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Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure

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VICTIM REPARATIONS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: A CRITICAL ASSESSMENT OF CURRENT PRACTICE AND PROCEDURE

*Jo M. Pasqualucci**

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INTRODUCTION

In the jungles of Suriname, government soldiers publicly beat seven young men of the Saramaca tribe, took them from their village, forced them to dig their own graves, and then murdered them.¹ Although Suriname eventually accepted international responsibility before the Inter-American Court of Human Rights for these human rights violations in the *Aloeboetoe Case*,² the Court still had to consider the type and amount of reparations and to whom they should be awarded. Reparations, which are often complicated by the varying socio-economic conditions in the Inter-American human rights system, were especially difficult to determine in the case of the remote Saramaca tribe.³ Although the Inter-American Court's innovative decisions in setting reparations in *Aloeboetoe*, and in other cases which reflect Third World conditions, have established important precedents in the area of reparations in international human rights law, significant inequities still exist. The Court, for example, cannot address the cases of most human rights victims due to the current procedural organization of the system. Moreover, in two recent cases, the Inter-American Court appears to be rede-

1. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 2-6 (1993).

2. *Id.* para. 24.

3. The Court had to determine whether to take into account tribal customs, which violated Surinamese family law, in determining the beneficiaries of the victims. The victims in this case practiced polygamy, as was customary in their tribe, and all of the wives claimed to be beneficiaries of the reparations award. Moreover, none of the victims' marriages or the births of their children had been registered, as was legally required for the status of beneficiaries under Surinamese law. The amount of lost earnings was also difficult to prove because, as is common in nonindustrial economies, the men worked only periodically when and where they could find employment. Moreover, there were no pay stubs or tax returns to use to calculate lost wages. *Id.* para. 88.

fining its basis of reparations to minimize difficulties in calculating damages and to establish more definite precedent which may encourage settlement.⁴ The Court awards of determinate amounts for particular types of damages in these cases may, however, result in criticism that the judgments are arbitrary and do not reflect actual damages.⁵ This article seeks to assess the viability of the Inter-American Court's victim reparations practice and procedure by examining the Court's body of victim reparations judgments and, where appropriate, by comparing those judgments with the practice and procedure of the European Court of Human Rights. The ultimate aim of the article is to suggest new directions in which the Court should move on this issue to further influence the progressive development of international human rights law.

It is a basic principle of international law that a State must make adequate reparation for the harm caused by the breach of its international obligations.⁶ The purpose of reparations is twofold: first, to require States to observe certain standards of law and order; and second, to repair, to the extent possible, any injuries caused as a result of a State's failure to meet those standards.⁷ A State may incur international obligations under customary international law or through the ratification of a treaty. Historically, under the International Law of Injury to Aliens, a State violated an international obligation to another State when it injured a citizen of another State.⁸ Only a State could sue another State and

4. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) (Sept. 19, 1996), *to be reprinted in* ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1996 (forthcoming in 1997) [hereinafter THE 1996 ANNUAL REPORT]; *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) (Sept. 19, 1996), *to be reprinted in* THE 1996 ANNUAL REPORT, *supra*.

5. *See Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 4 (Sept. 19, 1996) (Dissenting Vote of Judge Ad Hoc Orihuela Iberico), *to be reprinted in* THE 1996 ANNUAL REPORT, *supra* note 4.

6. *The Factory at Chorzów (Merits)*, 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13), *cited in* Velásquez Rodríguez Case (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 25 (1989). "Reparation therefore is the indispensable complement of a failure to apply a convention." *The Factory at Chorzów (Jurisdiction)*, 1927 P.I.C.J. (ser. A) No. 9, at 21 (July 26).

7. MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 23-24 (1937).

8. *See Mavrommatis Palestine Concessions (Jurisdiction)*, 1924 P.C.I.J. (ser. A) No. 2, at 13 (Aug. 30), in which the Permanent Court of International Justice stated:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

demand reparation for the injuries inflicted on its citizens. The injured individual did not have a directly enforceable claim against a State that violated his rights.⁹ Moreover, an individual had no international recourse in the case of a violation by her own government.¹⁰

Within the last fifty years, States have ratified human rights treaties that create international obligations owed by the ratifying States to individuals.¹¹ If the State violates these obligations, the treaties may require that the State remedy the violation by making reparations to the injured party.¹² Most States have ratified treaties under which they have voluntarily assumed an international obligation to protect human rights and have granted jurisdiction to international authorities to oversee their compliance.¹³ In the Americas, twenty-five States have ratified the American Convention on Human Rights.¹⁴ These States Parties to the

9. The Permanent Court of International Justice stated:

The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage.

Factory at Chorzów (Merits), 1928 P.C.I.J. at 28. See RICHARD B. LILlich & BURNS H. WESTON, *INTERNATIONAL CLAIMS CONTEMPORARY EUROPEAN PRACTICE* 1 (1982).

10. Only States were considered to be the subjects of international law; an individual was an object of international law and as such had no formal rights or obligations.

11. See generally Louis Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

12. See International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 2, 2(3)(a) & 9(5), 999 U.N.T.S. 171 (entered into force on Mar. 23, 1976); Universal Declaration of Human Rights, art. 8, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 71, 1948, U.N. Doc. A/810 (1948); European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Sept. 3, 1953, art. 50, 213 U.N.T.S. 262 (entered into force on Sept. 21, 1970); African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, art. 21(2), 21 I.L.M. 59 (1982) (limited right to a remedy).

See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 906 (1990). "Failure to provide such remedies would constitute an additional violation of the agreement." *Id.* § 703 cmt. c.

13. Under the principle of *pacta sunt servanda*, States have a duty to comply in good faith with the international obligations which they have undertaken. Vienna Convention on the Law of Treaties, *concluded* May 23, 1969, art. 26, 1155 U.N.T.S. 331 (entered into force on Jan. 27, 1980); see also Article 36 of the Statute of the International Court of Justice, June 26, 1945, art. 36, 59 Stat. 1055 (providing that when the parties voluntarily accept the jurisdiction of the Court, the Court shall have competence to decide on the "nature and extent of reparation").

14. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 693, OEA/ser.K/XVII/1.1/Doc. 65 (English) Rev. 1. Cor. 2 (1970) (entered into force July 18, 1978) [hereinafter the Convention or the American Convention]. The States that have ratified the American Convention are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. The United States has signed but never ratified the

Convention have undertaken an international obligation to protect and ensure the rights delineated in the treaty and to provide reparations to the injured parties if they violate those rights. The Inter-American Commission on Human Rights¹⁵ and the Inter-American Court of Human Rights¹⁶ are the international organs charged with the oversight of State compliance with the American Convention. Should the Commission find that a State has violated an individual's rights, and that State does not remedy the violation, the Commission may, when appropriate, refer the case to the Court.¹⁷

American Convention. ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1995, Inter-Am. C.H.R. 229, OAS/Ser.L/V/III.33/Doc. 7 rev. (1996).

15. The Inter-American Commission [hereinafter the Inter-American Commission or the Commission] is composed of seven commissioners. American Convention, *supra* note 14, art. 34. The commissioners are chosen from the Member States of the Organization of American States (OAS) and must be of recognized competence in the field of human rights. *Id.* art. 36. No two Commissioners may be nationals of the same State. *Id.* art. 37. The seat of the Commission is in Washington D.C.

All complaints alleging human rights abuses in the Inter-American system must first be directed to the Inter-American Commission. *Id.* art. 61(2). *See also*, In the Matter of Viviana Gallardo (Preliminary Objections), Inter-Am. Ct. H.R. Op. No. G101/81 (1981), reprinted in ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1981 12, OEA/Ser.L/III.7, doc.13 (1982). The Commission then determines whether the complaint meets the American Convention's requirements for admissibility. American Convention, *supra* note 14, art. 46. If it does not, the Commission may ask the petitioner for additional information. On the other hand, if the complaint is *prima facie* admissible, the Commission informs the government involved and requests pertinent information. *Id.* art. 48(1)(a). The Commission may hold hearings on the matter and, if appropriate, attempt to bring about a friendly settlement. *Id.* art. 48(1)(e), art. 48(1)(f). If, however, no friendly settlement is reached, the Commission draws up a report with recommendations and transmits it to the State concerned. *Id.* art. 50. Only after the procedures before the Commission have been exhausted can the case be referred to the Inter-American Court, and then only if the State involved has expressly recognized the Court's jurisdiction. *Id.* art. 51(1), 62(1). The Commission must appear in all cases before the Inter-American Court. *Id.* art. 57.

16. The Inter-American Court [hereinafter the Inter-American Court or the Court] is composed of seven judges, who are "nationals of the member states of the Organization, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights." American Convention, *supra* note 14, art. 52: The judges are elected for a term of six years and may serve no more than two terms. *Id.* art. 54. The Court sits part-time, and the seat of the Court is in San Jose, Costa Rica.

Following the conclusion of procedures before the Commission, the State Party or the Commission can refer a contentious case to the Court. *Id.* art. 61. After the parties have briefed the relevant issues the Court will hold public hearings in the case. In addition to its contentious jurisdiction, the Court has an advisory jurisdiction. *Id.* art. 62. Also, in "cases of extreme gravity and urgency," the Court may order a State to take provisional measures to protect persons from irreparable harm. *Id.* art. 63(2).

17. The State Party must have accepted the jurisdiction of the Court. Seventeen of the twenty-five States Parties to the American Convention have accepted the compulsory jurisdiction of the Inter-American Court. These States Parties are: Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1995 177-78, OAS/Ser.L/V/III.33/Doc.4 (1996).

Under the American Convention, the Commission and the State Party involved are the parties to a case. American Convention, *supra* note 14, art 61(1). The victim, or victim's

If the Inter-American Court attributes responsibility for the violation to the State,¹⁸ the Court may then order the State to make reparations to the individual in accordance with the American Convention.¹⁹ The American Convention confers on the Inter-American Court a broad authority to order reparations.²⁰ The Convention not only authorizes the Court to order a State to compensate the victim, it also empowers the Court to order the State to take remedial measures.²¹

The Court has made only limited use of its authority to order remedial measures, in part due to the type of case with which it has repeatedly been confronted. Reparations in international law were not developed to deal with large-scale violations of human rights or situations in which the government refuses to investigate the abuse or punish the violators. In the European system, for instance, there have not been cases of torture, disappearance, or extra-judicial execution, where the state apparatus often has besmirched the good name of the victim, failed to investigate the crime, and then granted a blanket amnesty to the perpetrators. The European system is generally confronted by isolated instances of human rights abuses, not by the gross and systematic abuses which have plagued the Inter-American system.²²

As evidenced in the *Aloeboetoe Case*, the socio-economic conditions of many States in the Americas present problems in the area of repara-

family, does not generally have standing before the Inter-American Court. See Jo M. Pasqualucci, *The Inter-American Human Rights System: Developing Precedents in Human Rights Law for Underdeveloped Regions*, 26 U. MIAMI INTER-AM. L. REV. 297, 316-20 (1994-95) [hereinafter Pasqualucci, *The Inter-American Human Rights System*] for a critique of this provision.

