docs/informes/eng_2009.pdf) (citing a first study of compliance conducted in 2008 – that, nevertheless, only appears to refer to monetary orders).

<sup>223</sup> See *id.* at 23–28 (describing a range of outreach and training activities).

<sup>224</sup> The Court's President recently called Colombia to a private hearing to inquire into its difficulties in implementing health care remedies in eight distinct judgments against the State. *Escué-Zapata v. Colombia*, Monitoring Compliance with Judgment, Order of the Court, 2010 Inter-Am. Ct. H.R. “Having Seen,” ¶ 8 (May 18, 2010). See also Rules of Procedure of the Inter-American Court of Human Rights art. 30(5), Nov. 16–28, 2009, [http://www.corteidh.or.cr/reglamento/regla\\_ing.pdf](http://www.corteidh.or.cr/reglamento/regla_ing.pdf) (“The Court may join proceedings for the monitoring of compliance of two or more judgments issued with respect to a single State if it considers that the decisions set out in each judgment are closely related.”).

<sup>225</sup> Despite the Court having required protective measures in its judgment, additional members of the Sawhoyamaya community died because of lacking basic services; as a result, the Court decided to apply more pressure on the State by calling a public hearing on compliance. See *Sawhoyamaya Indígena Cmty. v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. “Considerando,” ¶ 39 (May 20, 2009).

<sup>226</sup> Convening a private hearing in *Goiburú* seemed to spur the State's publication of the judgment. Also it appears that Paraguay provided more concrete information as a consequence, including a timeline for the completion of pending measures. See *Goiburú and Others v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. “Having Seen,” ¶¶ 6–8 (Nov. 19, 2009).

There are more basic refinements that the Court should pursue in parallel fashion. The most obvious is to consider closely all likely consequences before issuing a non-monetary order. Such evaluations are evidently not made on occasion, resulting in directives that are very difficult to fulfill even with management capability and political will. Here, I do not mean that judges should order less demanding remedies against states that are hostile toward the Court. Victims must always receive adequate redress. Yet the Tribunal at times seeks to pursue this objective through inapt means. One example is provided by *Loayza-Tamayo v. Peru*, whose compliance has been pending since 1998.<sup>227</sup> While it is true that the State has shown stubbornness in this case, one of the principal difficulties can be attributed to a Court order.

Ms. Loayza-Tamayo was a part-time instructor in both public and private universities when she was detained by state agents during the Fujimori regime.<sup>228</sup> In its judgment, the Tribunal demanded that her public university jobs be restored, “on the understanding that the amount of her salaries and other benefits shall be *equal* to the pay she was receiving for her teaching services in the *public and private* sectors at the time of her detention, appreciated to reflect its value as of the date of this Judgment” (emphasis added).<sup>229</sup> This provision demands a factual impossibility, since private universities in Peru provide higher salaries than public institutions. Many longstanding disputes would have been avoided if the Court had taken that circumstance into account.

Peru received another questionable order in *Castro-Castro Prison v. Peru*.<sup>230</sup> There, the Court instructed the State to inscribe the names of accused and convicted terrorists, whose violent deaths in prison had been attributed to government agents, on a monument called *El Ojo que Llora*.<sup>231</sup> According to some, the monument had been dedicated to victims of terrorist acts; as a result, the Court’s requirement triggered “enormous political and societal backlash,” including criticism from Peruvian President Alan García.<sup>232</sup> Fortunately, the Tribunal revised the order to allow for the commemoration of the *Castro-Castro Prison* victims through other means.<sup>233</sup> Certainly, remedying human rights violations is a challenging task, and all complications cannot be foreseen. Still, adequate research and careful evaluation of likely consequences are indispensable.<sup>234</sup>

Also critical for increased compliance is appropriate specificity in remedial

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<sup>227</sup> *Loayza-Tamayo v. Peru*, Reparations and Costs, Judgment, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42 (Nov. 27, 1998).

<sup>228</sup> *Id.* at ¶ 71.

<sup>229</sup> *Id.* at ¶ 192.

<sup>230</sup> *Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment, 2006 Inter-Am. Ct. H.R. (ser. C) No. 160 (Nov. 25, 2006).

<sup>231</sup> *Id.* at ¶¶ 453–454.

<sup>232</sup> Cavallaro & Brewer, *supra* note 185, at 825.

<sup>233</sup> *Miguel Castro-Castro Prison v. Peru*, Interpretation of the Judgment, 2008 Inter-Am. Ct. H.R. (ser. C) No. 181, ¶ 57 (Aug. 2, 2008).

<sup>234</sup> Article 76 of the revised Rules of Procedure of the Inter-American Court of Human Rights promises to be helpful for some types of errors. The Article provides: “The Court may, on its own motion or at the request of any of the parties to the case, within one month of the notice of the judgment or order, rectify obvious mistakes, clerical errors, or errors in calculation.” Rules of Procedure of the Inter-American Court of Human Rights art. 76, Nov. 16–28, 2009, [http://www.corteidh.or.cr/reglamento/regla\\_ing.pdf](http://www.corteidh.or.cr/reglamento/regla_ing.pdf).

orders. Beristain interviewed 207 individuals involved in reparations processes before the Inter-American system.<sup>235</sup> Nearly all of the victims' advocates informed him that the Court's remedial orders could benefit from more specific terms.<sup>236</sup> Greater detail, according to these advocates, would reduce disputes between victims and state representatives, and expedite the implementation of remedies.<sup>237</sup> An imprecise order concerning urgent medical assistance or security measures could even endanger lives.

Training programs also call out for a more meticulous approach. Court orders for capacity building—often directed toward security forces or prison officials—are often vague, leaving out details on both curricula and duration.<sup>238</sup> International standards on disproportionate use of force or minimum detention conditions are not difficult to find.<sup>239</sup> But the Tribunal should be more forthcoming on how long the course should last, and how many times it should be taught. A brief, one-shot training may have very limited benefit, especially in a military force with considerable turnover in its ranks.<sup>240</sup>

More detail from the Court may not always be possible, however, or even desirable. First of all, excessively specific orders may be perceived as undue intrusions upon state sovereignty. Overall compliance rates will suffer far more if key domestic actors recoil as a consequence, and mobilize against the rulings of international tribunals. Furthermore, as a general matter, Court judges have restricted information before them and limited expertise. They are often unprepared to issue detailed orders on housing or medical programs—or, as seen above—even apparently simpler measures.

Victim and expert input, of course, provide crucial data to inform all remedial orders.<sup>241</sup> But the Tribunal's new streamlined procedures grant less opportunity for live witness testimony.<sup>242</sup> Many experts now submit their testimony by affidavit only.<sup>243</sup> Also of concern are the recent restrictions placed upon the

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<sup>235</sup> He interviewed, among others, petitioners, lawyers, judges, state officials, and expert witnesses. See BERISTAIN, *supra* note 1, at 20.

<sup>236</sup> See BERISTAIN, *supra* note 6, at 40.

<sup>237</sup> See *id.* at 40–43.

<sup>238</sup> See, e.g., *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150, ¶¶ 148–149 (July 5, 2006) (“[T]he Court deems it appropriate that the State frame and implement a training program on human rights and international standards applied to inmates addressed to police agents and penitentiary officials.”).

<sup>239</sup> See, e.g., *International Law*, U.N. OFFICE OF HIGH COMMISSIONER ON HUMAN RIGHTS, <http://www2.ohchr.org/english/law/index.htm> (last visited May 5, 2011) (listing many human rights instruments of relevance).

<sup>240</sup> Indeed, compliance under this category may appear to be a more significant accomplishment than it actually is, if training programs are only superficial.

<sup>241</sup> Furthermore, several have stated that declaring before a tribunal has a significant reparative effect. See, e.g., BERISTAIN, *supra* note 1, at 177 (noting this observation by many of his interviewees).

<sup>242</sup> See Cavallaro & Brewer, *supra* note 185, at 800–801.

