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

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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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Victim-Centered Remedies and Restorative Justice

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

— Carlos Beristain

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 Martinez

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.” 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.”

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


2 Id. at 84.


4 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.\(^5\) 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.\(^6\) In this way, victims will be more inclined to rejoin the society that spurned them.\(^7\) Further symbolic reparations, including commemorations and memorials, are frequently demanded by victims as well.\(^8\)

In any reparative approach, ongoing injustices, such as illegal detention or deprivation of ancestral lands, must of course come to a halt.\(^9\) Victims also cite as

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\(^6\) 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.

\(^7\) See, e.g., Schotsmans, supra note 5, at 117; Bassiouni, supra note 5, at 231, 272; BERISTAIN, supra note 6, at 58–61.

\(^8\) See, e.g., Bassiouni, supra note 5, at 272; BERISTAIN, supra note 6, at 113–146.

\(^9\) 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. A criminal investigation and the sanction of perpetrators are almost universally demanded after serious violations. Finally, in cases of forced disappearance, the highest of priorities for next of kin is the most basic: the recovery of the loved one.

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. 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. For example, in some transitional justice efforts, where states try to repair massive human rights abuses, indigenous leaders have called for traditional justice methods. 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.

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

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

12 See, e.g., BERISTAIN, supra note 6, at 353–61. Beristain interviewed several family members of disappeared victims. One, a relative of Ernesto Castillo-Piez, 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.

13 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); Mojwana 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).


16 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.

17 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. If their views are not treated with utmost respect, the rupture between victim populations and society will only widen.

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. That is, if the State underplays its role in the atrocities and perpetrators roam free, psychological assistance will be of limited value.

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.

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. Several observe that cash damages are often “much less important than emotional or symbolic reparation” for litigants. Monetary compensation does not aptly address a person’s need for “dignity, emotional relief, participation in the social polity, or institutional reordering.” And a declaratory judgment “conveys little more to the

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18 See, e.g., Gómez, supra note 13, at 155–159; Beristain, supra note 6, at 23–26; Hamber, supra note 10, at 146.
22 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).
24 See id. at 1273 (citing John Braithwaite, A Future Where Punishment Is Marginalized: Realistic or Utopian?, 46 UCLA L. REV. 1727, 1744 (1999)).
25 Eric Yamamoto, INTERRACIAL 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.” Unfortunately, in legal systems such as the U.S., civil courts rarely
venture beyond ordering compensation.  

Some criminal courts have occasionally required apologies. 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.” 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 indigenes of Americas, Africa, Asia
and the Pacific, restorative traditions have persisted into modern times.”

Restorative justice practices are intended to heal at the individual and
communal levels. 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.” Even now, however, practitioners
concede that it represents a philosophy more than a “uniform set of practices or
processes.” Still, Braithwaite is definitive about its “keystone”: “empowering
victims to define the restoration that matters to them.” Studies have shown that
various incarnations of restorative justice practiced globally have resulted in high
rates of satisfaction for victims, offenders and other participants.

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.
Critics caution, however, that victims may be pressured into “forgiving”
prematurely and offenders’ needs may be prioritized. Since restorative justice

26 White, supra note 23, at 1283–84.
28 White, supra note 23, at 1268–69 (referring to the US criminal justice system).
29 Martha Minow, Keynote Address at the Ninth Annual Stein Center Symposium on the Role of
30 JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 5 (2002).
31 Carrie Menkel-Meadow, Restorative Justice: What Is It and Does It Work?, 3 ANN. REV. LAW
32 See id. at 163 (citing TONY F. MARSHALL, RESTORATIVE JUSTICE: AN OVERVIEW (1998)).
33 See id. at 179; see also HARRY MIKA ET AL., TAKING VICTIMS AND THEIR ADVOCATES
34 See BRAITHWAITE, supra note 30, at 46.
35 See, e.g., John Braithwaite, A Future Where Punishment is Marginalized: Realistic or
36 Menkel-Meadow, supra note 31, at 175.
37 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,
practices generally eschew legal formalities, others wonder what will happen to due process and associated rights.\textsuperscript{38} 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.\textsuperscript{39} 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.\textsuperscript{40} Yet these standards are not always met in the various situations around the globe where restorative justice is allegedly applied.\textsuperscript{41} Surely when such efforts lose sight of the victim’s perspective and needs they have strayed too far from the philosophy’s essence.\textsuperscript{42}