18. The American Convention, as interpreted by the Inter-American Court, establishes broad bases of State responsibility which are in keeping with general principles of international law. See Velásquez Rodríguez Case (Merits), 4 Inter-Am. Ct. H.R. (ser. C) para. 158 (1988); Godínez Cruz Case (Merits), 5 Inter-Am. Ct. H.R. (ser. C) para. 165 (1989). Cases in the Inter-American system exhibit some of the most complex and difficult issues in the attribution of State responsibility for human rights violations. Often there is evidence of an official attempt to provide impunity for the State and for those who perpetrated the abuses on its behalf. The *modus operandi* of many violations is planned so as to eliminate evidence. Death squads are composed of unknown assassins, victims may be held in clandestine prisons and then disappear—their bodies destroyed or buried in common graves, and witnesses are killed or intimidated into maintaining silence. The Inter-American Court has developed precedents to curtail the region's predominant problem of *de facto* and *de jure* impunity for human rights violations. See Pasqualucci, *The Inter-American Human Rights System*, *supra* note 17, at 326-328.

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

20. See *infra* Section I.

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

22. European cases often involve complaints of violations of "arrest and detention guarantees and fair administration of justice, and not the chilling and harrowing violations in other parts of the world." E.V.O. Dankwa, *Conference on Regional Systems of Human Rights Protection in Africa, the Americas and Europe*, 13 HUM. RTS. L.J. 314, 316 (1992).

tions. The poverty and inaccessibility of certain areas complicate the determination of damages.²³ The prevailing poverty also makes large awards to certain victims unacceptable when hundreds of other victims go uncompensated.²⁴ Social and cultural differences, especially those of indigenous groups, require cultural sensitivity and the innovative application of international law.²⁵ Decisions on reparations made thus far by the Inter-American Court have made significant inroads in dealing with the particular socio-economic situations of the region.

Many problems, however, have not yet been successfully resolved. For instance, although hundreds of individuals may have suffered the same type of violation in a State during the same general period of time, under the procedures now in place for case referral, only a few of the cases can be sent to the Court. Logically, the Court can only order reparations to be paid to the victims whose cases have come before it. All other victims generally go uncompensated because the domestic judicial systems often cannot act.²⁶ The Court has also demonstrated seemingly discriminatory tendencies in awarding a relatively small part of the damages to the spouse of the victim, who has to date been the widow,²⁷ and then in declaring that the larger share of the damages awarded to the children cannot be used for their basic expenses.²⁸

A study of the reparations ordered by the Inter-American Court, with relevant comparisons to the European human rights system and the International Law of Injury to Aliens, is of theoretical and practical importance for the resolution of these issues. It is relevant to the States Parties, as it may serve as a deterrent by educating them about the reparations that they may be publicly ordered to make to the victims; to

23. See generally David J. Padilla, *Reparations in Aloeboetoe v. Suriname*, 17 HUM. RTS. Q. 541 (1995).

24. THE PRELIMINARY REPORT ON DISAPPEARANCES OF THE NATIONAL COMMISSIONER FOR THE PROTECTION OF HUMAN RIGHTS IN HONDURAS: THE FACTS SPEAK FOR THEMSELVES 234 (Human Rights Watch/Americas trans., 1994) (abridged English translation of LOS HECHOS HABLAN POR SI MISMO: INFORME PRELIMINAR SOBRE LOS DESAPARECIDOS EN HONDURAS 1980-1993 (1994)) [hereinafter HONDURAN REPORT].

25. See Pasqualucci, *The Inter-American Human Rights System*, *supra* note 17, at 329-34.

26. See Jo M. Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT'L. L.J. 321 (1994) [hereinafter Pasqualucci, *The Whole Truth*] for the explanation that many democratic governments which take control after regimes or dictatorships do not have the power to prosecute the perpetrators of human rights violations. Thus, human rights offenders in that State are granted amnesty. The amnesty often prohibits victims from filing civil cases against the offenders.

27. To date in the Inter-American Court, reparations have been made only to the families of male victims.

28. Aloeboetoe Case (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 106 (1993).

the individual claimants, who must decide if it is worthwhile to pursue a claim; to the Inter-American Commission on Human Rights, which attempts to negotiate friendly settlements between the claimants and the States and which represents the claimants before the Inter-American Court; to other human rights systems and domestic courts that may be confronted by similar types of abuses; and to the Inter-American Court itself, which should reflect on and clarify its practice in this area.

In order to assist these entities, Part II of this article analyzes the statutory authority for reparations in the Inter-American system in light of the legislative history of the American Convention's reparations provision and compares that authority with that provided for in the European human rights system. Part III sets forth the Inter-American Court's procedures for determining reparations once State responsibility has been established. Part IV evaluates the parties who may receive reparations. Part V analyzes the types of reparations provided generally under international law and specifically in the Inter-American system. Part VI criticizes the Court's determination to grant only a small share of the reparations to the victim's spouse. Part VII sets forth the method of payment of Court ordered compensation. Part VIII suggests that the Court consistently structure its procedural phases to provide for a final, comprehensive reparations phase. Finally, Part IX outlines the principles of the execution of Court-ordered reparations and delineates State compliance to date.

I. INTER-AMERICAN COURT'S AUTHORITY FOR VICTIM REPARATIONS

Article 63(1) of the American Convention authorizes victim reparation for the violation of a right or freedom protected by the Convention.²⁹ This provision prescribes that:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that

29. American Convention, *supra* note 14, at art. 63(1). Although there is no formal statute of limitations which places a limit on the number of years after a violation when a victim can bring a complaint in the Inter-American system, there is a deadline for the presentation of the petition. In the Inter-American system, the complainant must file a petition with the Inter-American Commission within six months of the notification of a final ruling on the case at the domestic level. *Id.* art. 46. Other admissibility requirements provide that domestic remedies must have been exhausted, the subject of the petition must not be pending in another international proceeding, the individual petition must include specific identifying information about the person or entity lodging the complaint. *Id.* The petition must also state facts that tend to establish a violation of the human rights protected by the American Convention. *Id.* at art. 47.

was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.³⁰

Article 63(1) codifies the fundamental principle of international law that "every violation of an international obligation which results in harm creates a duty to make adequate reparation."³¹

The legislative history of Article 63(1) reveals that the drafters intended by its language to give the Inter-American Court broad powers to order reparations for the injured party. The original draft of the reparations provision of the Convention provided for only compensatory damages. That provision read, "[a]fter it has found that there was a violation of a right or freedom protected by this Convention, the Court shall be competent to determine the amount of compensation to be paid to the injured party."³² The Guatemalan representative then successfully proposed strengthening and expanding the provision. Under the Guatemalan proposal, if the Court recognized a violation of the Convention, it could provide "[t]hat the consequences of the decision or measure that has impaired those rights be stopped; [t]hat the injured party be guaranteed the enjoyment of his violated right or freedom, [and t]he payment of just compensation to the injured party."³³ After the drafting committee's

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

31. Velásquez Rodríguez Case (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 25 (1989) (citing *Factory at Chorzow (Jurisdiction)*, 1927 P.C.I.J. at 21, and *Factory at Chorzow (Merits)*, 1928 P.C.I.J. at 26); *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 184. The Inter-American Court stated:

It is a principle of international law, which jurisprudence has considered 'even a general concept of law,' that every violation of an international obligation which results in harm creates a duty to make adequate reparation. Compensation, on the other hand, is the most usual way of doing so.

Velásquez Rodríguez Case (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 25 (1989).

32. Draft Inter-American Convention on Protection of Human Rights, art. 52(1), OEA/Ser.L/V/II.19/Doc. 48 (English) Rev.1 (Oct. 2, 1968) *reprinted in* HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, Booklet 13, at 1, 20 (Thomas Burgenthal & Robert E. Norris eds., 1982 & Supp. 1993) [hereinafter HUMAN RIGHTS].

33. *Observations by the Governments of the Member States on the Draft Inter-American Convention on Protection of Human Rights: Guatemala*, OEA/Ser.K/XVII/1.1 Doc. 24 (English) (Nov. 8, 1969) *reprinted in* 2 HUMAN RIGHTS, *supra* note 32, Booklet 13, at 119, 132.

The Report of the United States Delegation to the Inter-American Conference on Protection of Human Rights stated that the final wording of the provision "represented a strengthening and expansion of Article 52, paragraph 1, of the Draft Convention, which referred only to the Court's competence to determine compensation. It was based on a Guatemalan proposal (Doc. 24, Article 39)." *Report of the U.S. Delegation*, at 54 *reprinted in* 3 HUMAN RIGHTS, *supra* note 32, Booklet 15, at i, 54.

affirmative vote on the Guatemalan proposal, Committee minutes reveal that it had “approved a text which is broader and more categorically in defense of the injured party than was the Draft.”³⁴ The legislative history of that particular Committee meeting provides no further explanation of the reasoning underlying the decision to strengthen the reparations provision. However, there are statements elsewhere in the legislative history which indicate that the drafters of the American Convention intended to enhance the protection of human rights within the unique circumstances of the Western hemisphere.³⁵ Although the American Convention is modeled on the United Nations human rights instruments and the European Convention, the drafters of the American Convention refused to simply replicate those treaties. Rather, the delegates to the drafting conference argued that “it was appropriate to introduce any modifications that were desirable in the light of circumstances prevailing in the American Republics.”³⁶

As ratified, the American Convention expressly authorizes the Court to order a State to take measures to remedy the consequences of the human rights violation. In addition to ordering the State to pay compensation, “the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated.”³⁷ Thus, if the victim were alive and in prison, and the Court held that the detention was illegal, the Court could order the State to free the victim. Also under Article 63(1), if appropriate, the Court shall rule that “the consequences of the measure or situation that constituted the breach of such right or freedom be remedied.”³⁸ Thus, the Court could require that the State provide medical care to a torture victim who continued to suffer health problems as a result of inhumane treatment.

The Inter-American Court’s authority to order reparations under Article 63(1) is much broader than that of its European counterpart.³⁹ The

34. *Report of Committee II: Organs of Protection and General Provisions*, OEA/Ser.K/ XVII/1.1 Doc. 71 (English) Rev. 1 (Jan. 30, 1970), reprinted in 2 HUMAN RIGHTS, *supra* note 32, Booklet 12, at 225, 232. The wording of the provision was later modified slightly.

35. See, e.g., Sydney Liskofsky, *Report on the Convention on Human Rights adopted by Inter-American Specialized Conference on Human Rights*, reprinted in 3 HUMAN RIGHTS, *supra* note 32, Booklet 15, at 87, 88.

36. Council of Europe, *Report on the Inter-American Specialized Conference on Human Rights* (Strasbourg, Dec. 22, 1969) [hereinafter *Council of Europe Report*], reprinted in 3 HUMAN RIGHTS, *supra* note 32, Booklet 15, at 67, 71.

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

38. *Id.*

39. *Council of Europe Report*, *supra* note 36, at 81. See also A. H. ROBERTSON & J. G. MERRILLS, *HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 311 (3d ed. 1993).

corresponding provision of the European Convention, Article 50, authorizes the European Court of Human Rights to "afford just satisfaction to the injured party" only if necessary.⁴⁰ Consequently, the European Court of Human Rights has determined that it is limited to ordering financial compensation: it is not empowered to order a State to take remedial measures.⁴¹ The European Court has regularly declared that in the European system, "it is for the State to choose the means to be used in its domestic legal system to redress the situation that has given rise to the violation of the Convention."⁴² The representative of the Council of Europe observing the American drafting conference reported on the reparations provision that "[t]he Inter-American Court of Human Rights will have considerably wider powers than the European Court."⁴³

The question arises whether the wider powers granted to the Inter-American Court in the area of reparations include the authority to order a State to repeal a law that resulted in a human rights violation. As stated, the American Convention empowers the Court to rule that "the consequences of the measure or situation that constituted the breach" be remedied.⁴⁴ Traditionally, however, those consequences are considered to be the injuries that have already been caused by the governmental measure. They do not include those consequences that may possibly be caused in the future if the law that resulted in the measure continues in force.⁴⁵ Under this interpretation, for instance, if the Inter-American Court were to rule that a domestic law violated the Convention by authorizing detention without adequate guarantees of due process, reparations would

40. The European Convention provides that,

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

European Convention, *supra* note 12, art. 50.