<sup>243</sup> It is true that the new Rules of Procedure allow opposing parties to present written questions to challenge assertions made by affidavit. See Rules of Procedure of the Inter-American Court of Human Rights art. 50(5), Nov. 16–28, 2009, [http://www.corteidh.or.cr/reglamento/regla\\_ing.pdf](http://www.corteidh.or.cr/reglamento/regla_ing.pdf). But even if the expert reports and follow-up questions are studied by the overcommitted judges (judges work part-time for the Court, and generally have other employment) it will be more cumbersome for them to question the experts directly. However, they still technically have the power to do so, under Article 58. See *id.* at art. 58.

Inter-American Commission's use of expert witnesses in Court proceedings.<sup>244</sup> Given the centrality of non-monetary redress to the Court's jurisprudence, these expediting tendencies in San José are unsettling. The Tribunal must maintain its fact-finding abilities in order to preserve its capacity to order non-monetary remedies.

### 3. Implementing a "Participative" Methodology

In a previous article I proposed a "participative" methodology to calibrate Court remedies more precisely to a victim's situation and necessities.<sup>245</sup> Drawing from "experimentalist regulation" in US public law litigation, I suggested that the Inter-American Tribunal should issue a merits decision and then obligate parties to negotiate remedial solutions.<sup>246</sup> Following a finding of liability and general objectives set out by the Court, the parties and relevant experts would discuss and devise remedies, with the facilitation of a mediator.<sup>247</sup> The resulting agreement, to be approved by the Court, would lend even more legitimacy to the reparations judgment, since the remedies would be ultimately formulated not by distant international judges (albeit with significant victim input), but rather by the stakeholders and experts after substantial deliberation.

I believe that this participative approach would also enhance state compliance with Court judgments. Details desired by advocates, reflecting on-the-ground conditions and governmental capabilities, would be incorporated into remedial directives. Such specificity may reduce the need for the victims to constantly appeal to a state compliance committee or the Court when obstacles to implementation are encountered. Furthermore, more precise remedies would speak for themselves, allowing NGOs and advocates to use the judgments in their campaigns to bring about related human rights advances in the country.<sup>248</sup>

On the other hand, the remedial negotiation process would also allow for flexibility in the agreement's terms when advantageous. Such plasticity would seem necessary when parties are tackling particularly complex projects, such as community development programs.<sup>249</sup> All complications cannot be anticipated, so a better solution might entail the establishment of general goals and a clear decision-

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<sup>244</sup> Only when "the Inter-American public order of human rights is affected in a significant manner," may the Commission utilize expert witnesses. *Id.* at art. 35(1)(f).

<sup>245</sup> See Antkowiak, *supra* note 22, at 402–407.

<sup>246</sup> See *id.* at 402–403. For more on the experimentalist approach, see generally Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

<sup>247</sup> See Antkowiak, *supra* note 22, at 403. One possibility is that the Inter-American Commission serve as a mediator. If its caseload lessens, the Commission would be a solid candidate, given its extensive experience facilitating victim-state negotiations and its deep familiarity with human rights problems in the region. On the other hand, states may perceive the Commission as biased, since it will have already ruled on the case to be negotiated (before submitting it to the Court).

<sup>248</sup> Cf. Cavallaro & Brewer, *supra* note 185, at 817 ("the Court should be less concerned with expanding understandings of human rights than with maximizing the relevance and implementability of its jurisprudence."). Similarly, the Court's narrative of proven facts provides advocates "with an authoritative record to use in their campaigns and [prevents] governments or their supporters from putting forth alternative factual accounts later." *Id.* at 793–794.

<sup>249</sup> See Sabel & Simon, *supra* note 246, at 1062.

making process, which would include victims or their representatives at every stage. To its credit, the Court has employed this approach with some of its infrastructural orders, providing for funds and implementing committees—with victim participation—to pursue broad purposes.<sup>250</sup>

Under my participative proposal, the state's compliance committee would represent the government in the remedial negotiations. They would not only have the experience and knowledge to craft attainable solutions with the victims, but they would also be vested with the necessary authority to see the process through to its completion. Moreover, a dispute resolution procedure could be created as part of the agreement's framework. If such a procedure cannot be agreed upon within a time frame established by the Court, the Tribunal could attach standard provisions in accord with the protections of the American Convention. This also may decrease the amount of time the Court would need to spend on judgment supervision.

Before approving the agreement on remedies, the Tribunal would ensure that the process was fair and that applicable measures required by international law, including cessation orders and criminal investigations, would be included. Such a review is currently conducted with respect to more conventional settlements before the Court.<sup>251</sup> Finally, if no accord were reached by the parties after a reasonable period such as six months, the Court would fashion remedies based on the victims' claims, expert testimony, and its own reparations case law.

The participative process, then, would diminish the chance of arbitrary Court decisions and impractical remedies. It would often provide the detail sought by victims' lawyers so that states cannot shirk their duties or substitute more convenient actions. Of course, a participative process, by definition, would put the victims, or at least their representatives, at the center of a constructive course of action. Empowering them in this way provides many of the benefits of restorative justice.<sup>252</sup> In addition, routine interaction with victims will sensitize the members of compliance committees to their plight; this will not merely engender sympathy, but will also help the officials consistently provide more effective assistance.<sup>253</sup>

Some issues would require attention even before the six-month negotiation period began. For instance, in urgent circumstances involving health or personal safety the Tribunal could use its powers to require provisional measures of the state.<sup>254</sup> In sum, if one is willing to delay the process before the Court six months more by employing a participative methodology, remedies would not only be more effective and restorative for victims *when* implemented, they also would likely be

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<sup>250</sup> See, e.g., *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 215 (June 15, 2005); *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 224 (Mar. 29, 2006); *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 205 (June 17, 2005).

<sup>251</sup> See *García-Ramírez*, *supra* note 9, at 19–22.

<sup>252</sup> See Section II(B), *supra*.

<sup>253</sup> For example, a participative approach would assist in a country like Guatemala; parties to the negotiation would be familiar with the racism and exclusion in the society. See *DPLF*, *supra* note 11, at 8 (describing these serious problems of Guatemalan society). As a result, remedies and their implementation would fully take into account the challenging context.

<sup>254</sup> The Court has made similar orders for the security of petitioners and witnesses before the issuance of merits and reparations judgments. See, e.g., *Gómez-Paquiyaui Brothers v. Peru*, Provisional Measures, Order of the Court, “Decides,” ¶¶ 1–2 (Inter-Am. Ct. H.R. May 7, 2004), available at [http://www.corteidh.or.cr/docs/medidas/gomez\\_se\\_01\\_ing.pdf](http://www.corteidh.or.cr/docs/medidas/gomez_se_01_ing.pdf).

implemented by states at higher rates.

#### 4. *Special Challenges*

Even if more participative models are used, however, certain orders will reliably provide vexing challenges. One is the provision of medical and psychological rehabilitation through state institutions, which, as noted above, has obtained disappointing results. State medical institutions, typically underresourced and overutilized in comparison with their private counterparts, often lack adequate facilities and training to treat victims of severe human rights abuse.<sup>255</sup>

Furthermore, when attempting to redress violations suffered by indigenous and ethnic communities, the state encounters another philosophy of life, a different *cosmovisión*. In many instances, these cultures also have withstood longstanding oppression and persecution. Justifiable animosity toward state institutions, as well as cultural and language barriers, complicate a collaborative design and execution of health and housing programs, educational initiatives, memorials, and the demarcation of ancestral territories. In some cases, commercial development and resource extraction have caused irreparable damage to such lands, making restitution impossible.

Such special challenges lower compliance rates with Court judgments. But there is reason for optimism if the governments and individuals involved share their successful approaches and lessons learned. There have been good-faith efforts and significant achievements, both with respect to indigenous and ethnic communities and other victim populations. As adequate protocols and institutions are firmly established at the national level, with the full participation of victims, subsequent Court judgments will achieve compliance far quicker.<sup>256</sup> In this regard, the OAS would do well to facilitate the distribution of best practices, and provide technical assistance of its own.<sup>257</sup>

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<sup>255</sup> See BERISTAIN, *supra* note 6, at 245–246.