\section*{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.”\textsuperscript{43} 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”).\textsuperscript{44} While the Basic Principles were not approved by the General Assembly until 2005, they influenced other UN instruments and state policy during their development.\textsuperscript{45} 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.”\textsuperscript{46}

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

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Delgado, supra note 37, at 759–61.
\item See Menkel-Meadow, supra note 31, at 163.
\item See id. at 168.
\item 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.
\item 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”).
\item See Bassiouni, supra note 5, at 278-79.
\item Basic Principles, supra note 44, at p. 6 ¶ 18.
\end{enumerate}
\end{footnotesize}
of All Persons from Enforced Disappearance provides for compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.\textsuperscript{47} 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.\textsuperscript{48}

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.”\textsuperscript{49} 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.\textsuperscript{50} 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.\textsuperscript{51}

Better known are the UN’s achievements concerning the International Criminal Court and its Rome Statute, which, as of this writing, boasts 114 ratifications.\textsuperscript{52} Former Secretary General Kofi Annan “described victims’ concerns as the ‘overriding interest’ that should drive the Rome Conference, and many delegates heeded his call.”\textsuperscript{53} 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.”\textsuperscript{54} Such sweeping claims refer to the Rome Statute’s


\textsuperscript{49} 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/962001.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.

\textsuperscript{50} 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”).

\textsuperscript{51} See DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 184–185 (2d ed. 2005).


\textsuperscript{53} Alex Little, Balancing Accountability and Victim Autonomy at the International Criminal Court, 38 GEO. J. INT’L L. 363, 369-70 (2007).

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.”

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. 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. 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. I have previously discussed other advantages to the Court’s

55 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.

56 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).


58 See, e.g., BERISTAIN, supra note 6, at 93 (noting that Luis Cantoral-Benavides, a petitioner
remedial paradigm. For instance, equitable orders, as opposed to cash compensation, can be tailored to specific violations and thus are more effective at remediation. In addition, non-monetary, forward-looking measures are generally more efficient and less expensive than lump-sum attempts at full economic compensation.

Despite the numerous benefits of the reparations doctrine of the Inter-American and United Nations systems, however, the European Court of Human Rights has historically favored monetary compensation and declaratory relief. 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. Under similar facts, the Inter-American Tribunal would generally award greater non-pecuniary sums, 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. 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.

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59 Antkowiak, supra note 22, at 387–402.
60 See id. at 387.
61 See id. at 400.


64 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.
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.” 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.”

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. 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. Thus, the Court appears to permit remedial shortfall—at least of a monetary nature—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, one would expect it to be even more acute at the

68 Id.
69 Id.
70 See Antkowski, supra note 22, at 399–400.
72 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.
73 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.\textsuperscript{74}

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.\textsuperscript{75} 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.\textsuperscript{76} Pecuniary damages awarded to petitioners rarely reflect market value.\textsuperscript{77} The Court refuses to order states to investigate violations,\textsuperscript{78} a legal obligation of all states parties to the European Convention,\textsuperscript{79} presumably for the intensive resources and political hazards such efforts would entail.\textsuperscript{80} In delicate situations, the Strasbourg Tribunal will even decline to redress victims at all on public policy grounds.\textsuperscript{81}

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.\textsuperscript{82} 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,\textsuperscript{83} 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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\textsuperscript{74}See generally Peru’s International Defiance, N.Y. TIMES, July 14, 1999.

\textsuperscript{75} 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.

\textsuperscript{76}See, e.g., HARRIS ET AL., supra note 63, at 861.

\textsuperscript{77}Id. at 859.

\textsuperscript{78}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).