41. See P. VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 184 (2d. ed. 1990). See also Montserrat Enrich Mas, *Right to Compensation under Article 50, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 775, 778 (R. St. J. Macdonald et al. eds., 1993) ("A number of applicants have requested the Court to annul an internal decision or measure, to issue an injunction and to give some directions to the respondent State. The Court has answered that it had no jurisdiction to do so.").

42. *Zanghi v. Italy*, 194-C Eur. Ct. H.R. (ser. A) at 48 (1991).

43. *Council of Europe Report*, *supra* 36, at 81; see also ROBERTSON & MERRILLS, *supra* note 39, at 311.

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

45. 2 F.V. GARCIA-AMADOR, *THE CHANGING LAW OF INTERNATIONAL CLAIMS* 583 (1984).

be limited to an order that the victim's prison term be annulled. Article 63(1) would not authorize the Court to order that the State repeal the offending law. The domestic effect of the Court's ruling that the offending law does not comply with the State's international legal obligations under the Convention would then depend upon whether the State concerned adheres to a monistic or dualistic view of international law.⁴⁶

The view, presently accepted in international law, that international treaty obligations may not be self-executing, does not advance the effective enforcement of human rights. Modern human rights treaties

are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States.⁴⁷

States accept certain human rights obligations when they ratify these treaties. The Inter-American Court has clarified that "[i]n concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction."⁴⁸ Given this reality, reparations provisions in human rights treaties, such as Article 63(1), should be interpreted broadly to allow international courts to require States to alter their laws to comply with treaty obligations. It is illogical and archaic that a domestic law, which has been declared in violation of a State's international legal obligations, would be allowed to remain in force, thereby requiring each successive victim of that law to pursue a prolonged and costly case before national tribunals,⁴⁹ and then within an international human rights system, to remedy the violation. This current limitation on the power of international human rights courts is a remnant of exaggerated state sovereignty.

46. VAN DIJK & VAN HOOF, *supra* note 41, at 11-12. Thomas Buergenthal *Self-Executing and Non Self-Executing Treaties in National and International Law*, 235 RECUEIL DES COURS 303 (1992). See also Thomas Buergenthal, *International Tribunals and National Courts: The Internationalization of Domestic Adjudication*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG 687, 695-99 (Max-Planck 1995) for a discussion of the Argentine Supreme Court's holding that a particular provision of the American Convention is directly self-executing in Argentina. *Ekmekdjian v. Sofovich*, Corte Suprema de Justicia de la Nación 315 Fallos 1492 (1992).

47. The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75), 2 Inter-Am. Ct. H.R. (ser. A) para. 29 (1982) (advisory op.).

48. *Id.*

49. A victim must first exhaust domestic remedies before he or she may file a complaint for international relief. See American Convention, *supra* note 14, art. 46(1)(a).

In contrast to the situation of human rights courts, the European Court of Justice has determined that provisions of European Union law are directly applicable in the member States; regardless of whether the national legal system provides for a monistic or dualistic approach to international law.⁵⁰ Moreover, according to the European Court of Justice, these self-executing provisions of European Union law have priority over all national laws.⁵¹ The Court based this determination on the fact that the States have renounced their sovereign rights in accepting the legal system of the Union, and on the principle of effectiveness, which holds that without priority of the international law, that law could not be applied in a reasonable and useful way.⁵² This reasoning is even more applicable when the subject matter of the laws in question is the protection of individual human rights.

At this time, the Inter-American Court does not have the consensus necessary to initiate this development.⁵³ Even changes of lesser import could presently jeopardize the system.⁵⁴ Such a change may need to be effected through the future development of an economic free-market which incorporates human rights provisions.

II. INTER-AMERICAN COURT PROCEDURES IN DETERMINING REPARATIONS

When the Inter-American Court has attributed responsibility to the State or the State has accepted responsibility for a violation of the

50. VAN DIJK & VAN HOOF, *supra* note 41, at 12-13.

51. *Id.* at 13.

52. *Id.*

53. Only seventeen of the twenty-five States which have ratified the Convention have accepted the jurisdiction of the Inter-American Court. For a list of States Parties to the American Convention see *supra* note 17.

In the European human rights system, major changes in the role of the European Court were not made until all Member States had accepted the compulsory jurisdiction of the Court. See *Chart of Signatures and Ratifications of the European Convention on Human Rights and Additional Protocols*, 15 HUM. RTS. L.J. 114 (1994). Twenty-seven of the twenty-eight Member States to the European Convention at that time signed Protocol 11. *Id.* at 81 n.1.

54. David Padilla, the former Deputy Secretary of the Inter-American Commission, in reference to the possibility of giving the individual the power to seize the Court, a move much less threatening than giving the Court the power to declare that provisions of the American Convention are directly applicable in the Member States, stated:

I believe it would be imprudent if not downright risky to accelerate and expand the role of the private actor in the conduct of contentious cases before the Inter-American Court until and unless a substantial majority of the OAS member states are likely to acquiesce to such changes. Rejection of these developments could jeopardize broader acceptance by reticent member states of the OAS whose participation in the system is essential for future progress.

David Padilla, *The Inter-American Commission on Human Rights of the Organization of American States: A Case Study*, 9 AM. U.J. INT'L L. & POL'Y 95, 110 (1993).

Convention, the issue of State reparations to the injured party is then before the Court.⁵⁵ If the Court has not specifically determined reparations in the judgment on the merits, the Court may reserve its decision for further proceedings.⁵⁶ To date, the Court has reserved most decisions on reparations for a subsequent phase of the proceedings.⁵⁷

In those cases, the Court has allowed the Commission and the State Party a period of six months following the judgment on the merits to agree on reparations.⁵⁸ The Court, however, retains jurisdiction over the case to "verify the fairness of the agreement"⁵⁹ or, should the parties fail to reach an agreement, to institute the subsequent stage.⁶⁰ When feasible, the same judges who decided the merits of the case make the decision as to reparations and supervise compliance with the Court's judgment.⁶¹ In no case to date have the Commission and State reached complete agreement during the six month negotiation period.⁶² This may be due to limited and conflicting Inter-American case law on reparations. The parties could not anticipate the Court's award in a given case, and, consequently, an inadequate basis existed for settlement negotiations.

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

56. INTER-AM. CT. H.R. RULES OF PROCEDURE art. 56 [hereinafter RULES OF THE COURT] (the new Rules of Procedure adopted by the Court at its thirty-fourth session held Sept. 9–20, 1996 are on file with the *Michigan Journal of International Law*). In the European Court, the decision on just satisfaction may be made simultaneously with the judgment on the merits of the case if the Court finds that the issue is ready for decision. If it is not yet ready, the Court may reserve the decision for a further procedure. See VAN DIJK & VAN HOOF, *supra* note 41, at 173.

57. But see the *Gangaram Panday Case (Merits)*, 16 Inter-Am. Ct. H.R. (ser. C) para. 71 (1994), in which the Court determined the amount of damages for the violation of the right to liberty in the merits phase of the proceedings.

58. *Neira Alegria Case (Merits)*, 20 Inter-Am. Ct. H.R. (ser. C) para. 91(4) (1995); *El Amparo Case (Merits)*, 19 Inter-Am. Ct. H.R. (ser. C) res. 3 (1995); *Aloboetoe Case (Merits)*, 11 Inter-Am. Ct. H.R. (ser. C) res. 2 (1991); *Velásquez Rodríguez Case (Merits)*, 4 Inter-Am. Ct. H.R. (ser. C) para. 194(6) (1988).

59. RULES OF THE COURT, *supra* note 56, art. 56. In the *Maqueda Case* against Argentina, the parties reached a friendly settlement after the case was referred to the Court but before the Court reached the merits of the case. In accordance with the previous Article 43(2) of the Rules of the Court, the Court then reviewed and approved the settlement before it struck the case off its docket. *Maqueda Case*, 18 Inter-Am. Ct. H.R. (ser. C) paras. 24–27 (1995).

60. *Caballero Delgado and Santana Case (Merits)*, 22 Inter-Am. Ct. H.R. (ser. C) para. 72(7) (1995); *Godínez Cruz Case (Merits)*, 5 Inter-Am. Ct. H.R. (ser. C) para. 203(6) (1989); *Velásquez Rodríguez Case (Merits)*, 4 Inter-Am. Ct. H.R. (ser. C) para. 194(6) (1988).

61. Order of the Inter-American Court of Human Rights of September 19, 1995 reprinted in ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 129 (1996). ("[A]ll issues related to a decision on reparations and compensation, and to the supervision of compliance with this Court's judgments, fall to the judges who served on the Court at the time the Court decided those matters, unless a public hearing has already taken place, in which case the judges that were present at that hearing will decide the issue.")

62. The only formal partial agreement came in the *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) para. 5 (1989), in which the parties were able to agree on the beneficiaries.

Perhaps as a result, the Commission has often requested damages that are much higher than those actually awarded by the Court⁶³ and the States have offered far less.⁶⁴ In its most recent decisions, however, the Court has more clearly defined the criteria it will use when determining damages.⁶⁵ This greater definition should help the Commission and the States to better anticipate the Court's reparations awards, which may lead to agreements between the parties and less frequent resort to the Court for determinations of reparations.

If the parties fail to agree in the specified time period, the Court exerts its authority and institutes a subsequent phase of the proceedings. At this point, the Court generally sets a date for a public hearing on reparations and requests that the victim or the victim's family, the Commission, and the State submit briefs on reparations.⁶⁶ The Court may also initiate any studies that it deems necessary and call for a public hearing.⁶⁷ At the public hearing the Court hears the arguments of the parties. A recent innovative change by the Court provides that in the reparations phase of the case the representatives of the victims or of their families may present their evidence and arguments directly to the Court.⁶⁸ The Court then deliberates in private and subsequently issues its judgment at a public session.⁶⁹ The judgment of the Court is "final and not subject to appeal."⁷⁰ If there is disagreement about its scope or meaning, the parties may ask the Court to interpret the judgment.⁷¹

63. The Commission requested a total of 9,889,420 lempiras in the *Velásquez Rodríguez Case*. The total amount initially awarded by the Court before the interpretation of its judgment was 750,000 lempiras. *Id.* para. 9, 60(2) and 60(3). But see the *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 92 (1993), in which the Court accepted the Commission's recommendation as to the amount of moral damages.

64. In the *Velásquez Rodríguez Case*, the State argued that the compensation should be based on the most favorable treatment available under Honduran law for the family of the victim in the case of accidental death. That amount, plus an amount voluntarily contributed by the State, resulted in an offer of 150,000 lempiras. *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) para. 43 (1989). The total amount initially awarded by the Court before the interpretation of its judgment was 750,000 lempiras, more than four times the State's offer. *Id.* paras. 60(2) and 60(3).

65. *El Amparo Case (Reparations)*, ___ Inter-Am. Ct. H.R. (ser. C) (Sept. 14, 1996), *to be reprinted in THE 1996 ANNUAL REPORT*, *supra* note 4; *Neira Alegria Case (Reparations)*, ___ Inter-Am. Ct. H.R. (ser. C) (Sept. 19, 1996), *to be reprinted in THE 1996 ANNUAL REPORT*, *supra* note 4.