<sup>256</sup> Chile can offer many useful lessons after having implemented a national health reparations program, known as “PRAIS.” See *id.* at 276–285.

<sup>257</sup> The Inter-American Institute of Human Rights, “an independent international academic institution,” should be commended for publishing Carlos Beristain’s excellent two-volume study, *DIÁLOGOS SOBRE LA REPARACIÓN: EXPERIENCIAS EN EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS. About Us*, INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS, [http://www.iidh.ed.cr/acerca\\_eng.htm](http://www.iidh.ed.cr/acerca_eng.htm) (last visited May 5, 2011).

## V. TRANSFERRING A VICTIM-CENTERED REMEDIAL MODEL TO OTHER COURTS

### A. *The European Court of Human Rights*

#### 1. *Introduction*

Until recently the European Court only ordered declaratory relief and monetary compensation for human rights violations. During the past decade, divergences from this limited approach appeared, as the world's most enduring human rights tribunal sporadically ordered the restoration of liberty, the return of property, and legislative reform.<sup>258</sup> Nevertheless, these developments do not appear to indicate a fundamentally-changed reparations doctrine.<sup>259</sup> Restoring an individual's liberty ceases an illegal detention, and legislative modifications help to prevent the recurrence of widespread violations. Such cessation of ongoing violations and assurances of non-repetition are not technically reparations.<sup>260</sup> As in the case of criminal investigations (see Section III(D)(2), *supra*), they originate in a state's general obligation to respect and ensure human rights within its jurisdiction. Thus, these measures are independent from a state's duty to redress individual victims.<sup>261</sup>

Meanwhile, the European Court continues to disregard restorative measures for the individual petitioner, such as apologies and rehabilitation. Even the infrequent orders for legislative change were essentially forced upon the Court. The Tribunal's crushing caseload, particularly thousands of similarly-situated petitions, necessitated a desperate innovation called the "pilot judgment."<sup>262</sup> At the instance of the Committee of Ministers,<sup>263</sup> this procedure began in 2004 when, upon

<sup>258</sup> See, e.g., Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 147–149 (2008); Valerio Colandrea, *On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdivic Cases*, 7 HUM. RTS. L. REV. 396, 410–411 (2007); Philip Leach, *supra* note 78, at 151. It appears that in property restitution cases, the state is also given the option to provide monetary compensation. See *Brumărescu v. Romania*, 2001-I Eur. Ct. H.R. 155, 163, 165.

<sup>259</sup> See Colandrea, *supra* note 258, at 410–411.

<sup>260</sup> See Section III(D)(2), *supra*.

<sup>261</sup> Of course, it is clear that many of these measures benefit the individual victim, and are frequently requested by petitioners.

<sup>262</sup> According to the Protocol 14 Explanatory Report, the "increase [in cases] is due not only to the accession of new States Parties . . . 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 of Europe, E.T.S. 194, *available* at <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>. Decisions from the European Court of Human Rights are available from <http://www.echr.coe.int/echr/>.

<sup>263</sup> Eur. Parl. Ass., *Resolution of the Committee of Ministers on Judgments Revealing an Underlying Systemic Problem*, 114th Sess., Res. 2004(3) (2004) (ordering the Court "to identify, in its judgments . . . what it considers to be an underlying systemic problem and the source of this problem,



finding “underlying systemic problems,”<sup>264</sup> the Court started an intermittent practice of expressly requiring legal reform.<sup>265</sup>

I have characterized the European Tribunal’s restraint toward remedies as a “cost-centered” approach. Simply stated, the Court avoids imposing extra costs upon states parties, in the form of more expensive or detailed remedies, in order to minimize risks to its institutional integrity. Several examples of the Court’s practice support this thesis. Among them, the Tribunal has at times held that a mere finding of a violation is sufficient “just satisfaction” for the injured party.<sup>266</sup> Pecuniary damages awarded to victims rarely represent market value.<sup>267</sup> The Court does not order states to investigate violations,<sup>268</sup> a legal obligation of all states parties to the European Convention.<sup>269</sup> In sensitive political situations, the Strasbourg Tribunal may even decline to redress victims at all.<sup>270</sup>

As an initial matter, the Court’s conservative posture might seem understandable. After all, states still challenge the rulings of international courts on the basis of sovereignty.<sup>271</sup> In fact, scrutiny was upon the Court in 1998 as it underwent a major reorganization, absorbing the European Commission on Human Rights. Subsequently, the Court’s institutional integrity has been jeopardized owing to two troubling developments: a dramatic increase in the number of applications and diminished success in the execution of its judgments.<sup>272</sup>

Furthermore, as discussed in connection with the Inter-American Court, tribunals may be ill-equipped to demand sweeping remedies that require technical expertise and familiarity with political realities. Ordering more non-monetary remedies would require an expansion of fact-finding efforts—and thus more time and resources of the straining European Court. At first glance, then, some may

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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”), available at <https://wcd.coe.int/ViewDoc.jsp?id=743257&Lang=en>.

<sup>264</sup> 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. *Hutten-Czapska v. Poland*, 2006-VIII Eur. Ct. H.R. ¶¶ 235–36; see also *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1, 74–75.

<sup>265</sup> 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 provide, in the operative paragraphs, any remedial instructions on legal reform.

<sup>266</sup> See, e.g., *HARRIS ET AL.*, *supra* note 63, at 861.

<sup>267</sup> See *id.* at 859.

<sup>268</sup> See, e.g., *Leach*, *supra* note 78, at 151.

<sup>269</sup> See Section III(D)(2), *supra*.

<sup>270</sup> See, e.g., *McCann and Others v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) ¶ 219 (“having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court does not consider it appropriate to make [a damages] award”); see also *HARRIS ET AL.* *supra* note 63, at 861.

<sup>271</sup> In the case of the European Court, its remedial authority has been challenged by states on occasion. See Council of Europe, Committee of Ministers, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights* ¶ 33 (2001), available at <https://wcd.coe.int/ViewDoc.jsp?id=226195&Lang=fr>.

<sup>272</sup> 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.” 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>

defend the Court's decision to stay its course with respect to reparations.

However, several commentators have objected to the Tribunal's shackled approach toward remedies. These objections appear to incorporate four overlapping<sup>273</sup> rationales: i) victims' needs and preferences; ii) international law; iii) remedial theory; and iv) pragmatic issues regarding the escalating caseload and faltering compliance rates.

## 2. *A Victim's Perspective*

First, as stated previously, victims generally desire that violators perform an apology or recognition of responsibility, as well as other measures that will restore their dignity, health, and place in their community.<sup>274</sup> Mere cash compensation is not sufficient. It is acknowledged that the Court's requirements for legislative reform will likely provide victims some satisfaction, as measures that seek to prevent recurrence of the abuses.<sup>275</sup> But they are only ordered by the Court in extreme circumstances. The pilot judgment cases were representative of many pending applications, which exerted great pressure on the Tribunal to order legislative modifications.

It is true that petitioners have direct access to the Strasbourg Tribunal, as opposed to the Inter-American system, where complaints are first considered by the Inter-American Commission. Ultimately, however, the European Court simply does not order the remedies that most matter to victims, despite their numerous petitions for restorative redress.<sup>276</sup> Its approach spurns the key restorative justice principle to "empower victims to define the restoration that matters to them."<sup>277</sup> During supervision of compliance before the Committee of Ministers, the situation is no better. While victims are permitted to submit information, they are excluded from the Committee's deliberations—"in stark contrast to the right of the respondent state to play a full part in the proceedings."<sup>278</sup> Moreover, any measures the Committee may adopt as a result of victim submissions are, it is recalled, merely of a non-binding nature.