\textsuperscript{80}See Sections III(D)(2) and IV(B), supra.

\textsuperscript{81}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.

\textsuperscript{82}See Section V(A), supra.

\textsuperscript{83}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).
\end{flushleft}
back down when a few states challenged its competence. 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?

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. This Section will consider state compliance with these measures, first studying remedies for individuals, then remedies directed at discrete communities, and finally those addressed to society as a whole. The results consider all official information available as of this writing, pertaining to 88 cases in total.

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. Eleven cases have been closed due to full compliance. A small fraction of judgments is no longer...
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.

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. 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.

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. It is unfortunate, then, to report that the crucial “find and return” measure has been poorly


93 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).


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.\footnote{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-Alvarez and Lapo-Liébana 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).} States have reversed convictions from military and civilian criminal courts in two cases out of five.\footnote{Cantoral-Benavides v. Peru, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. (Nov. 19, 2009).} And all three orders to waive fines or cancel debts have been followed.\footnote{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 Court, 2009 Inter-Am. Ct. H.R. (Mar. 20, 2009).} 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.\footnote{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-Petruzzi 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.}

In death penalty matters, the Court has required stays on executions in three cases; two have been obeyed by Guatemala.\footnote{Fermin Ramirez 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).} In one of those judgments, \textit{Fermin Ramirez}, the Tribunal ordered a new trial, which was granted.\footnote{Fermin Ramirez v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (May 9, 2008).} In the other, \textit{Raxcacó-Reyes}, Guatemala followed the Court’s instructions to commute the death sentence to a lesser penalty.\footnote{Raxcacó-Reyes v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, 2008 Inter-Am. Ct. H.R. (May 9, 2008).}
In 2001, the Court ambitiously pursued the restitution of 270 state jobs in *Baena-Ricardo v. Panama.* As an alternative to employment, it allowed the State to provide the victims monetary compensation. While the process has not yet concluded, the parties reached an agreement on compensation amounts and payments have been made. 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.

This matter has not yet been resolved.

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. After a ten-year wait, Ms. Loayza-Tamayo still has not received complete redress—although two of her three teaching positions have been reestablished. Furthermore, on two occasions, the Court ordered, unsuccessfully as of yet, that victims be reinstated in their respective retirement pensions.

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. While it is true that this requirement poses complexities, Peru has been unable to conclude the matter since the 2001 judgment. Argentina, on the other hand, complied with a
requirement “to lift the attachments, general property encumbrances and other measures that were ordered against the properties and business assets” of Mr. José Maria Cantos.\textsuperscript{115}

In \textit{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.\textsuperscript{116} 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.\textsuperscript{117}

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.\textsuperscript{118} 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.\textsuperscript{119}

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 \textit{Juvenile Reeducation Institute v. Paraguay}.\textsuperscript{120} While meaningful progress has been noted in select cases,\textsuperscript{121} 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

\begin{itemize}
\item \textit{Inter-Am. Ct. H.R.} (Nov. 24, 2009).
\item \textit{Aloeboetoe et al. v. Suriname}, Monitoring Compliance with Judgment, 1997 \textit{Inter-Am. Ct. H.R.} (Feb. 5, 1997); \textit{Plan de Sánchez Massacre v. Guatemala}, Monitoring Compliance with Judgment, 2009 \textit{Inter-Am. Ct. H.R.} (July 1, 2009). Note that several additional states have complied with orders to provide future medical expenses, but \textit{Aloeboetoe} and \textit{Plan de Sánchez} appear to contain the only equitable remedies related to healthcare that have been deemed fulfilled.
\end{itemize}
literacy programs and primary school, to university studies and opportunities to update professional skills.\textsuperscript{122} 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.\textsuperscript{123} The sparse rehabilitation orders in Inter-American case law for adult prisoners have not yet met with full success either.\textsuperscript{124}

3. Recognition of Responsibility and Apologies

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

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.\textsuperscript{128} Considering that states are often required to send high-ranking representatives to the Court, these apologies have had a significant effect on the relationship between the states and the Tribunal. The Tribune has called them “a key instrument to promoting a culture of accountability.”\textsuperscript{129}


\textsuperscript{124} 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).