66. See RULES OF THE COURT, *supra* note 56, art. 44(2).

67. *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) para. 4 (1989).

68. RULES OF THE COURT, *supra* note 56, art. 23.

69. RULES OF THE COURT, *supra* note 56, art. 57(1).

70. American Convention, *supra* note 14, art. 67.

71. *Id.*

III. PERSONS WHO MAY BE AWARDED REPARATIONS BY THE INTER-AMERICAN COURT

In accordance with traditional principles on causation, the Inter-American Court has held that the State must make reparations only to those who suffer the "immediate effects" of its unlawful acts and then only to the extent that has been "legally recognized."⁷² The Court stated that "[t]o compel the perpetrator of an illicit act to erase all the consequences produced by his action is completely impossible, since that action caused effects that multiplied to a degree that cannot be measured."⁷³ Consequently, the Court has not awarded reparations to all those who have claimed to be injured indirectly by the State's breach of its human rights violations. The Court's determination as to who shall receive reparations is based on the American Convention and other international court decisions applying similar reparations provisions.⁷⁴

A. *The Direct Victim*

The American Convention specifies that the "injured party" shall receive reparations.⁷⁵ The "injured party" under the American Convention is the victim of a human rights abuse: the individual whose right or freedom has been violated.⁷⁶ Similarly, in the European human rights system, the European Court has held that the term "injured party" is synonymous with the term "victim" meaning the person or persons directly affected by a violation of the European Convention.⁷⁷ To date, there have been only two surviving direct victims in cases decided by the Inter-American Court.⁷⁸ All other direct victims have been deceased or have disappeared as a result of the human rights violations.⁷⁹

72. Aloeboetoe Case (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 49 (1993). See Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human Rights*, 10 AM. U.J. INT'L L. & POL'Y 333, 363-364 (1994) for a critique of this standard.

73. Aloeboetoe Case (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 48 (1993).

74. Neira Alegria Case (Reparations), __ Inter-Am. Ct. H.R. (ser. C) para. 37 (Sept. 19, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

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

76. *Id.*

77. The Sunday Times Case, 38 Eur. Ct. H.R. (ser. A) at 8 (1981).

78. In the *El Amparo Case*, sixteen fishermen were attacked by Venezuelan Special Military Forces. Two of the fishermen survived the attack and received reparations. *El Amparo Case* (Reparations), __ Inter-Am. Ct. H.R. (ser. C) para. 2 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

79. See, e.g., Aloeboetoe Case (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. (1993); Godínez Cruz Case (Compensatory Damages), 8 Inter-Am. Ct. H.R. (ser. C) para. (1989); Velásquez Rodríguez Case (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para.

B. The Beneficiaries of the Direct Victim

When the direct victim is deceased or remains disappeared, the Inter-American Court has ruled that the victim's entitlement to actual or pecuniary damages and moral or nonpecuniary damages automatically passes to the victim's heirs by succession.⁸⁰ This may be in contrast to the European system, in which only pecuniary damages definitely pass to the successors of the victim. It is within the European Court's discretion whether nonpecuniary damages for the victim's emotional distress are awarded to the victim's heirs. The European Court deems these damages to be personal to the victim,⁸¹ and passes such compensation to the heirs only "if necessary," to advance "the cause of justice."⁸² It should be noted, however, that in none of the cases in the European system has the victim's death been attributed to the State or have injuries attributed to the State resulted in the death of the victim.⁸³ It could be presumed that the European Court would find that in such a case it would be necessary to the cause of justice to award the damages to the estate of the victim.⁸⁴

(1989). But see *Gangaram Panday Case (Merits)*, 16 Inter-Am. Ct. H.R. (ser. C) para. 60-62 (1994), in which the illegal detention of the victim was attributed to the State but his subsequent death while incarcerated was not.

80. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 54 (1993). The Inter-American Court may distinguish between the beneficiaries of the damages owed to the victim for his suffering prior to death and the beneficiaries of the damages owed the victim for loss of life. Although the Court held that entitlement to both types of damages is an inherent right of the deceased victim, it may differentiate as to whom those rights pass upon death. The damages for the moral injuries of the victim up to the time of death are transmitted to the heirs in succession. *Id.* para. 54.

81. *Montserrat Enrich Mas*, *supra* note 41, at 782.

82. *See X v. United Kingdom*, 55-B Eur. Ct. H.R. (ser. A) at 16, para. 18-19 (1982). The European Court held that "just satisfaction is to be afforded only 'if necessary', and the matter falls to be determined by the Court at its discretion, having regard to what is equitable." *Id.* para. 18.

83. In the European system, "if the death of the direct victim is the result of the alleged violation, e.g. in the case of torture, his relatives will as a rule qualify as indirect victims." VAN DIJK & VAN HOOFF, *supra* note 41, at 49.

84. It is especially appropriate to award the moral damages due to the deceased victim to the victim's successors when the violation resulted in the victim's death. If moral damages were denied once the victim died, it would be cheaper for the State to kill a person than to injure him. As murder is the more grievous crime, the family of the victim, which is often poor, should receive the compensation owing to the deceased party. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984). [hereinafter PROSSER AND KEETON].

Originally, common law denied a recovery in tort for an injury once the victim had died. In the United States, many states currently have survival statutes which allow the victim's estate to recover the damages which the victim would have recovered had he or she lived (increased by the damages for death). These damages may include loss of earnings between the time of injury and death, any medical expenses, and pain and suffering. *Id.* at 942-43, 954. In addition, states have wrongful death statutes which compensate the beneficiaries for loss of any economic

In cases involving a deceased or presumed deceased direct victim, the Inter-American Court determines the beneficiaries of the damages awarded to the victim. Those beneficiaries need not first meet the requirements of the inheritance law of the State to be considered the victim's heirs in the Inter-American Court.⁸⁵ In the absence of international customary or conventional rules that would determine a person's successors,⁸⁶ the Inter-American Court applies general principles of law recognized by civilized nations to determine the issue.⁸⁷ The Court has found that under most legal systems, successors are the deceased's children and spouse.⁸⁸ If the deceased was not married and did not have children, the person's ascendants, his parents, are usually the heirs.⁸⁹ In the *Velásquez Rodríguez* and *Godínez Cruz* cases, both victims were married and had children. In those cases, the Court directed that the reparations be made to the victims' wives and children.⁹⁰

The issue of beneficiaries was more complicated, however, in the *Aloeboetoe Case*, in which in accordance with tribal custom, some of the deceased victims had practiced polygamy, an illegal practice in Suriname. Additionally, the marriages and births of the tribe were not legally recognized, because they had not been officially registered with the State as required under Surinamese law.⁹¹ The Inter-American Court ruled that the determination as to who were the children, spouse, and ascendants of the deceased was to be made in accordance with local family law.⁹² Although local law would normally be the law of the State, in *Aloeboetoe* the Court found that Surinamese family law did not apply to the tribe.⁹³ The Court had two bases for this holding. First, the tribe was unaware of State law and lived by its own rules. Second, the State did not provide the facilities necessary to legalize the marriages and register the births of the tribe.⁹⁴

benefits which they reasonably expected to receive from the decedent. These benefits may include support or services which the decedent would have made during his lifetime. *Id.* at 949.

85. *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) para. 54 (1989).

86. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 61 (1993).

87. *Id.*; see also Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055.

88. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 62 (1993).

89. *Id.*

90. *Godínez Cruz Case (Compensatory Damages)*, 8 Inter-Am. Ct. H.R. (ser. C) paras. 51-53 (1989); *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) paras. 56-58 (1989).

91. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 63 (1993).

92. *Id.* para. 62.

93. *Id.* para. 58.

94. *Id.* The Court's recognition of the culture of the tribe, although the tribe cannot be considered indigenous within the strict meaning of the word, is important in Latin America,

C. The Indirect Victim

In some circumstances, an individual may have so close a connection with the direct victim that that person is considered to be an indirect victim who has also suffered a personal injury as a result of the State's human rights violation. The U.N. General Assembly, in its Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, declared that, "[t]he term 'victim' also includes, where appropriate, the immediate family or dependents of the direct victim."⁹⁵ The European human rights system also recognizes the indirect victim.⁹⁶ The European Commission defined the term "victim" as "not only the direct victim or victims of the alleged violation, but also any person who would indirectly suffer prejudice as a result of such violation or who would have a valid personal interest in securing the cessation of such violation."⁹⁷

Whether the Inter-American Court will award compensation to indirect victims is now in question. Until the Court's most recent reparations decisions in *El Amparo* and *Neira Alegria*, in which it is unclear if the Court awarded damages directly to the family of the victims,⁹⁸ the Court acknowledged the injury to those most closely related to the victim. Although in its earlier judgments the Inter-American Court made no explicit reference to indirect victims, it nevertheless demonstrated that it in-

parts of which have large indigenous populations with their own cultures. See Pasqualucci, *The Inter-American Human Rights System*, *supra* note 17, at 329-34.

95. G.A. Res. 40/34, U.N. GAOR 3d Comm., 40th Sess., Annex para. 2, U.N. Doc. A/C.3/40/L.21 (1985). The Resolution specified that States should attempt to provide financial compensation to the family of victims who have died or been incapacitated due to the crime. *Id.* para. 12.

It is not clear whether the United Nations Committee on Human Rights also recognizes a family member of a deceased or disappeared person as an indirect victim with the possibility of receiving compensation in his or her own right for mental anguish, or whether family members are only entitled to claim compensation for the victim's injury. In at least one case (Case 107/1981), the Committee stated that the mother of a disappeared woman could herself be considered to be the victim and urged the State to pay compensation for the wrongs suffered. Theo Van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. GAOR 4th Comm., 45th Sess., Provisional Agenda Item 4, para. 57, U.N. Doc. E/CN.4/Sub.2/1993/8 (1993) [hereinafter *Van Boven Report*].

96. See A.A. Cançado Trindade, *Co-Existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)*, 202 RECUEIL DES COURS 202, 265-66 (1987); VAN DIJK & VAN HOOF, *supra* note 41, at 46.

97. *X v. Federal Republic of Germany*, App. No. 4185/69, 35 Eur. Comm'n H.R. Dec. & Rep. 140, 142 (1970); see also *Koolen v. Belgium*, App. No. 1478/62, 13 Eur. Comm'n H.R. Dec. & Rep. 71, 89 (1963).

98. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4; *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

cluded indirect victims within the term "injured party" under Article 63(1).⁹⁹ The Court even ruled that the State's obligation to make reparation is sometimes extended to indirect victims who are not successors of the victims but who suffered some consequence of the unlawful act.¹⁰⁰ This category of claimant the Court referred to as "dependents."¹⁰¹ Examples might include parents of a married victim, other "companions" who were supported by the victim, and illegitimate children of the victim.¹⁰²

The Court has established a three-pronged test to determine whether the claim of an indirect victim who is a nonsuccessor dependent should be met. First, the victim must have previously made payments to the claimant, even if the victim did not have a legal obligation to pay such support.¹⁰³ These payments must have been "regular, periodic payments either in cash, in kind, or in services."¹⁰⁴ A "series of sporadic contributions" would not be sufficient to meet this criteria.¹⁰⁵ Second, the Court held that "the nature of the relationship between the victim and the claimant should be such that it provides some basis for the assumption that the payments would have continued had the victim not been killed."¹⁰⁶ Third, the claimant must have had a financial need that was met by the contributions of the victim.¹⁰⁷ The Court's test for non-successor dependents appears equitable in that it compensates not only

99. Velásquez Rodríguez Case (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. (1989); Godínez Cruz Case, (Compensatory Damages), 8 Inter-Am. Ct. H.R. (ser. C) para. (1989). See *infra* Part V.C. The European Court has also on occasion awarded nonpecuniary damages to indirect victims. See *Colozza and Rubinat v. Italy*, 89 Eur. Court H.R. (1985). In the *Colozza Case*, the victim, Mr. Colozza, suffered a violation of his right to a fair trial. He died before the case was decided by the Court. The widow claimed, in addition to pecuniary damage, that the violation had occasioned "both for him and her, physical and mental suffering." *Id.* para. 36. The Court stated that "[t]o . . . [pecuniary damages] has to be added the non-pecuniary damage undoubtedly suffered by him and by his widow." *Id.* para 38 (emphasis added).

100. Aloeboetoe Case (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 67 (1993).

101. *Id.* para. 71.

102. In the *Velásquez Rodríguez* and *Godínez Cruz* cases, the Court asked the parties to submit information on "any concubines [of the victim] recognized in any official documents," on all children born in or outside of the marriage, and on the parents of the victim. *Velásquez Rodríguez Case* (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 13 (1989); *Godínez Cruz Case*, (Compensatory Damages), 8 Inter-Am. Ct. H.R. (ser. C) para. 12 (1989).

103. Aloeboetoe Case (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 68 (1993).

104. *Id.*

105. *Id.* The Court specified that the effectiveness and regularity of the contributions was of importance. *Id.*

106. *Id.*

107. *Id.* The Court clarified that "[t]his does not necessarily mean that the person should be indigent, but only that it be somebody for whom the payment represented a benefit that, had it not been for the victim's attitude, it would not have been able to obtain on his or her own." *Id.*

family members, but also other indirect victims who suffered serious losses from the victim's death.¹⁰⁸

The Inter-American Court has refused to expand the principle of "indirect victim" beyond that of the victim's successors and dependents. In the *Aloeboetoe Case*, for instance, the Court did not act on the request of the Commission to award moral damages to the Saramaca tribe as a whole.¹⁰⁹ The Commission argued that the members of the tribe "constitute a family in the broad sense of the term,"¹¹⁰ and thus should be awarded moral damages. The Commission reasoned that tribal society is unique in that a person is a member of the family group, the village community, and the tribe.¹¹¹ The Court, however, did not attribute special significance to the tribal culture: rather, it found that all persons are members of families, citizens of a state, and also belong to intermediate communities¹¹² and that moral compensation does not extend to such communities.¹¹³

Under international human rights law, when a State has undertaken a systematic practice of gross violations of human rights designed to intimidate an entire community into submissiveness, there is an argument that the community itself is an indirect victim to which it may be appropriate to award moral damages.¹¹⁴ Under the International Law of Injury

108. The Court has held that there is a presumption that the victim's death caused actual and moral damages to the victim's successors. *Id.* para. 71. The burden of proof is on the State to show that there were no damages to successors. Conversely, the Commission has the burden of proving that all conditions for reparations are met for persons who are not successors to the victim, but who claim damages as dependents. *Id.* It may not be necessary, however, for the Commission to prove moral damages in the case of the parents of victims who suffered a violent death. *See id.* para. 76.

109. *Id.* para. 83.

110. *Id.* para. 19.

111. *Id.*

112. *Id.* para 83.

113. *Id.* This decision of the Court has been criticized by at least one human rights scholar who stated:

The Commission also attempted to demonstrate that the self-esteem of an entire people had been profoundly violated during the 1986-1987 civil war through repeated and pitiless incursions of the army. The Committee [sic] then tried to establish that failure to compensate the Saramaccans to restore their lost dignity would constitute an irreparable injury to their cultural integrity. On this issue, the Court appears to have missed the relevant issue entirely by limiting examination of this question exclusively to the juridical character of the 1762 Treaty.

Padilla, *supra* note 23, at 548.

114. Gross and systematic violations of human rights are perpetrated pursuant to a governmental policy in such a manner and in such number that the human rights of certain groups in the population are threatened. CECILIA MEDINA QUIROGA, *THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS OF HUMAN RIGHTS AND THE INTER-AMERICAN SYSTEM* 16 (1988).

to Aliens, a State could demand satisfaction for moral damages from another State for impairment of the injured State's honor or prestige.¹¹⁵ The determining factor for moral injury to the State is the "character or gravity of the imputable act or omission."¹¹⁶ Analogously, it could be argued that a community is entitled to damages when the act imputable to the State has particularly grave consequences for an entire community.

Nevertheless, the Court was probably wise in not further extending the application of damages at this time. Historically, damages for emotional distress were not awarded to third parties. The award of compensation to the spouse and children of the direct victim for their own injuries in wrongful death cases is still controversial in some areas. Despite the unique culture of the Saramacas, the Court's refusal to further expand moral damages beyond that which is currently accepted is understandable. An international court cannot afford to make decisions that are "too far advanced for community acceptance."¹¹⁷

Recent Inter-American Court reparations decisions indicate that, rather than expanding the list of those who will be entitled to reparations, the Court may be retreating from its earlier more expansive decisions.¹¹⁸ In the *El Amparo* and *Neira Alegria* cases, the Court may not have awarded damages to indirect victims.¹¹⁹ If this is so, in future cases, family members and other dependents of the direct victim, irrespective of their relationship, may not be eligible for compensation for their own suffering.

Truth commission reports in Latin America confirmed that governments used a deliberate policy of human rights violations to intimidate and to maintain control. *See* REPORT OF THE COMMISSION ON TRUTH FOR EL SALVADOR, FROM MADNESS TO HOPE: THE 12-YEAR WAR IN EL SALVADOR 10 (United Nations 1993) [hereinafter THE EL SALVADOR REPORT]; HONDURAN REPORT, *supra* note 24, at 217-18.

115. "An act which is contrary to international law may, irrespective of whether it causes material injury, result in moral injury to another State which consists in the impairment of the latter's honor or prestige." GARCIA-AMADOR, *supra* note 45, at 568 (quoting De Visscher, *La responsabilité des états*, II BIBLIOTHECA VISSERIANA 119 (1924)).

116. GARCIA-AMADOR, *supra* note 45, at 568. Moral damages in this context usually consisted of an apology for acts taken against official representatives of the State or against diplomatic or consular premises. *Id.* at 569.

117. *See* Peter J. Goldsworthy, *Interim Measures of Protection in the International Court of Justice*, 68 AM. J. INT'L L. 258, 263 (1974).

118. *El Amparo* Case (Reparations), __ Inter-Am. Ct. H.R. (ser. C) (Sept. 14, 1996), *to be reprinted in* THE 1996 ANNUAL REPORT, *supra* note 4; *Neira Alegria* Case (Reparations), __ Inter-Am. Ct. H.R. (ser. C) (Sept. 14, 1996), *to be reprinted in* THE 1996 ANNUAL REPORT *supra*, note 4.

119. *El Amparo* Case (Reparations), __ Inter-Am. Ct. H.R. (ser. C) (Sept. 14, 1996), *to be reprinted in* THE 1996 ANNUAL REPORT, *supra* note 4; *Neira Alegria* Case (Reparations), __ Inter-Am. Ct. H.R. (ser. C) (Sept. 14, 1996), *to be reprinted in* THE 1996 ANNUAL REPORT, *supra* note 4.

*D. No Reparations for Victims Who Are Unable to
Gain Access to the Court: A Need for Reform*

No procedural means exist by which the Inter-American Court can order reparations for the majority of human rights victims, those whose cases do not reach the Court. There are often multiple victims of similar abuses in a State during a given period as a result of a governmental policy of gross and systematic human rights abuses. In Honduras, for example, from 1991 to 1994, one hundred to one hundred and fifty persons disappeared.¹²⁰ The Inter-American Commission has been deluged with individual complaints in such situations. Only one or two of these cases can be sent to the Court, which sits part-time.¹²¹ The Honduran Human Rights Commissioner and former President of the Inter-American Commission, Leo Valledares, opined that it was unfair that only those whose cases were before the Inter-American Court received reparations and recommended that all proven cases of disappearances should receive economic reparations.¹²² A response to the problem of limited access to the Court would be the development of a class action type of procedure that would allow for joinder of the cases of several victims before the Court. In the alternative, the contentious jurisdiction of the Court could be interpreted to include requests from the Commission that the Court make a determination as to whether a State has perpetrated a governmental policy of gross and systematic abuses in a State. If the Court were to find that such a State policy existed, it could order the State to make reparations to the victims. The Court would then serve as a type of claims tribunal for persons claiming to be individual victims of that policy. Such changes cannot be made without the express agreement of the States Parties to the American Convention. Either procedure would consequently require a protocol to the American Convention, which is not likely to be accepted in the near future.

IV. TYPES OF REPARATIONS

Under international law, the term "reparations" may encompass restitution, financial compensation, rehabilitation, and satisfaction.¹²³

120. Velásquez Rodríguez Case (Merits), 4 Inter-Am. Ct. H.R. (ser. C) para. 147(a) (1988).

121. See Pasqualucci, *The Inter-American Human Rights System*, *supra* note 17, at 355-59.

122. THE HONDURAN REPORT, *supra* note 24, at 234.

123. *Van Boven Report*, *supra* note 95, para. 48. In 1989, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities requested that Van Boven study international human rights norms, relevant decisions, and the views of international human rights organs for the purpose of developing basic principles and guidelines on the subject of

Restitution "re-establish[es], to the extent possible, the situation that existed for the victim prior to the violation of human rights."¹²⁴ Full restitution may therefore often include the other forms of reparations. Financial compensation remedies "economically assessable damage resulting from human rights violations."¹²⁵ It may recompense loss of earnings, pain and suffering, emotional distress, medical expenses, injury to reputation or dignity, and the costs of legal or expert assistance in obtaining a remedy.¹²⁶ Rehabilitation may include medical or psychological services, legal assistance, or the restoration of the victim's dignity and reputation if the victim is alive.¹²⁷ It can also be argued that rehabilitation of the victim's reputation continues to be necessary if the victim is deceased or has disappeared.¹²⁸ Satisfaction may involve public disclosure of the truth, an apology or acknowledgement of wrongdoing, the prosecution and punishment of the individual violators, and the implementation of measures to prevent a recurrence of the violation.¹²⁹ Under international law, a victim may be awarded both satisfaction and compensation for a breach of a duty.¹³⁰

The usual form of reparations in international law has been in the form of financial compensation.¹³¹ When the damage is to the person of the victim, however, more than financial compensation may be required.

restitution, compensation, and rehabilitation for the victims of gross human rights violations. *Id.* para. 1. Full reparations may include, restitution in kind, financial compensation, satisfaction, and guarantees that the violations will not be repeated. *Id.* para. 48. These categories often overlap.

124. *Id.* para 137(8).

125. *Id.*

126. *Id.* para 137(9). Van Boven also listed harm to property or business, which would include lost profits and lost opportunities. See generally Richard Lillich, *Damages for Gross Violations of International Human Rights Awarded by US Courts*, 15 HUM. RTS. Q. 207 (1993).

127. *Van Boven Report*, *supra* note 95, para. 137(10).