This misalignment between victims' preferences and remedies is the primary reason why I object to the European Court's remedial approach. Acting within its competence, a human rights court's first obligation is to victims.<sup>279</sup> Still, there are additional compelling arguments to be made against this "cost-centered"

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<sup>273</sup> The categories are not autonomous. For example, to some extent, victims' needs have crystallized into international law.

<sup>274</sup> See Section II(A), *supra*.

<sup>275</sup> See BERISTAIN, *supra* note 1, at 88 (discussing a case where family members of victims desire legislative reform above all else). In *Gutiérrez-Soler v. Colombia*, a victim of the case expressed his desire, in order to prevent the recurrence of "these cruel actions," that the State "instruct police officers and the army in human rights." *Gutiérrez-Soler v. Colombia*, Merits, Reparations and Costs, Judgment, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶¶ 41(b)–42(b) (Sept. 12, 2005).

<sup>276</sup> See, e.g., SHELTON, *supra* note 51, at 281 (applicants have unsuccessfully requested a variety of non-monetary measures from the European Court); Leach, *supra* note 78, at 155–56 (applicants have sought Court orders that respondent states should carry out criminal investigations).

<sup>277</sup> BRAITHWAITE, *supra* note 30, at 46.

<sup>278</sup> HARRIS ET AL., *supra* note 63, at 872.

<sup>279</sup> See *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, 1988 Inter-Am. Ct. H.R. ¶ 134 (July 29, 1988).

method. A second category to consider is that of international law itself.

### 3. *International Law: Principles and Practice*

Article 41 of the European Convention 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.”<sup>280</sup> Dinah Shelton has remarked that the term “satisfaction” in international practice has never been restricted to monetary compensation.<sup>281</sup> She also notes that the drafting history of European Convention indicates only that the Court lacks power to annul directly a national act.<sup>282</sup> Indeed, the framers of the European Convention intended that international principles of state responsibility should be applied in order to determine a state’s obligations after rights violations.<sup>283</sup> As stated earlier, the International Law Commission’s articles on state responsibility advance a much broader notion of remedies than the European Court.

Furthermore, developments at the United Nations and the Inter-American Court have constructed a persuasive legal framework of remedial principles. Such principles require rehabilitation, restitution, satisfaction and guarantees of non-repetition in the wake of human rights abuses.<sup>284</sup> The European system itself acknowledges the importance of such elements, which it calls “individual” and “general” measures.<sup>285</sup> The problem is that the Committee of Ministers leaves these measures to the state’s initiative, and offers only recommendations as to their design and implementation. In consequence, states can cut corners on both the quality and quantity of non-monetary measures.<sup>286</sup>

It is disappointing and even puzzling, then, that the Court, which operates in the same dynamic era as the Inter-American Court and the ICC and often cites the principle of *restitutio in integrum* in its judgments, would show such deference to the respondent state and the Committee of Ministers. Even the Court’s signature approach to defining the contours of human rights, the “margin of appreciation” doctrine, does not grant such latitude to states when there is regional consensus—and internationally there has been a growing convergence around necessary remedies.<sup>287</sup> Instead, its hands-off approach allows for inconsistent and insufficient

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<sup>280</sup> Note that despite the language of Article 41, the Court does not require a successful petitioner to return to national institutions to seek compensation before issuing its award. See HARRIS ET AL., *supra* note 63, at 857.

<sup>281</sup> See SHELTON, *supra* note 51, at 280-281.

<sup>282</sup> See *id.* at 281.

<sup>283</sup> See 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, 26 (Theodora Christou & Juan Pablo Raymond eds., 2005).

<sup>284</sup> See Sections II and III, *supra*.

<sup>285</sup> *E.g.*, Scozzari and Giunta v. Italy, 2000-VIII Eur. Ct. H.R. 471, 528 (“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.”).

<sup>286</sup> See Hawkins & Jacoby, *supra* note 180, at 11–12.

<sup>287</sup> *E.g.*, Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at ¶ 47 (1976).

redress among petitioners and cases. This obscures states' legal obligations concerning reparations. And the ambiguity is not resolved when the Court only sporadically issues a non-monetary order or more detail in its instructions.<sup>288</sup>

The pilot judgment procedure shows that the Court is capable of modifying its reparations practice. From a legal standpoint, this development was completely legitimate. While the pilot judgment is not expressly referenced in the European Convention, most of the Tribunal's law is judge-made. There is room for innovation, as the Court is not strictly bound by its earlier decisions.<sup>289</sup>

The European Court has observed on many occasions that the Convention "is a living instrument which . . . must be interpreted in the light of present-day conditions."<sup>290</sup> As the Tribunal has advanced expanding conceptions of rights over the years, a corresponding extension of remedies is indispensable. The Inter-American Court also has an evolving approach to the American Convention and, for its part, has pursued an incremental development of both rights and remedies.<sup>291</sup>

These legal arguments may be of less interest to a court principally worried about imposing undue costs upon states and provoking their ire. It must be emphasized, however, that the Committee of Ministers ordered the Court to find a solution that became the pilot judgment procedure. A few years before, the Parliamentary Assembly had urged the Tribunal to include greater detail in its remedial orders.<sup>292</sup> Such instructions from the Council of Europe's main political bodies show evidence that states are willing to submit themselves, at least temporarily, to enhanced remedial powers, and that regional standards for reparations are more demanding than what the Court has required.<sup>293</sup>

#### 4. Remedial Theory: Insights from U.S. Constitutional Scholars

Some scholars have decried the narrow scope of remedies ordered by US courts in response to constitutional violations. Similar to the Strasbourg Tribunal, a US court will most likely award monetary damages to a successful plaintiff; injunctions and other measures are uncommon.<sup>294</sup> Sometimes remedies are withheld entirely.

<sup>288</sup> See Helfer, *supra* note 258, at 153 ("The Court has not, however, indicated such measures in every judgment, creating needless uncertainty for states and inequity among applicants.").

<sup>289</sup> See, e.g., J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 13–14 (1993).

<sup>290</sup> Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) at ¶ 31 (1978).

<sup>291</sup> See Sergio Garcia-Ramírez, *Conference: Reparations in the Inter-American System: A Comparative Approach*, 56 AM. U.L. REV. 1375, 1429–1430 (describing the Court's evolution in the last twenty years in terms of both rights and reparations); Cassel, *supra* note 181, at 213–214. Shelton argues that the European Court and the Inter-American Court "have both inherent and treaty-based power" to provide victims a range of remedies. SHELTON, *supra* note 51, at 280.

<sup>292</sup> See Eur. Parl. Ass., *Execution of Judgments*, *supra* note 272, at ¶ 11.

<sup>293</sup> See Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L. L. 101, 107 (2008) ("A parallel commitment expressed through the Council of Europe sometimes substitutes for comparison of national practices, and may provide elements of political consent along with evidence of normative consensus.").

<sup>294</sup> See, e.g., GERALD ROSENBERG, *THE HOLLOW HOPE* 343 (1991) ("American courts . . . were designed with severe limitations."); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies – and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 654 (2006).

Concerning this “right-remedy gap,” these commentators have a number of assertions. I will present a few, not nearly an exhaustive list, which are relevant for the European Court. First, John Jeffries and others state that, for adequate constitutional enforcement, different rights violations require different remedies, not cash alone.<sup>295</sup> Second, rights are inextricable from remedies; they “cannot sensibly be crafted apart from remedies, or vice versa.”<sup>296</sup> Thus, a “rights essentialism” view whereby courts, such as the European Tribunal, should only handle decisions of principle, not “real world” calculations for remedies, is challenged.<sup>297</sup> Third, and related to the second point: as a remedy contracts, the corresponding right is weakened—and no remedy makes the right “essentially worthless.”<sup>298</sup>

These scholars argue that courts should openly acknowledge when they withhold certain remedies because they find them troubling. This alludes to a judicial practice of evading complicated or sensitive orders through convenient decisions on justiciability, rights and remedies.<sup>299</sup> Gewirtz remarks, “by candidly acknowledging that they are providing something less than a full remedy, courts leave the unfulfilled right as a beacon. This leaves open the possibility that at some point the courts will be able to furnish a more complete remedy.”<sup>300</sup> The European Court, in contrast, generally claims to achieve “just satisfaction” for rights abuses through monetary compensation alone. In so doing, the Court sends an erroneous message that the little it affords applicants, together with those measures fortuitously proffered by states, is sufficient according to international law.<sup>301</sup>

Perhaps the European Court would take issue with these arguments, and prefer to decide on rights alone. It would leave remedies other than monetary compensation to a political body, the Committee of Ministers, and thus neither agitate respondent states nor move out of its comfort zone.<sup>302</sup> But external pressures, even from that very political body, have led the Tribunal to require legislative reform and to provide more detail in other orders. Like it or not, the European Court is now in the business of remedies, both monetary and equitable. It must take up its significant responsibilities and require adequate redress. Otherwise, the Court will both abridge the rights it strives to protect, and undermine the victim-centered developments of international law.