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. 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.”

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.” To date it has not complied with the directive. 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*.

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. 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.

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, and Nicaragua has already


begun broadcasts in at least four locally-spoken languages. Guatemalan courts have 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.

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 and human rights courses.

States have complied with these directives 13 out of 25 times. Orders to name streets and schools are the most commonly fulfilled; schools, as might be expected, primarily memorialize children who have lost their lives. *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 as the “Day Dedicated to the Boys and Girls Who Disappeared During the Armed Conflict.”

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138 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).
139 These should be distinguished from scholarships awarded directly to victims, falling under the “rehabilitation” heading.
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 2001.143

In four cases involving massacres, the Tribunal found that members of indigenous and tribal communities had not returned to their homes out of fear.144 As of yet, states have not fully complied with the ensuing orders to "guarantee the safety" of returning members.145 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.146 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.147

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.148 Of these seven cases, two judgments have attained full compliance: *Mayagna (Sumo) Awas Tingni v. Nicaragua* and *Escu6-Zapata v. Colombia*.149

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149 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); *Escu6-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. In Aloeboetoe v. Suriname, the State reopened a small school and staffed it with personnel, and brought a local medical clinic back into operation.

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. In a handful of instances, executive branches have proposed bills for congress and currently await the results. Yet the Court is not satisfied with such efforts and will only declare compliance when the bill becomes law.

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. Such vague language would have permitted


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).


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).

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

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.\(^{158}\) Moreover, in three other cases the Court has found significant progress towards compliance on this point.\(^{159}\) 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,\(^{160}\) 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);\(^{161}\) a web page to facilitate searches for missing children;\(^{162}\) a national committee charged with finding disappeared youth;\(^{163}\) a

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157 See id.


"unified registry" among all state institutions investigating violent deaths of children, and a campaign to create "awareness in the Honduran society regarding the importance of the protection of children." Only the order for the "unified registry" has been accomplished to date.

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). 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. 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*. This includes cases as longstanding as *Caballero-Delgado y Santana v. Colombia* from 1995. 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. In 2009, Alberto Fujimori himself, former President of Peru and mastermind of killings examined by the Court, was sentenced to 25 years of prison.

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. Another major factor is that Latin American criminal justice

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163 *Id.* at ¶¶ 183-88.
165 *Id.* at ¶ 201.
168 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.
systems often have feeble conviction rates. 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. As a result, individuals who have assisted state investigations, including family members of victims and their attorneys, have withstood attacks upon their lives.

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. 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.

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, 174


175 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).


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

177 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.” The Committee of Ministers, as a result, has accepted a range of measures as acceptable forms of compliance.

Given this context, Latin American states have responded notably to the Inter-American Tribunal’s detailed requirements. 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. 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. The Organization of American States (“OAS”), the Court’s parent organization, has not effectively fostered compliance with judgments.

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).

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).
In addition, the Court’s conservative determinations (and lower compliance rates as a consequence) do not adequately convey its impact upon Latin American states.\(^{16}\) 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.\(^{17}\) 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.\(^{18}\)

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.\(^{18}\) It has been summarized into three broad categories—international enforcement, management, and domestic politics.\(^{19}\) While there are a number of nuances and additional factors to contemplate,\(^{20}\) these three headings offer a useful approach for present purposes.

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


\(^{17}\) But see discussion in Section IV(C)(2) infra, regarding training programs.

\(^{18}\) 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).


\(^{20}\) See Hawkins & Jacoby, supra note 180, at 6.

\(^{19}\) 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.\(^{192}\) 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.\(^{193}\) 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.\(^{194}\) 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.\(^{195}\)

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.\(^{196}\) 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.\(^{197}\) In fact, such public announcements could signal a

\(^{192}\) 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.

\(^{193}\) 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.”).


\(^{195}\) 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.