128. See Pasqualucci, *The Whole Truth*, *supra* note 26, at 332.

129. *Van Boven Report on the Right to Restitution, Compensation, and Rehabilitation*, *supra* note 95, para. 137(11). Satisfaction and guarantees of nonrepetition may include:

[c]essation of continuing violations; [v]erification of the facts and full and public disclosure of the truth; [a] declaratory judgment in favor of the victim; [a]pology, including the public acknowledgment of the facts and acceptance of responsibility; [b]ringing to justice the person responsible for the violations; [c]ommemorations and paying tribute to the victims and, preventing the recurrence of violations.

Id.

130. *Id.* at 28. The United Nations Human Rights Committee has expressed the view that to remedy human rights violations, the State must: investigate the facts, take appropriate action, bring the responsible parties to justice, provide the victims with any necessary medical care, and pay compensation to the victim or family members. *Id.* Compensation should be made for wrongs suffered, and for "physical and mental injury and suffering caused to the victim by the inhuman treatment to which he was subjected." *Id.*

131. *Factory at Chorzów (Merits)*, 1928 P.C.I.J. at 28.

Sohn and Baxter observe that the duty to make reparations under international law "may be discharged through measures designed to re-establish the situation prior to the wrongful act or omission, or through payment of damages, or through a combination of the two."¹³² The award of reparations must in effect wipe out all consequences of the illegal act.

A. Full Restitution

The Inter-American Court has held that "[r]estitution of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm."¹³³ In more recent cases, however, the Court appears to be limiting this earlier holding on full restitution. In the *Aloeboetoe Case*, the Court stated that "*restitutio in integrum* refers to one way in which the effect of an international unlawful act *may* be redressed, but it is not the only way in which it *must* be redressed, for in certain cases such reparation may not be possible, sufficient or appropriate."¹³⁴ Full restitution is not "possible," for example, in the case of an extrajudicial execution or a disappearance in which the victim is most likely deceased because the Court cannot guarantee to the victim the enjoyment of the right to life that has been violated.¹³⁵

The Court did not explain when full restitution would not be "appropriate."¹³⁶ Garcia-Amador stated in his study, *The Changing Law of International Claims*, that certain forms of reparations may not be appropriate if they prove "incompatible with the municipal law of the

132. Louis B. Sohn & R. R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 546 (1961).

133. Velásquez Rodríguez Case (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 26 (1989). Note that the term "patrimonial and non-patrimonial" harm appears to be a direct translation from the Spanish. See also Godínez Cruz Case (Interpretation of the Compensatory Damages), 10 Inter-Am. Ct. H.R. (ser. C) para. 27 (1990).

134. Aloeboetoe Case (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 49 (1993). (Emphasis in the original.)

135. El Amparo Case (Reparations), __ Inter-Am. Ct. H.R. (ser. C) para. 16, *to be reprinted in* THE 1996 ANNUAL REPORT, *supra* note 4; Neira Alegria Case (Reparations), __ Inter-Am. Ct. H.R. (ser. C) para. 38, *to be reprinted in* THE 1996 ANNUAL REPORT, *supra* note 4; Godínez Cruz Case (Merits), 5 Inter-Am. Ct. H.R. (ser. C) para. 199 (1989) *cited in* Aloeboetoe Case (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 46 and 50 (1993); Velásquez Rodríguez Case (Merits), 4 Inter-Am. Ct. H.R. (ser. C) para. 189 (1988).

136. The Court could be alluding to States in which amnesty laws have granted impunity to the violators of human rights, thereby making individual punishment of the violators impossible. See Pasqualucci, *The Whole Truth*, *supra* note 26, at 343; see also Robert Norris, *Leyes de Impunidad y los Derechos Humanos en Las Americas: Una Respuesta Legal*, 15 INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS REVISTA 47 (1992).

respondent state, offend national honor and dignity, or [are] seriously out of proportion to the injury sustained or the character of the act or omission imputed to the State."¹³⁷ Under these criteria, however, States could find that any form of satisfaction, such as the duty to investigate the violation and punish the violators, is inappropriate. State discretion of this magnitude would unduly limit the type of reparations that could be awarded for human rights violations.

B. *Compensatory or Actual Damages*

The type of reparations most commonly awarded in human rights cases is pecuniary compensation, which seeks to compensate the victims for the "actual damages suffered."¹³⁸ The amount of compensation that the Inter-American Court may order a State to pay to the victims of human rights abuse is determined by the "American Convention and the applicable principles of international law."¹³⁹ It is not "limited by the defects, imperfections or deficiencies of national law."¹⁴⁰ The Court has stated that it does not have complete discretion in determining the amount of compensation for actual damages; rather it must adhere to the ordinary methods of case law in determining the award.¹⁴¹ As generally understood, the term actual damages may include loss of earnings, restitution of money or material possessions, and loss of real property.

1. Loss of Earnings

Compensation for the victim's loss of earnings is one form of actual damages. The Inter-American Court has used various criteria in an attempt to establish a victim's lost earnings with reasonable certainty.¹⁴² Its efforts,

137. GARCIA-AMADOR, *supra* note 45, at 596.

138. Aloeboetoe Case (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 50 (1993).

139. Velásquez Rodríguez Case (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 31 (1989).

140. *Id.* para. 30. In *Velásquez Rodríguez*, Honduras maintained that the amount of compensation paid to the victim's next of kin should be based on the most favorable benefits provided by Honduran legislation in the case of accidental death. *Id.* at para. 5. In support of its contention, the State produced Honduran provisions on tax, inheritance, social security, and retirement. *Id.* at paras. 16-17. The Court did not agree. The Court does, of course, consider information on national wage rates, actuary tables, etc., in determining the ultimate amount, but it does not limit itself to the remedy available under domestic law. *Id.* para. 46.

141. Aloeboetoe Case (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 87 (1993).

142. In the *Godínez Cruz Case*, the Court based the measurement of the victim's future earnings on a "prudent estimate of the possible income of the victim," calculated by reference to probable life span. *Godínez Cruz Case* (Compensatory Damages), 8 Inter-Am. Ct. H.R. (ser. C) para. 29, 47 and 50 (1989). The Court has stated that it does not base its calculations on "rigid criteria," but rather on the circumstances of each case. *Velásquez Rodríguez Case* (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) paras. 26-28 (1989); *Godínez Cruz*

however, have often been thwarted by the seasonal employment of the victims, the lack of employment and tax records, and geographical and cultural impediments. In the *Aloeboetoe Case*, for example, the victims, members of the Saramaca tribe, lived in the jungles of south-central Suriname far from the Caribbean Coast.¹⁴³ Their tribe does not use written documents and most of its members are functionally illiterate.¹⁴⁴ Moreover, the victims did not have stable employment: they had periodically traveled to the coasts of Suriname and French Guiana to work at construction jobs.¹⁴⁵ Even with the assistance of expert witnesses, it was difficult to establish evidence of lifetime loss of earnings "in a culture and economy in which pay stubs, tax returns, and other ordinary means of verification are not customarily employed."¹⁴⁶

In its most recent reparations decisions, the Court has attempted to develop more definitive criteria for calculating the amount of lost earnings.¹⁴⁷ For victims who have died as a result of the human rights violation, the Court will base its calculations on the victim's age and life expectancy at the time of death and the victim's actual salary, when that information is proved.¹⁴⁸ If reliable information about the victim's actual salary is not available, the Court will normally base its calculations on the minimum wage in the State at the time of death.¹⁴⁹ It is the responsibility

Case (Compensatory Damages), 8 Inter-Am. Ct. H.R. (ser. C) para. 40 (1989) cited in *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 85 (1993).

At one time, the Court differentiated between the basis for lost earnings when the victim was deceased as compared to when the victim was totally and permanently disabled. Velásquez Rodríguez Case, (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) paras. 47-48 (1989); Godínez Cruz Case, (Compensatory Damages), 8 Inter-Am. Ct. H.R. (ser. C) para. 45 (1989). Under the Court's present criteria, however, the Court will apply the same criteria whether the lost wages are those of a deceased victim or a living victim. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 28 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

143. Padilla, *supra* note 23, at 545.

144. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 72 (1993).

145. Padilla, *supra* note 23, at 546.

146. *Id.* at 552 (explaining why the Commission submitted sworn affidavits of family members to establish wage earnings).

147. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 28 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4; *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 49 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

148. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 28 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4; *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 49 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

149. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 28 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4; *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 49 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

of the parties to provide the Court with reliable evidence of the minimum wage.¹⁵⁰ If they do not produce adequate evidence on this issue, the Court will determine an amount grounded in the principles of equity and the actual economic and social situation in Latin America.¹⁵¹ For example, in the *Neira Alegria Case*, the Court was not provided with official figures on the minimum wage in Peru;¹⁵² citing equity and the actual economic and social situation, the Court estimated \$125 per month as the probable income of the victims.¹⁵³ Alternately, the Court may base its calculations on the "canasta alimentaria basica," a measure based on the consumer price index for subsistence goods, if that measure is higher than the minimum wage in the area.¹⁵⁴ Whichever measure the Court applies in determining the amount of lost wages, the Court then deducts twenty-five percent as an estimate of the personal expenses which would have been incurred by the victim had he lived.¹⁵⁵

The Court's award of lost earnings also includes interest from the date of the violations to the time of judgment.¹⁵⁶ It does not, however, include adjustments for future inflation or salary increases. Nor is the amount reduced to reflect the present value of the future earnings. If the victim is living, the Court calculates lost wages based on the above criteria, but limits the judgment to the amount of time that the victim was unemployed due to the violations.¹⁵⁷ The Court has not yet been confronted with the situation in which the victim lived and is employable in some capacity, but due to the injuries is no longer able to engage in as gainful a position.

The parties may present expert testimony to establish proof of lost earnings when appropriate. Thus in the *Aloeboetoe Case*, the Commission introduced an anthropological expert, who testified about relevant factors in Saramacan culture, and a representative of the accounting firm of Coopers and Lybrand, who testified about the projected earnings of the victims

150. *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 50 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

151. *Id.* para. 49.

152. *Id.* para. 50.

153. *Id.*

154. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 28 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

155. *Id.*; *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 49 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

156. *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 50 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

157. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 28 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4. The two survivors in the *El Amparo Case* were unemployed for two years after the attack. The Court granted them each \$4,566.41 in lost wages.

using the "present value added" method of accounting.¹⁵⁸ The Court may also employ experts or make use of its own staff in determining appropriate reparations *proprio muto*.¹⁵⁹ In the *El Amparo Case*, the Court employed an actuarial counselor to calculate the amount of damages.¹⁶⁰ In *Aloeboetoe*, the Deputy Secretary of the Court went to Suriname to make an *in situ* verification of the loss of earnings figures.¹⁶¹

2. Other Compensation Awarded

In addition to compensating for loss of earnings, pecuniary damages also include the restitution of money or material possessions taken from the victims, financial reimbursement for any items that cannot be returned,¹⁶² and even the reallocation of economic resources to housing, education, health care or employment.¹⁶³ As an example of the reallocation of economic resources, in *Aloeboetoe*, the Court ordered the State to open and staff the school and medical dispensary in the area of the victims' beneficiaries.¹⁶⁴ The Court reasoned that part of the compensation awarded to the victims' children was meant to enable them to complete their education, a remedy which could not be realized if the State did not provide a school in the area of the tribe.¹⁶⁵ The Court's order to open basic educational and health facilities would seem to be well in keeping with the letter and spirit of the American Convention, which provides for the progressive development of economic, social, and cultural rights.¹⁶⁶

158. Padilla, *supra* note 23, at 546. Professor Price testified that the victims regularly earned and saved substantial amounts, as much as \$20,000, during their migratory work on the coast. *Id.*

159. RULES OF THE COURT, *supra* note 56 arts. 44(3) and (4).

160. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 34 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

161. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 87 (1993).