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<sup>295</sup> See Jeffries, *supra* note 27, at 262.

<sup>296</sup> *Id.* at 281; see also, Levinson, *supra* note 73, at 857.

<sup>297</sup> Levinson, *supra* note 73, at 861–862.

<sup>298</sup> *Id.* at 888; see also Fallon, *supra* note 282, at 685–86 (“[t]he more extensive and potent the enforcement mechanisms, the more valuable a right becomes.”).

<sup>299</sup> See, e.g., Fallon, *supra* note 294, at 637; Starr, *supra* note 71, at 697.

<sup>300</sup> Gewirtz, *supra* note 67, at 673.

<sup>301</sup> Cf. Starr, *supra* note 71, at 762 (explaining that, in some circumstances, the European Court “claims to grant an effective remedy while in fact granting no remedy at all.”).

<sup>302</sup> There even is a proposal to refer decisions on compensation amounts to national bodies. See Council of Europe, Report of the Group of Wise Persons to the Committee of Ministers, CM(2006)203 (Nov. 15, 2006), at paras. 96–99, available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1063779&Site=CM>.

### 5. *Pragmatic Issues Regarding Escalating Caseload and Faltering Compliance*

Times have been tumultuous at the European Court during the last ten years: the caseload has continued to grow at an unsustainable pace and compliance difficulties have materialized. While a conservative court might be inclined to adopt a defensive posture, experts—including authorities within the Council of Europe—have demanded action. One significant result of this push is Protocol 14 to the European Convention, finally in force as of 2010, which seeks to improve the filtering and processing of petitions.<sup>303</sup>

The pilot judgment procedure and legislative reform also will help assuage the escalating docket woes. By ordering legislative modifications, the Court will reduce pending applications rapidly and obviate the need for related litigation in the future. As for execution difficulties, enhanced specificity with remedial orders, urged by the Parliamentary Assembly, would expedite compliance in many cases. As discussed above, increased detail frequently reduces guesswork and potential disputes, which would assist both the Committee in monitoring and the victims in pressuring for compliance.<sup>304</sup>

The Council of Europe has shown its resolve to confront pressing concerns with its human rights machinery.<sup>305</sup> But Protocol 14, the Court's sporadic orders for legislative modifications, and other scattered non-monetary measures are not enough.<sup>306</sup> Consistent requirements for legislative reform and greater detail in remedies, when appropriate, as well as more assertive supervision of compliance by the Committee, all will be necessary to improve the system's efficiencies and help alleviate docket overcrowding and lagging execution.

### 6. *Moving Forward*

Fully incorporating the Inter-American Court's victim-centered model, however, would not likely optimize the disposal of cases in Strasbourg. Full

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<sup>303</sup> See Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, June 1, 2010, Council of Europe, E.T.S. 194, available at <http://conventions.coe.int/Treaty/EN/Treaties/html/194.htm>.

<sup>304</sup> See also Helfer, *supra* note 258, at 154.

<sup>305</sup> See High Level Conference on the Future of the European Court of Human Rights: Interlaken Declaration (Feb. 19, 2010), available at [http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final\\_en.pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf) (announcing a joint declaration by representatives of the 47 Member States of the Council of Europe that confirms their intention to secure the long-term future of the European human rights system) [hereinafter Interlaken Declaration]. Note also that the Committee of Ministers has engaged in more detailed supervision of judgments in recent years. 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. In addition, the Parliamentary Assembly is becoming actively involved in the compliance process. See Eur. Parl. Ass., *Implementation of Judgments of the European Court of Human Rights*, Res. 1516 ¶ 3 (2006), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/ERES1516.htm> (“[T]he Assembly has increasingly contributed to the process of implementation of the Court's judgments”).

<sup>306</sup> See Paul Mahoney, *Parting Thoughts of an Outgoing Registrar of the European Court of Human Rights*, 26 HUM. RTS. L.J. 345, 346 (2005) (stating that “quite radical” further structural reform will be necessary). The pilot procedure itself also needs to be studied and improved. See Interlaken Declaration, *supra* note 305.

incorporation would lead to the ordering of restitution and cessation, rehabilitation, apologies, memorials, legislative reform, training programs for state officials, and possibly community development schemes, among other remedies. This is much more than what is currently provided by the European Court and Committee of Ministers working together.

What would be the consequences of such a shift? Most obvious is that the Court would have to engage in more fact development to proficiently order non-monetary remedies. This includes expanded victim, witness, and expert testimony. But proceedings before the Court are increasingly pared down, and hearings are held only rarely. So this would clearly constitute a change in direction—a shift, moreover, that would likely require a significant investment of resources and additional delays in processing cases.<sup>307</sup>

To lessen the Court's burden, the Directorate General of Human Rights could collaborate with the Court's Registry, particularly the division specializing in Article 41 matters, in order to study victims' claims and offer remedial proposals to the Tribunal.<sup>308</sup> The Council of Europe's Commissioner for Human Rights could also provide the Court useful recommendations, including applicable society-wide remedies like legislative reform. The Commissioner, an independent entity, is now authorized by Protocol 14 to take part in Court hearings. However roles are defined, adequate opportunities must be granted to the victims to express their preferences to the Tribunal.

Ideally, a participative approach would be used, whereby the victim and a state committee meet, after a decision on the merits, to devise appropriate remedies. Under such an arrangement, the Registry or Directorate General could facilitate the negotiations, and the Court would evaluate and, if appropriate, approve the resulting agreement. In fact, the current Rules of the Court allow for a similar procedure, whereby a decision on reparations is "reserved," and the parties have a subsequent opportunity to negotiate.<sup>309</sup> Unfortunately, this occurs rarely; much more common is a process that is nearly the inverse of a participative methodology: the Court's judgment is referred to the Committee of Ministers, where the victims have little influence upon the determination of remedies.<sup>310</sup>

Some experts have contemplated a greater role for mediation in order to resolve the many backlogged petitions quickly.<sup>311</sup> However, without a previous

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<sup>307</sup> Of course, if the petition process is slowed too much, the purpose of a human rights court is defeated.

<sup>308</sup> Currently, "in close co-operation with the authorities of the state concerned, the Directorate General considers the measures that should be taken to comply with the Court's judgment." When the Committee of Ministers requests it, "the Directorate offers its opinion and advice, which are based on the experience and practice of the Convention bodies." *A Unique and Effective Mechanism*, COUNCIL OF EUROPE, [http://www.coe.int/t/dghl/monitoring/execution/Presentation/About\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Presentation/About_en.asp) (last visited May 5, 2011).

<sup>309</sup> Council of Europe, European Court of Human Rights, Rules of Court, Rule 75 (Apr. 21, 2011), available at [http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/RulesOfCourt\\_April2011.pdf](http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/RulesOfCourt_April2011.pdf).

<sup>310</sup> See HARRIS ET AL., *supra* note 63, at 857 (noting that reparations are reserved in only a "minority of cases").