\(^{197}\) 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.\textsuperscript{198}

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.\textsuperscript{199} 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.\textsuperscript{200} 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.\textsuperscript{201} 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.\textsuperscript{202}

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.\textsuperscript{203} Similar troubles are found when the Court orders community development initiatives, the improvement of prisons, or the restitution of multiple jobs.\textsuperscript{204} 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: 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

\textit{Sánchez Massacre}, Cantoral-Benavides, and Mack-Chang all occurred under subsequent governmental administrations.

\textsuperscript{198} 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, \textit{Conference: Reparations in the Inter-American System: A Comparative Approach}, 56 AM. U.L.REV. 1375, 1461–1462 (2007).

\textsuperscript{199} 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.


\textsuperscript{201} See id.

\textsuperscript{202} \textit{id.}

\textsuperscript{203} See Section III(B)(2), supra.

\textsuperscript{204} See Section III, supra.

\textsuperscript{205} While the Court’s jurisdiction also covers some states in the Caribbean, there is much more data on Latin American nations. \textit{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. These efforts require forensic expertise, as well as persistence and courage: while leads and witnesses have long vanished, threats and attacks remain commonplace.

C. Improving Compliance with Court Judgments in the Americas

1. 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. 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.

As indicated in the foregoing Section, consistent categories for the Court's remedies have emerged. 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

206 See Section III(D)(2), supra.
208 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.").
209 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.
210 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).
211 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.\footnote{212} 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.\footnote{213} 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 statues of limitations, in contravention of international law and Inter-American jurisprudence.\footnote{214} Other international crimes, like forced disappearance, are not even defined in some domestic penal codes.\footnote{215} Finally, various jurisdictions prohibit judgments and investigations from being reopened, which may be necessary, among other reasons, to remedy due process abuses.\footnote{216}

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.\footnote{217} Police investigators and medical examiners must be instructed in globally-approved techniques to detect signs of torture.\footnote{218}

Of course, such training will not only allow

\footnote{212} 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. \textit{Braithwaite, supra} note 30, at 46.

\footnote{213} For one account of these developments, see Larry Rohter, \textit{After Decades, Nations Focus on Rights Abuses}, \textit{N.Y. Times}, Sept. 1, 2005, at A4.

\footnote{214} See, e.g., \textit{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; \textit{Gómez-Paquiyauri 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 

\footnote{215} See, e.g., \textit{Report of the Working Group on Enforced or Involuntary Disappearances}, \textit{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"); \textit{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).

\footnote{216} See, e.g., \textit{Canton, supra} note 196, at 1454.


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. While not many weapons are in its arsenal, the OAS must marshal more political force to sanction any state that chronically disregards the Court. In fact, a specific political mechanism to support the Court’s supervision of judgments will likely become more necessary as its docket expands. 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. 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. Another recent strategy is to convene closed hearings for problematic cases. In instances where private hearings are ineffective, the Court has shown a willingness to open them to the public. It appears that these assertive tactics have been beneficial.

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219 See Cavallaro & Brewer, supra note 185, at 783–784; Judgment to Justice, supra note 184, at 89.
221 Cf. Judgment to Justice, supra note 184, at 78 (describing failed efforts to establish “a permanent mechanism to monitor and promote compliance”).
223 See id. at 23–28 (describing a range of outreach and training activities).
224 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. Escue-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 (“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.”).
225 Despite the Court having required protective measures in its judgment, additional members of the Sawhoyamaxa 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 Sawhoyamaxa Indigenous Cmty. v. Paraguay, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R. “Considerando,” ¶ 39 (May 20, 2009).
226 Convening a private hearing in Goiburi 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 Goiburi 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 1998.227 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.228 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).229 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.230 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.231 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 Garcia.232 Fortunately, the Tribunal revised the order to allow for the commemoration of the Castro-Castro Prison victims through other means.233 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.234

Also critical for increased compliance is appropriate specificity in remedial

228 Id. at ¶ 71.
229 Id. at ¶ 192.
231 Id. at ¶¶ 453-454.
232 Cavallaro & Brewer, supra note 185, at 825.
234 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.
orders. Beristain interviewed 207 individuals involved in reparations processes before the Inter-American system. Nearly all of the victims' advocates informed him that the Court's remedial orders could benefit from more specific terms. Greater detail, according to these advocates, would reduce disputes between victims and state representatives, and expedite the implementation of remedies. 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. International standards on disproportionate use of force or minimum detention conditions are not difficult to find. 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.