162. NETHERLANDS INSTITUTE OF HUMAN RIGHTS, SIM SPECIAL NO. 12, SEMINAR ON THE RIGHT TO RESTITUTION, COMPENSATION, AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 11 (1992). In the *Aloeboetoe Case*, in which the Commission alleged that the victims were stripped of their personal possessions before being killed, the Court did not award reimbursement because the Commission had not presented a claim. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 80 (1993).

163. NETHERLANDS INSTITUTE OF HUMAN RIGHTS, *supra* note 162, at 11.

164. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 96 (1993).

165. *Id.*

166. American Convention, *supra* note 14, art. 26. There is an Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, which specifies that there is a right to primary health care and education. *Protocol of El Salvador*, arts. 10(2)(a) and 13(1), OEAJ reprinted in 2 HUMAN RIGHTS, *supra* note 32, at 67.

3. Compensation for Property Rights

The Inter-American Court has not yet adjudicated a case alleging violation of property rights. The American Convention protects the right of individuals to "the use and enjoyment" of property.¹⁶⁷ The *Los Cimientos* case, currently before the Inter-American Commission, may provide an opportunity for the Court to address some of the most difficult questions in this area. According to the petition in the *Los Cimientos* case, in 1981 the Guatemalan army invaded land to which the Quiche, an indigenous people of Guatemala, had held legal title since 1909. The people were allegedly driven from their land, which was subsequently occupied by a military garrison and resettlement village. The Guatemalan Government did not compensate the Quiche people,¹⁶⁸ and they have filed a complaint with the Inter-American Commission. If this case eventually reaches the Court, and if the Court holds that this taking of property was illegal, the Court will have the opportunity to address the question of reparations for the violation of property rights under the American Convention.

4. Minimal Compensation for an Inferred Violation

The Inter-American Court has awarded only minimal compensation when it must infer that the State is responsible for a violation of the Convention due to the State's failure to produce information requested by the Court.¹⁶⁹ The parties are obligated to provide information in their possession when the Court requests it.¹⁷⁰ Should the State neglect to respond to the Court's request for information, and other factors concur,

167. American Convention, *supra* note 14, art. 21(1). The Convention does, however, allow the State to exercise eminent domain in appropriate circumstances. Article 21(2) provides that "[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in cases and according to the forms established by law." *Id.*

168. See Angela Collier, *Recent Developments in Compensation for the Violation of Property Rights*, 3 HUMAN RIGHTS BRIEF (Ctr. for Hum. Rts. and Human. L., Wash. D.C.), Winter 1996, at 2.

169. The Inter-American Commission also has a rule which allows it to presume a violation when the Government fails to produce information. The repeated failure of a State to reply to even basic Commission requests for information has resulted in the Commission's rule that the Commission will presume to be true the facts reported in a petition if the State does not provide the pertinent information requested, provided that the evidence before the Commission does not lead to a different conclusion. Regulations of the Inter-American Commission on Human Rights, art. 42, *modified* June 29, 1987, *reprinted in* 2 HUMAN RIGHTS, *supra* note 32, Booklet 9.2, at 14 [hereinafter Regulations of the Commission].

170. RULES OF THE COURT, *supra* note 56, art. 44(2).

the Court may infer State responsibility.¹⁷¹ In the *Gangaram Panday Case*, for example, the Court inferred State responsibility for an illegal detention when Suriname failed to provide it with pertinent information that would have determined State responsibility.¹⁷² In that case, the Court awarded only minimal compensation to the family of the victim because the violation was inferred rather than proved.¹⁷³ A Court award of only minimal compensation in such cases could lead to the unfortunate result that where evidence is incriminating, the State may choose to withhold it so as to limit its exposure. The Court would be better advised to apply the same reparations criteria in all cases in which it has determined that the Convention has been violated.

5. Ex Gratia Compensation

Under the International Law of Injury to Aliens, States at times refuse to accept legal responsibility for a violation, but nonetheless "as an act of grace" pay *ex gratia* compensation¹⁷⁴ to the State of the injured party.¹⁷⁵ This situation has not yet arisen in the Inter-American system, but can be envisioned. For instance, a new government elected in a State that is currently involved in a case in which the previous government is accused of human rights violations, could offer to make reparations to the injured party *ex gratia* but refuse to admit liability for the alleged violation. An advantage to the new government in this scenario is that it would not then

171. *Gangaram Panday Case* (Merits), 16 Inter-Am. Ct. H.R. (ser. C) para. 51 (1994).

172. *Id.*

173. *Id.* para. 70. The amount of compensation to be paid by the Government of Suriname was set at the equivalent of \$10,000. In the *Gangaram Panday Case*, a Surinamese citizen died while in detention. The Court requested that the Government of Suriname provide it with a Spanish translation of the Suriname Constitution and the substantive laws and criminal procedure in force in Suriname at the time of the detention. When the Government did not produce the information, the Court had no direct evidence to determine if the detention was illegal under the Constitution of Suriname. Consequently, the illegal detention could not be proved or disproved, and the Court "inferred" the detention to be illegal. Although local law is not usually the determining factor before an international court, in the case of detention the American Convention provides that "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto." American Convention, *supra* note 14, art. 7(2). Thus, it was necessary for the Court to determine the law of Suriname in order to determine if the detention was illegal.

174. "Ex gratia payment" is defined as "[p]ayment made by one who recognizes no legal obligation to pay but who makes payment to avoid greater expense." BLACK'S LAW DICTIONARY 573 (6th ed. 1990).

175. "Some arbitral claims commissions, while holding that, strictly according to the law, no reparation of the injury was due, have recommended to the State that it indemnify the loss as 'an act of grace.'" GARCIA-AMADOR, *supra* note 45, at 575 (quoting JACKSON H. RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS 57-58 (1926)).

be ordered to investigate the violation and to punish the violators, acts which might jeopardize the stability of the new government.

An offer of *ex gratia* compensation would normally be made during negotiations for a friendly settlement. Friendly settlement procedures in international human rights treaties allow the government to settle cases without loss of face while still providing for the promotion of human rights. The American Convention provides that the Commission "shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement."¹⁷⁶ A difficulty might arise if the victim or family of the victim refused to accept the State offer of *ex gratia* compensation, insisting rather on a finding of State liability from the Commission. The case would then presumably go forward in the Commission. It would be unlikely, however, in view of the government's attempt to remedy the violation, that the Commission would subsequently refer the case to the Court.¹⁷⁷ If the case were already before the Court when the victim rejected the State's offer, presumably the Court would make a determination on state responsibility and, if appropriate, issue a judgment on reparations.

C. Nonpecuniary or Moral Damages

International law traditionally provides moral damages for emotional harm suffered by the injured party, particularly in the case of human rights violations.¹⁷⁸ The term "moral damages" in international law and in civil law systems generally equates with damages for emotional distress and, in the appropriate case, with damages for the loss of society, comfort, and protection under common law.¹⁷⁹ In the *Aloeboetoe Case*, the Inter-American Court held that the victims suffered moral injuries when they were taken into illegal custody, beaten, and then killed. The Court stated that "[t]he beatings received, the pain of knowing they were condemned to die for no reason whatsoever, [and] the torture of having to dig their

176. American Convention, *supra* note 14, art. 48(1)(f).

177. The victim does not have standing to seize the Court in the Inter-American system. See Manuel D. Vargas, *Individual Access to the Inter-American Court of Human Rights*, 16 N.Y.U. J. INT'L L. & POL. 601 (1984). Only the Commission or the State Parties have the right to submit a case to the Court after a decision by the Commission. American Convention, *supra* note 14, art. 61. The Commission has many cases before it in which the State refuses to accept responsibility. Due to the part-time nature of the Court and the limited financial resources of the Commission and the Court, the Commission can only refer select cases to the Court. See Pasqualucci, *The Inter-American Human Rights System*, *supra* note 17, at 355-59.

178. Velásquez Rodríguez Case (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 27 (1989).

179. For a discussion of moral damages in domestic legal systems, see Stuart Malawer, *Moral Damages in Wrongful Death Cases in Foreign Law*, 7 E. J. INT'L L. 218 (1975).

own graves” was part of the moral damage suffered by the victims who died.¹⁸⁰ The one victim who did not die immediately also suffered the moral injury of bearing “the pain of his wounds being infested by maggots and of seeing the bodies of his companions being devoured by vultures.”¹⁸¹ The Court awarded compensation to the beneficiaries of the deceased victims for the victims’ moral injuries.

In several cases, the Inter-American Court has also awarded moral damages to compensate for the emotional distress suffered by indirect victims.¹⁸² In the *Aloeboetoe Case*, the Court supported its award of moral damages to the parents of the victim by observing that “it is essentially human for all persons to feel pain at the torment of their child.”¹⁸³ Apparently applying the same reasoning in the earlier *Velásquez Rodríguez* and *Godínez Cruz* cases, the Court awarded moral damages for the suffering of the victims’ wives and children.¹⁸⁴ In its most recent cases, however, the Court’s award of moral damages did not specify whether it was for the suffering of the victim alone or also for the suffering of the victim’s family.¹⁸⁵ In these cases, the Court divided the moral damages between the wife, children, and parents of the victim, but it did not state whether the relatives were receiving the damages for their own suffering or whether they were beneficiaries of the damages granted for the victims’ suffering.¹⁸⁶ The Court did state that when the violation is sufficiently serious, the moral suffering of the victims “and their families” must be compensated.¹⁸⁷ The Court did not grant moral damages to

180. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 51 (1993).

181. *Id.*

182. *Velásquez Rodríguez (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) para. 50 (1989).

183. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 76 (1993).

184. *Godínez Cruz Case (Compensatory Damages)*, 8 Inter-Am. Ct. H.R. (ser. C) para. 49 (1989); *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) para. 51 (1989).

185. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) (Sept. 14, 1996), *to be reprinted in THE 1996 ANNUAL REPORT, supra note 4*; *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) (Sept. 14, 1996), *to be reprinted in THE 1996 ANNUAL REPORT, supra note 4*.

186. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) paras. 41–42 (Sept. 14, 1996), *to be reprinted in THE 1996 ANNUAL REPORT, supra note 4*; *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) paras. 61–62 (Sept. 14, 1996), *to be reprinted in THE 1996 ANNUAL REPORT, supra note 4*.

187. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 35 (Sept. 14, 1996), *to be reprinted in THE 1996 ANNUAL REPORT, supra note 4*; *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 56 (Sept. 14, 1996), *to be reprinted in THE 1996 ANNUAL REPORT, supra note 4*.

the families of surviving victims, however.¹⁸⁸ The survivors received the total amount of the \$20,000 awarded in moral damages.¹⁸⁹ This ruling may indicate: first, that the Court did not find that the type of violation suffered by the surviving victims resulted in moral suffering for their loved ones; second, that the Court will not in the future award moral damages to third parties when the violation is other than the right to life; or third, that the Court is no longer awarding moral damages to third parties in any case. The Court's original decision to award moral damages to the families of victims was sound. The victims' families do suffer emotional distress at the suffering of their loved ones and deserve to be compensated for that suffering. Preferably, the Court's failure to award moral damages to the family of the surviving victims in the *El Amparo Case* resulted from a finding that in that particular case, the families had not suffered. The Court should clarify its reasoning to provide a basis for future settlement negotiations for the parties.