<sup>311</sup> See, e.g., Report of the Group of Wise Persons to the Committee of Ministers, *supra* note 302, at paras. 106–108; Andrea K. Schneider, *Bargaining in the Shadow of (International) Law: What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution*, 41 N.Y.U. J. INT'L L. & POL. 789, 818–819.

decision establishing the state's liability, or at least while Court precedents for non-monetary remedies are weak, petitioners will be at a disadvantage. At a minimum, settlements before merits decisions should pursue victim-centered principles through the facilitation of the Registry and the supervision of the Court.

It is evident that states would also have to work harder if the European Court adopted a victim-centered paradigm. Specific remedial orders, across a range of categories, would prevent them from choosing more convenient solutions. Requirements to rehabilitate victims and other unfamiliar measures would present complications during the initial cases. Still, just as in Latin America, adequate implementing committees would eventually be formed (if not already in existence) and appropriate protocols designed. Several Council of Europe states, in fact, would seem to be in a better position—both economically and operationally—to implement such measures.<sup>312</sup>

As for capacity to execute an increased number of Court-ordered legal reforms, the European system has a significant edge over its Inter-American counterpart. The Committee of Ministers has already launched important initiatives to harmonize national laws with the European Convention and Court case law. For example, 80 percent of member states now have the capability to reopen domestic criminal proceedings.<sup>313</sup> Furthermore, all COE nations now have some form of review procedure that assesses the compatibility of domestic laws with the European Convention.<sup>314</sup> For its part, the Commissioner of Human Rights is mandated to “identify possible shortcomings in the law and practice of member states” and to assist and promote implementation of European human rights standards.<sup>315</sup>

With these systemic efforts already bearing fruit, fewer reform directives will be necessary from the Court in the future. Those that are ordered will likely not come as a surprise, and Council of Europe institutions such as the Commissioner can offer assistance in implementation.<sup>316</sup> Another benefit of the current legislative reforms is that the risk-averse Court will be encouraged to order additional non-monetary remedies—such as renewed criminal investigations or even retrials—knowing that states are prepared for such procedures and compliance is feasible.<sup>317</sup>

In other aspects the European human rights system is also more “embedded” within member states than its Inter-American peer. The European Tribunal has fostered relationships with supreme courts and constitutional courts, although there is room for improvement in this regard.<sup>318</sup> Council of Europe

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<sup>312</sup> Of course, after 1990 the Council of Europe became a much more heterogeneous environment; recently-entered states may have weaker management capacities for the implementation of remedies. See Bates, *supra* note 293, at 54–56.

<sup>313</sup> See Helfer, *supra* note 258, at 150.

<sup>314</sup> See *id.*

<sup>315</sup> See COUNCIL OF EUROPE, COMMISSIONER FOR HUMAN RIGHTS, *Mandate*, [http://www.coe.int/t/commissioner/Activities/mandate\\_en.asp](http://www.coe.int/t/commissioner/Activities/mandate_en.asp) (last visited May 23, 2011).

<sup>316</sup> See Interlaken Declaration, *supra* note 305 (calling upon Committee of Ministers to “bring about a cooperative approach including all relevant parts of the Council of Europe in order to present possible options to a State Party required to remedy a structural problem revealed by a judgment”).

<sup>317</sup> See Helfer, *supra* note 258, at 150.

<sup>318</sup> See *id.* at 155–57; see also Report of the Group of Wise Persons to the Committee of Ministers, *supra* note 302, at paras. 81–86.



mechanisms have implemented training programs with national judges and other state agents, and national human rights institutions are increasingly connected to the Commissioner of Human Rights.<sup>319</sup> As a result, any training program ordered by the European Court under an Inter-American remedial approach is likely to benefit from the Council of Europe's support and expertise, ensuring a greater degree of success.

Incorporation of a victim-centered model often, but not always, leads to a court's detailed instructions on how a state must execute its legal obligations in a given case. Thus, the Committee of Ministers' responsibility to recommend appropriate remedial measures would decrease substantially. The enhanced detail would also simplify the Committee's monitoring of compliance, as already mentioned. Moreover, the instructions, as binding directives from an international tribunal, would have greater force than those coming from the Committee. The Committee, as a result, would be able to devote more of its energies to serve as a political forum, while the Court would focus on the more judicial tasks of determining rights violations and designing corresponding remedies.

In sum, while the Committee of Ministers workload would decrease, a shift to a victim-centered approach would likely require more overall effort and resources of the straining European human rights system, especially in the short term. Despite this disadvantage, there are compelling arguments to justify incorporation—above all, the needs and preferences of victims of human rights violations. There are few indications, nevertheless, that a victim-centered model will be introduced anytime soon.<sup>320</sup>

It is likely that the pilot judgment procedure, Protocol 14, and other regional efforts will assist in easing the docket crisis. Meanwhile, the Court should pursue an incremental approach, like the Inter-American Tribunal during the 1990's, gradually ordering a broader repertoire of remedies, with increased detail. The first of the new remedies should be the apology and recognition of responsibility. Such orders are simple and inexpensive to implement, do not demand additional fact-finding, and often contribute substantially to victim satisfaction. Once the docket situation and other problems begin to stabilize in Strasbourg, further aspects of a victim-centered model should be put into practice.

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

The newest regional human rights court, the African Court on Human and Peoples' Rights, was established by a protocol to the African Charter on Human and Peoples' Rights. While the Protocol entered into force in 2004, little progress was made, and the first judgment was not issued until the end of 2009. Much of the delay owed to the African Union's decision to fuse the Court with the AU Court of Justice.<sup>321</sup> This merger, creating the African Court of Justice and Human Rights,

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<sup>319</sup> Report of the Group of Wise Persons to the Committee of Ministers, *supra* note 302, at paras. 112–13.

<sup>320</sup> The Report of the Group of Wise Persons and the Interlaken Declaration, for example, do not clearly indicate interest in non-monetary remedies, although they support continued use and refinement of pilot judgment procedures.

<sup>321</sup> *See generally*, George Mukundi Wachira, African Court on Human and Peoples' Rights: Ten

will be complete after its founding treaty enters into force.

For now, the African Court on Human and Peoples' Rights will continue to operate. It is too early to tell how the Court will take up its extensive remedial mandate. 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."<sup>322</sup> The African Court of Justice and Human Rights has a similar remedial competence. Its Protocol reads: "the Court may, if it considers that there was a violation of a human or peoples' right, order any appropriate measures in order to remedy the situation, including granting fair compensation."<sup>323</sup>

The language in both provisions—like the equivalent text of the American Convention on Human Rights—grants ample room for a variety of equitable remedies, in addition to compensation. From a legal standpoint then, given the Inter-American Court's established jurisprudence on victim-centered remedies, and the UN's reinforcement of these principles, both African Courts would have good reason to adopt this model.

Nevertheless, both newly-minted Tribunals will face harrowing remedial deterrence. Could they risk, in their first judgments, issuing assertive non-monetary orders to distrustful states? African nations may be less capable, from economic and operational perspectives, than some Latin American countries of implementing such directives. Additionally, there will be little regional precedent, as the African Commission on Human and Peoples' Rights has only inconsistently recommended non-monetary remedies.<sup>324</sup> Furthermore, if the Courts prioritize cases of massive violations, proportionately more complex—and more intrusive—remedies will be required.

The African system will be fragile during the first rounds of judgments. There appears to be only a modest culture of cooperation with continent-wide human rights bodies, if one considers the checkered experience of the African Commission.<sup>325</sup> As a result, a gradual approach toward victim-centered remedies again would seem necessary. Meanwhile, state compliance committees and relevant protocols must be established as soon as practical to prepare for judgment implementation.<sup>326</sup> Parallel efforts through the African Union and African Commission must build relationships with national institutions and civil society, as

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years on and still no justice (2008), *available at* [www.unhcr.org/refworld/pdfid/48e4763c2.pdf](http://www.unhcr.org/refworld/pdfid/48e4763c2.pdf).

<sup>322</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, (June 9, 1998), OAU doc. OAU/LEG/EXP/AFCHPR/PROT (III).