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. But the Tribunal's new streamlined procedures grant less opportunity for live witness testimony. Many experts now submit their testimony by affidavit only. Also of concern are the recent restrictions placed upon the

235 He interviewed, among others, petitioners, lawyers, judges, state officials, and expert witnesses. See BERISTAIN, supra note 1, at 20.
236 See BERISTAIN, supra note 6, at 40.
237 See id. at 40–43.
238 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.").
240 Indeed, compliance under this category may appear to be a more significant accomplishment than it actually is, if training programs are only superficial.
241 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).
242 See Cavallaro & Brewer, supra note 185, at 800–801.
243 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. 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.\textsuperscript{244} 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. \textit{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.\textsuperscript{245} 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.\textsuperscript{246} 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.\textsuperscript{247} 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.\textsuperscript{248}

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.\textsuperscript{249} All complications cannot be anticipated, so a better solution might entail the establishment of general goals and a clear decision-
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.250

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.251 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.252 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.253

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.254 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


251 See Garcia-Ramirez, supra note 9, at 19–22.

252 See Section II(B), supra.

253 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.

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.\(^{255}\)

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.\(^{256}\) In this regard, the OAS would do well to facilitate the distribution of best practices, and provide technical assistance of its own.\(^{257}\)

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\(^{255}\) *See* BERISTAIN, *supra* note 6, at 245–246.

\(^{256}\) Chile can offer many useful lessons after having implemented a national health reparations program, known as “PRAIS.” *See* id. at 276–285.

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. Nevertheless, these developments do not appear to indicate a fundamentally-changed reparations doctrine. 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. 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.

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.” At the instance of the Committee of Ministers, this procedure began in 2004 when, upon

259 See Colandrea, supra note 258, at 410–411.
260 See Section III(D)(2), supra.
261 Of course, it is clear that many of these measures benefit the individual victim, and are frequently requested by petitioners.
262 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/.
263 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," the Court started an intermittent practice of expressly requiring legal reform.265

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.266 Pecuniary damages awarded to victims rarely represent market value.267 The Court does not order states to investigate violations,268 a legal obligation of all states parties to the European Convention.269 In sensitive political situations, the Strasbourg Tribunal may even decline to redress victims at all.270

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.271 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.272

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

[ Furtherfootnotes ]
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 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. 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. 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. Its approach spurns the key restorative justice principle to “empower victims to define the restoration that matters to them.” 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.” 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. Still, there are additional compelling arguments to be made against this “cost-centered”
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.” Dinah Shelton has remarked that the term “satisfaction” in international practice has never been restricted to monetary compensation. She also notes that the drafting history of European Convention indicates only that the Court lacks power to annul directly a national act. 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. 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. The European system itself acknowledges the importance of such elements, which it calls “individual” and “general” measures. 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.

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 en 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. Instead, its hands-off approach allows for inconsistent and insufficient

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280 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.
281 See SHELTON, supra note 51, at 280-281.
282 See id. at 281.
284 See Sections II and III, supra.
285 E.g., Scozzari and Giunta v. Italy, 2000-VII 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.”).
286 See Hawkins & Jacoby, supra note 180, at 11-12.
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.\(^{288}\)

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.\(^{289}\)

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.”\(^{290}\) 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.\(^{291}\)

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.\(^{292}\) 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.\(^{293}\)

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.\(^{294}\) Sometimes remedies are withheld entirely.

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\(^{288}\) 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.”).


\(^{291}\) See Sergio Garcia-Ramirez, 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.


\(^{293}\) 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.”).