<sup>323</sup> African Union, Protocol on the Statute of the African Court of Justice and Human Rights, art. 45, July 1, 2008, *available at* <http://www.unhcr.org/refworld/type,MULTILATERALTREATY,,,4937f0ac2,0.html>

<sup>324</sup> See Frans Viljoen & Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004*, 101 AM. J. INT'L L. 1, 16 (2007). *But see* Soc. & Econ. Rights Action Ctr. and Ctr. for Econ. & Soc. Rights v. Nigeria, Afr. Comm'n Human and Peoples' Rights, 155/96, (2001), *available at* [http://www.achpr.org/english/Decison\\_Communication/Nigeria/Comm.155-96.pdf](http://www.achpr.org/english/Decison_Communication/Nigeria/Comm.155-96.pdf) (providing extensive recommendations, including resettlement assistance, environmental cleanup, and a criminal investigation).

<sup>325</sup> See Viljoen & Louw, *supra* note 324, at 8 ("there is clearly an overall lack of state compliance with the recommendations of the African Commission").

<sup>326</sup> African Union collaboration and technical assistance would be useful in these efforts.

well as encourage domestic laws to fall in line with the African Charter. In so doing, the African system can pursue essential victim-centered remedies while seeking to avoid the compliance delays of the Americas and, eventually, even a docket overload.<sup>327</sup>

### C. *The International Criminal Court*

There have been high expectations for the International Criminal Court. Many observers have praised a “unique system in which the elements of retributive and restorative justice aim to be reconciled.”<sup>328</sup> The restorative justice aspect, as discussed earlier, refers to the Rome Statute’s novel remedial provisions for victims.

Different possibilities exist at the ICC for the delivery of victim benefits. First, “the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”<sup>329</sup> If at the time it is impossible to effectuate an order directly to the victim(s), it may be deposited in the Trust Fund for Victims<sup>330</sup> for later disbursement.<sup>331</sup> On the other hand, “where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate,” the Court may order that reparations be made “through” the Trust Fund.<sup>332</sup> In the case of deposits or Court-directed “collective awards,” the Trust Fund must obtain Tribunal approval for its eventual remedial plan.<sup>333</sup>

Second, the Trust Fund may act without a Court order, “for the benefit of victims of crimes within the jurisdiction of the Court.”<sup>334</sup> This “general assistance” mandate is triggered when the Fund’s Board of Directors “considers it necessary to provide physical or psychological rehabilitation or material support” for such

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<sup>327</sup> Consider if the many thousands of internally-displaced persons in Africa or survivors of crimes against humanity began to use this system. Note that direct access to the Court depends on an additional ratification process, which has been infrequent as of this writing. So any initial overload might take place at the African Commission, which may or may not result in a prompt flooding of the Court’s docket. The African Commission’s role with respect to the Court is still in a process of definition. See, e.g., Frans Viljoen, *A Human Rights Court for Africa, and Africans*, 30 BROOK. J. INT’L L. 1, 25-35 (2004).

<sup>328</sup> TRUST FUND FOR VICTIMS, *Legal Basis for Trust Fund for Victims*, <http://www.trustfundforvictims.org/legal-basis> (last visited May 5, 2011).

<sup>329</sup> Rome Statute, *supra* note 55, art. 75(2).

<sup>330</sup> See Rome Statute, *supra* note 55, art. 79. The Trust Fund depends upon voluntary contributions and assets collected through fines and forfeiture.

<sup>331</sup> Int’l Criminal Court, Rules of Procedure and Evidence, rule 98(2) (2002), available at [http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules\\_of\\_procedure\\_and\\_Evidence\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf). The deposited award for reparations “shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.” *Id.*

<sup>332</sup> *Id.*, rule 98(3).

<sup>333</sup> Approval is necessary to the extent that the terms of the reparations are not already specified by the Tribunal. See Int’l Criminal Court, Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3, paras. 57, 69 (Dec. 3, 2005), available at [http://www.icc-cpi.int/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3_English.pdf) [hereinafter Trust Fund Regulations].

<sup>334</sup> Rome Statute, *supra* note 55, art. 79.

victims and their families.<sup>335</sup> Before proceeding, the Fund must notify the Tribunal of its intentions, with the objective to ensure that the proposed initiative would not pre-determine any issue before the Court or prejudice the rights of the accused.<sup>336</sup>

As of this writing, the ICC has not yet secured a conviction, so it has not made a reparations order against an individual. Nevertheless, the Trust Fund has been active under its “general assistance” competence, which is not limited to the victims participating in Court proceedings. It currently conducts 34 projects that, according to the Fund, support an estimated 42,300 direct beneficiaries and an additional 182,000 family and community members in Uganda and the Democratic Republic of Congo.<sup>337</sup>

The Fund states that it follows two “targeting strategies” for its general assistance: “projects tailored to meet the needs of victims of specific crimes” and “large-scale projects to help communities rebuild themselves and establish long-term peace and reconciliation.”<sup>338</sup> The initiatives, which are supported only by voluntary contributions to the Fund, include medical and psychological rehabilitation, education, rebuilding of community infrastructure, and creation of employment opportunities.<sup>339</sup>

As administrators of broad transitional justice efforts, the task before the ICC and the Trust Fund is daunting. Perpetrators are not expected to have many resources available for direct transfer to victims.<sup>340</sup> Yet the number of potential victims—both participating before the Court and otherwise—overwhelms.<sup>341</sup> The ICC Prosecutor has estimated that in the DRC alone tens of thousands, if not hundreds of thousands, would qualify as victims of crimes within the Court’s jurisdiction.<sup>342</sup>

With so many possible claimants upon its limited resources, it is not surprising that the Fund has opted for projects with a wide impact, so it can pool resources for a more efficient approach. This choice to move away from individual cash compensation towards non-monetary remedies, however, appears to be grounded in principle as well as practicality. A focus has been placed on the victim’s perspective, which is reflected in the Fund’s governing provisions and official policies. Grant proposals must address certain needs already identified through consultations with local stakeholders.<sup>343</sup> Moreover, projects must

<sup>335</sup> Trust Fund Regulations, para. 50(a)(i).

<sup>336</sup> *Id.*, para. 50(a)(ii).

<sup>337</sup> TRUST FUND FOR VICTIMS, *Projects*, <http://www.trustfundforvictims.org/projects> (last visited May 5, 2011).

<sup>338</sup> TRUST FUND FOR VICTIMS, *Welcome*, <http://www.trustfundforvictims.org/homepage> (last visited May 5, 2011).

<sup>339</sup> *See* TRUST FUND FOR VICTIMS, *Projects*, <http://www.trustfundforvictims.org/projects> (last visited May 5, 2011).

<sup>340</sup> *See, e.g.*, Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims’ Reparations*, 29 T. JEFFERSON L. REV. 189, 195 (2007).

<sup>341</sup> *See id.* at 210; Adrian Di Giovanni, *supra* note 15, at 50.

<sup>342</sup> Prosecution’s Application for Leave to Appeal Pre-Trial Chamber I’s Decision, Int’l Criminal Court, Pre-Trial Chamber I, ICC-01/04-103, at ¶ 5 (Jan. 23, 2006), *available at* <http://www.icc-cpi.int/iccdocs/doc/doc183444.PDF>.

<sup>343</sup> *See* TRUST FUND FOR VICTIMS, *Projects*, <http://www.trustfundforvictims.org/projects> (last visited May 5, 2011) (explaining the proposal process and the Trust Fund’s presence in the field). Note that requests for grant proposals are circulated by the Fund in the regions where the ICC is active.

emphasize participation by victims in program planning.<sup>344</sup>

Planning and design in themselves, it is reiterated, provide victims opportunities for empowerment and healing. Furthermore, the resulting Trust Fund projects show great restorative potential: for example, vocational training, medical and psychological support for victims of torture and mutilation, protective measures for victims of sexual and gender-based violence.<sup>345</sup> Such initiatives mirror the remedies of the Inter-American Court's victim-centered model, which are also crafted after listening closely to victims.