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. Second, rights are inextricable from remedies; they “cannot sensibly be crafted apart from remedies, or vice versa.” 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. Third, and related to the second point: as a remedy contracts, the corresponding right is weakened—and no remedy makes the right “essentially worthless.”

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. 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.” 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.

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. 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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295 See Jeffries, supra note 27, at 262.
296 Id. at 281; see also, Levinson, supra note 73, at 857.
297 Levinson, supra note 73, at 861–862.
298 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.”).
299 See, e.g., Fallon, supra note 294, at 637; Starr, supra note 71, at 697.
300 Gewirtz, supra note 67, at 673.
301 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.”).
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.303

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.304

The Council of Europe has shown its resolve to confront pressing concerns with its human rights machinery.305 But Protocol 14, the Court’s sporadic orders for legislative modifications, and other scattered non-monetary measures are not enough.306 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


304 See also Helfer, supra note 258, at 154.


306 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.  

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.  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. 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.

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

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

308 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 (last visited May 5, 2011).


310 See HARRIS ET AL., supra note 63, at 857 (noting that reparations are reserved in only a “minority of cases”).

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.\(^3\)

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.\(^3\) Furthermore, all COE nations now have some form of review procedure that assesses the compatibility of domestic laws with the European Convention.\(^3\) 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.\(^3\)

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.\(^3\) 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.\(^3\)

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.\(^3\)

\(^3\) 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, infra note 293, at 54–56.

\(^3\) See Helfer, supra note 258, at 150.

\(^3\) See id.


\(^3\) 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”).

\(^3\) See Helfer, supra note 258, at 150.

\(^3\) 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. 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.

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. This merger, creating the African Court of Justice and Human Rights,

320 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.
321 See generally, George Mukundi Wachira, African Court on Human and Peoples’ Rights: Ten
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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.” 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.”

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. 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. 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. Parallel efforts through the African Union and African Commission must build relationships with national institutions and civil society, as


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

326 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.\(^\text{327}\)

**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."\(^2\) 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."\(^3\) 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\(^3\) for later disbursement.\(^3\) 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.\(^3\) In the case of deposits or Court-directed "collective awards," the Trust Fund must obtain Tribunal approval for its eventual remedial plan.\(^3\)

Second, the Trust Fund may act without a Court order, "for the benefit of victims of crimes within the jurisdiction of the Court."\(^3\) 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

\(^{327}\) 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).


\(^{329}\) Rome Statute, *supra* note 55, art. 75(2).

\(^{330}\) *See* Rome Statute, *supra* note 55, art. 79. The Trust Fund depends upon voluntary contributions and assets collected through fines and forfeiture.

\(^{331}\) *Int’l Criminal Court, Rules of Procedure and Evidence*, rule 98(2) (2002), available at http://www.icc-cpi.int/NR/donlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3EBB115E68/140164/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.*

\(^{332}\) *Id.*, rule 98(3).

\(^{333}\) 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/donlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3_English.pdf [hereinafter Trust Fund Regulations].

\(^{334}\) Rome Statute, *supra* note 55, art. 79.
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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.

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.

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.” 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.

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. Yet the number of potential victims—both participating before the Court and otherwise—overwhelms. 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.

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. Moreover, projects must

335 Trust Fund Regulations, para. 50(a)(i).
336 Id., para. 50(a)(ii).
341 See id. at 210; Adrian Di Giovanni, supra note 15, at 50.
342 Prosecution’s Application for Leave to Appeal Pre-Trial Chamber I’s Decision, Int’l Criminal Court, Pre-Trial Chamber 1, ICC-01/04-103, at ¶ 5 (Jan. 23, 2006), available at http://www.icc-cpi.int/icedocs/doc/doc183444.PDF.
343 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.344

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.345 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.346 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.”347 The decision indicates that victims before the ICC are not only eligible for numerous possible benefits of participation,348 but also that their reparations will be prioritized.349

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347 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.

348 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.

349 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.
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. 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. 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. 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. Of course, this will be difficult when such programs differ from government priorities. 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


351 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.

352 See id. at 236.

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

354 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.\footnote{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”).}

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.