The ICC, through its Trust Fund, has directly fostered the development of restorative, non-monetary remedies for victims of serious international crimes. It is crucial that the Court maintain this approach when it finally orders reparations against convicted individuals, whether the measures are individual or collective. On an individual level, a perpetrator can provide his or her victim with an apology or recognition of responsibility, whose benefits may very well surpass the restitution of assets. It is true that apologies cannot always be obtained. However, to the extent appropriate and feasible, the full spectrum of remedies within the ICC's competence—restitution, compensation and rehabilitation—should be required of the perpetrator. Moreover, and equally important, the Court's collective remedies should follow the holistic, victim-centered parameters already instituted by the Trust Fund.

Commentators have expressed concern that victims appearing before the Court will receive far more favorable treatment in terms of remedies.<sup>346</sup> In fact, the Pre-Trial Chamber I held that "the responsibility of the Trust Fund is first and foremost to ensure that sufficient funds are available in the eventuality of a Court reparation order pursuant to Article 75 of the Statute."<sup>347</sup> The decision indicates that victims before the ICC are not only eligible for numerous possible benefits of participation,<sup>348</sup> but also that their reparations will be prioritized.<sup>349</sup>

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<sup>344</sup> See TRUST FUND FOR VICTIMS, *Funding Opportunities*, <http://www.trustfundforvictims.org/funding-opportunities> (last visited May 5, 2011).

<sup>345</sup> See TRUST FUND FOR VICTIMS, *Projects*, <http://www.trustfundforvictims.org/projects> (last visited May 5, 2011).

<sup>346</sup> See generally Tom Dannenbaum, *The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims*, 28 WIS. INT'L L. J. 234 (2010); Charles P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT'L L. 777 (2008); Pablo de Greiff & Marieke Wierda, *The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints*, in OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS 225.

<sup>347</sup> Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with

Regulation 50 of the Regulations of the Trust Fund, Int'l Criminal Court, Pre-Trial Chamber I, ICC-01/04-492 (Apr. 11, 2008) at 7, available at <http://www.icc-cpi.int/iccdocs/doc/doc470235.PDF>.

<sup>348</sup> Tom Dannenbaum outlines such potential benefits: "(1) gain victim status and thus acknowledgement before the Court; (2) participate in proceedings in a number of meaningful ways and on their own terms (rather than as tools of the prosecutor); (3) receive protection, counseling, and legal representation during that participation; (4) gain access to fines and forfeitures levied by the Court against the defendant; (5) see 'their' perpetrator punished; and (6) receive the reparative award ordered by the Court, pursuant to Article 75." Dannenbaum, *supra* note 346, at 281–82.

<sup>349</sup> In an attempt to comply with the Pre-Trial Chamber's ruling, the Trust Fund allocated a "reparations reserve" of €1 million to supplement Court-ordered Article 75 reparations. TRUST FUND FOR VICTIMS, BACKGROUND SUMMARY 9 (2008), [http://www.icc-cpi.int/NR/rdonlyres/E582AE21-D718-4798-97ED-C6C9F0D9B42D/0/TFV\\_Background\\_Summary\\_Eng.pdf](http://www.icc-cpi.int/NR/rdonlyres/E582AE21-D718-4798-97ED-C6C9F0D9B42D/0/TFV_Background_Summary_Eng.pdf).

Without a doubt, marginalized individuals will have the most difficulty either participating in Court proceedings or ensuring their consideration in Fund project proposals. This is no different than the frustrating limits inherent to regional and UN human rights mechanisms.<sup>350</sup> The best the ICC can do in this regard is to reduce the obstacles to access: it must intensify outreach efforts to inform victims of relevant opportunities before the Court or the Trust Fund. Participation, moreover, may not even be an option if safety is threatened—so security must be provided to the extent possible.

The Court must also closely coordinate with the Trust Fund to ensure comparable remedies across victim populations—whether they are Ugandan victims before the Court or DRC beneficiaries of a Trust Fund project.<sup>351</sup> By “comparable,” I mean that similar efforts are expended to ascertain needs, and adequate resources are invested in the ensuing remedial programs. Such an approach would allow for varying solutions according to the preferences of victim groups, consistent with international law on remedies. In this respect, the ICC has an advantage over regional human rights courts. In the Trust Fund, it has a committee of experts with on-the-ground access to victims, stakeholders, and other relevant figures—not to mention funds available for the immediate implementation of remedies. The ICC must fully utilize its uniquely potent counterpart in its reparations orders.

While these efforts will provide desperately-needed redress to thousands of individuals, the ICC and the Trust Fund will always be constrained by limited resources and other factors. One of these additional impediments may be the very source of the benefits. Consider victims who have suffered abuses at the hands of state agents. Even if they receive comprehensive programs from the ICC, they will face obstacles in the healing process if their state does not acknowledge its guilty role.<sup>352</sup> In this way, the Trust Fund rightly calls its independent projects “general assistance” rather than “reparations,” which are actions of the offending party.

When states share responsibility for human rights violations, by action or omission, they have a range of remedial obligations under international law. To discharge these obligations and to assist victim healing, they should facilitate the Trust Fund’s projects and the ICC’s orders.<sup>353</sup> Of course, this will be difficult when such programs differ from government priorities.<sup>354</sup> And reparations initiatives are always imperfect, inevitably leaving out deserving victim groups. But state collaboration with the ICC could be an efficient and sustainable beginning to the

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<sup>350</sup> Note, however, that at the end of 2009, the OAS Permanent Council approved the Rules of Procedure for the Operation of the “Legal Assistance Fund of the Inter-American Human Rights System.” Permanent Council of the Organization of American States, Rules of Procedure for the Operation of the Legal Assistance Fund of the Inter-American Human Rights System, OEA/Ser.G/CP/RES. 963 (1728/09), (Nov. 11, 2009), available at <http://www.oas.org/consejo/resolutions/res963.asp>.

<sup>351</sup> See de Greiff & Wierda, *supra* note 346, at 239–41. Yet more monetary compensation before the ICC would seem likely if the defendant is in possession of a victim’s assets.

<sup>352</sup> See *id.* at 236.

<sup>353</sup> After all, the projects would not likely have been initiated if the state’s efforts were already sufficient.

<sup>354</sup> Yet victims must be accorded at least the same importance as other urgent national needs. See Jaime Malamud-Goti & Lucas Grosman, *Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies*, in *THE HANDBOOK OF REPARATIONS* 539, 548 (Pablo de Greiff ed., 2006).

remediation of human rights abuses in transitional societies.<sup>355</sup>

## VI. CONCLUSION

All of the courts discussed in this Article can improve the restorative nature of their remedial approaches. The European Court of Human Rights needs to change the most, even while facing battles on other fronts: a docket overload and faltering compliance rates. Indeed, the European Court must strive for far more than expedited processing of petitions and firm supervision of compliance. The progress towards a victim-centered model may be gradual, but must be consistent.

Of course, if a victim-centered approach is not implemented with caution, and delicate balances are upset, human rights machinery may be spurned by states and rendered useless. In this way, while the needs and preferences of victims before a court are paramount, judges also cannot lose sight of future petitioners and other stakeholders. This is why human rights tribunals—the European Court, the African Court, and even the ICC—should study the example of the Inter-American Court.

The Inter-American Court has navigated these treacherous waters. It has listened to victims and ordered remedies that they desired and needed, following key restorative justice principles. Just as important, the Court has increasingly attained implementation of these orders, to the benefit of individuals and whole societies, without losing the allegiance of states. In conclusion, the Court's incremental expansion of both rights and remedies over the last two decades serves as an essential frame of reference for international courts that seek the restoration of petitioners before them.

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<sup>355</sup> It would be a sustainable approach because local implementing organizations are favored by the Trust Fund. See TRUST FUND FOR VICTIMS, *What We Do*, <http://www.trustfundforvictims.org/what-we-do> (last visited May 5, 2011) (describing grants “to support locally-registered national and international organizations already present in the region”).