1. The Basis for Determining Moral Damages

Moral damages for emotional distress cannot be calculated mathematically by the use of a precise formula.¹⁹⁰ Nonetheless, the victim should receive an amount approximating the loss, if possible.¹⁹¹ In the Inter-American system, the Court has held that the amount of moral damages is "based on the principles of equity."¹⁹² The Court claims to consider the "particular circumstances of the case" in setting moral damages,¹⁹³ but it now appears that the Court has determined that it will award a set amount of moral damages in each case where moral damages

188. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 41(g) (Sept. 14, 1996), *to be reprinted in* THE 1996 ANNUAL REPORT, *supra* note 4.

189. *Id.*

190. GARCIA-AMADOR, *supra* note 45, at 579.

191. *Id.* at 580.

192. Velásquez Rodríguez Case (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 27 (1989); Godínez Cruz Case (Compensatory Damages), 8 Inter-Am. Ct. H.R. (ser. C) para. 61 (1989) *cited in* Aloeboetoe Case (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 86 (1993). The European Court of Human Rights also bases awards for moral damages on the principle of equity. *H v. Belgium*, 127 Eur. Ct. H.R. (ser. A) at 38 (1987).

193. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 37 (Sept. 14, 1996), *to be reprinted in* THE 1996 ANNUAL REPORT, *supra* note 4; *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 58 (Sept. 14, 1996), *to be reprinted in* THE 1996 ANNUAL REPORT, *supra* note 4. The Court accepted the amount of moral damages proposed by the Commission in the *Aloeboetoe Case* because it found that the amount was fair and because there was no other data. Six of the seven victims who were murdered were awarded the same amount of moral damages because no evidence indicated that there had been differences in the ill treatment or injuries they received. The other victim, who watched his companions die and then lived for a month after the assault, was granted a greater amount in moral damages. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 91 (1993).

are at issue, regardless of the amount of suffering borne by each of the victims.¹⁹⁴ Thus, in the *El Amparo Case*, in which fourteen fishermen were murdered and two escaped, the Court without explanation set \$20,000 as the moral damages awarded to the living victims and to the beneficiaries of the deceased victims.¹⁹⁵ In the *Neira Alegria Case*, in which three victims perished, the Court also established \$20,000 as moral damages for each victim.¹⁹⁶ While it may be advantageous for settlement purposes to establish one amount for moral damages because the parties can then better anticipate the Court's judgment, the practice nevertheless undermines the Court's assertion that it will consider the facts of each case and be guided by equitable factors. Equitable principles properly applied would require that the Court take into account the right violated and the individual suffering of each victim when determining moral damages.

In determining what equitable factors affect a determination of moral damages, the Court has reasoned that it may reduce the amount of moral damages if the State accepts international responsibility for the human rights violations because the acceptance itself constitutes moral satisfaction for the victims.¹⁹⁷ Yet moral damages for the suffering of deceased victims should not be reduced if the State accepts international responsibility for the violation because the amount of their suffering does not change with the acceptance of responsibility. The moral suffering of families and surviving victims may be ameliorated, however, with State acceptance of responsibility for the violation. In such a case, it may be equitable for the Court to reduce the award of damages for moral suffering of the families and surviving victims. The Court distinguished the large awards of moral damages in the *Velásquez Rodríguez* and *Godínez Cruz* cases against Honduras from the lesser awards in the *Aloeboetoe* and *El Amparo* cases because Suriname accepted responsibility for the violations in *Aloeboetoe* and Venezuela accepted responsibility in *El Amparo*.¹⁹⁸ If the Court does decrease moral damages when the State voluntarily accepts responsibility,

194. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4; *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

195. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

196. *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

197. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 34 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

198. *Id.*

it may influence States to accept responsibility in future cases. This possible influence was undermined, however, when the Court awarded the same amount of moral damages in *El Amparo*, in which Venezuela accepted responsibility, as it did in *Neira Alegria*, in which Peru did not accept responsibility for the violations. Identical awards of moral damages per victim in both cases negates the Court's assertion that acceptance of international responsibility may reduce moral damages, and, therefore, it undermines settlement negotiations on that basis. If the Court is going to reduce awards for moral damages when the state accepts responsibility for a violation, it must do so consistently to encourage State acknowledgement of human rights violations.

Finally, in some instances the Court has also concluded, in accordance with the judgments of other international courts and with its own jurisprudence, that the Court's judgment itself may constitute sufficient compensation for moral injuries.¹⁹⁹ In considering this approach in the *El Amparo Case*, however, the Court wisely held that when the violation is serious, such as the violation of the right to life, principles of equity mandate that the victims and families should also receive monetary compensation.²⁰⁰ The Court has consistently awarded moral damages for serious violations of human rights and should continue to do so. To date, the Court has not been confronted with less egregious violations. In the future, when cases of less serious human rights violations are before the Court, it may be sufficient to compensate the victim financially for actual losses and allow the Court's judgment to compensate for any moral damages.

2. Proof of Moral Injury

The Commission need not prove moral injury to the victim. Moral injury to the victim can be presumed from the character of the abuse. The Court has noted that "it is characteristic of human nature" that any person subjected to State aggression and abuse will experience moral suffering.²⁰¹ With this understanding of human nature, it would appear that no evidence beyond the State's admission of responsibility for the violation is required to prove moral damages to the victims.

In cases where the Court ordered moral damages for the suffering of indirect victims, the Court has considered the relationship of the claimants

199. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 35 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4; *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 56 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

200. *Id.*

201. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 52 (1993).

to the victim in determining whether moral injury must be proved. In the *Aloeboetoe Case*, the Court held that the moral suffering of the parents could be presumed as a result of the cruel death of their sons.²⁰² In the *Velásquez Rodríguez* and *Godínez Cruz* cases, in which the State did not voluntarily accept responsibility for the disappearances of the victims, the Commission produced expert psychiatric testimony as to the psychological problems suffered by the wives and children of the men who had disappeared.²⁰³

D. Rehabilitation

To date, the Inter-American Court has had no opportunity to order physical rehabilitation for victims of human rights violations. All but two of the victims for whom reparations have been ordered were deceased or missing.²⁰⁴ The only two surviving victims were fishermen who survived the attack at El Amparo.²⁰⁵ Presumably they did not require rehabilitation as the Commission did not request it.

Physical rehabilitation is not the only type of rehabilitation that the Court could order. The Court could also accede to requests for reparations that would rehabilitate the reputations of the victims. In some instances in Latin America, States that abused human rights pursued policies that maligned victims by accusing them of being subversives, terrorists, enemies of the State, or common criminals. The Decree establishing the Chilean Truth Commission explains the rationale underlying the rehabilitation of the victim's reputation: "only the knowledge of truth will restore the dignity of the victims in the public mind, allow their relatives and mourners to honor them fittingly, and in some measure make it possible to make amends for the damage done."²⁰⁶ Some public action on the part

202. *Aloeboetoe Case* (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 76 (1993). The Court reasoned that "it is essentially human for all persons to feel pain at the torment of their child." *Id.*

203. *Godínez Cruz Case* (Compensatory Damages), 8 Inter-Am. Ct. H.R. (ser. C) para. 49 (1989); *Velásquez Rodríguez Case*, (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 51 (1989). In awarding moral damages, the Court did not distinguish between those damages awarded to the beneficiaries for the victim's suffering and those awarded to the beneficiaries for their own suffering. Although this approach may not be analytically satisfactory, the European system also does not make a clear distinction. In both systems such damages are based on equitable principles.

204. *El Amparo Case* (Reparations), ___ Inter-Am. Ct. H.R. (ser. C) para. 37 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

205. *Id.*

206. Decree Establishing the National Commission on Truth and Reconciliation, Supreme Decree No. 365 (Apr. 25, 1990) reprinted in REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Philip E. Barryman, trans. 1993) [hereinafter CHILEAN REPORT]. See also NETHERLANDS INSTITUTE OF HUMAN RIGHTS, *supra* note 162, at 12 ("[T]he

of the State, which would serve to admit that those who were killed or who remain disappeared were innocent victims, could serve to rehabilitate their reputations.²⁰⁷

E. Satisfaction

Satisfaction is awarded in cases in which the injury "cannot be repaired."²⁰⁸ It is most often granted when there has been a moral wrong in addition to material harm.²⁰⁹ A judgment on the merits in a human rights case "is in itself a type of reparation and moral satisfaction of significance and importance for the families of the victims."²¹⁰ Moreover, a judgment against the State contributes to the clearing of the victim's name, which in addition to rehabilitating the reputation of the victim, may also be a form of satisfaction.

1. Forms of Satisfaction Ordered by the Inter-American Court

In addition to the judgment itself, the Inter-American Court has also ordered two forms of satisfaction specifically tailored to the types of violations which most commonly come before the Court. First, when confronted with victims who have been forcibly disappeared, the Court has required the State to use all means available to inform the families of

revelation of the truth is a useful means to remove the stigma from the victims who are burdened by a sense of responsibility for their own victimization. . . . Society is often inclined to treat victims with a shunning or shame because it is thought that they must have done something wrong to bring about their victimization. Public disclosure of the facts will make it clear that the victim was not responsible or guilty of causing his/her own harm.").

207. The Court, however, has not acceded to requests from the families of the victims to order the Government to honor the memory of the disappeared by, for example, naming a street, park, or other public structure after them. For the families' requests, see *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 20 (1993); *Godínez Cruz Case (Compensatory Damages)*, 8 Inter-Am. Ct. H.R. (ser. C) para. 6 (1989); *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) para. 7 (1989). These actions could serve to rehabilitate the good name of the victims.

208. GARCIA-AMADOR, *supra* note 45, at 572. Although satisfaction was traditionally granted to the State of the injured alien, this was not necessarily the case. Garcia-Amador notes that "even in cases involving the reparation of injuries sustained by private individuals where the question of 'moral injury' to the State of nationality is not raised, certain measures are sometimes applied which imply 'satisfaction', given to the individual concerned rather than reparation *stricto sensu*, however, this is a question of terminology and not of substance." *Id.* at 573.

209. *Id.* at 572. While most other forms of reparations are compensatory in nature, some forms of satisfaction are considered to be punitive. *Id.* at 574-75.

210. *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) para. 36 (1989). The European Court has repeatedly held that in regard to nonpecuniary damage, the Court's judgment constitutes "sufficient just satisfaction for the purposes of Article 50." *Manifattura Fl v. Italy*, 230-B Eur. Court H. R. (ser. A) at 21 (1992).

the victims' fate and to locate their remains.²¹¹ Second, the Inter-American Court has indicated that the State has a continuing duty to punish the violators of human rights.²¹² In the judgment on the merits of the *Caballero Delgado and Santana Case*, the Court stated that "reparations should consist of the continuation of the judicial proceedings for the clarification of the disappearance of Isidro Caballero Delgado and María del Carmen Santana and punishment in conformance with Colombian domestic law."²¹³

The Court's ruling may provide a means of satisfaction for the family of the victims if the domestic laws of the State provide for punishment. Difficulties may arise, however, if the State has promulgated an amnesty law that grants *de jure* impunity to the violators of human rights.²¹⁴ Where impunity prevails, a victim's right to reparation for gross violations of human rights and fundamental freedoms "is likely to become illusory."²¹⁵ The amnesty laws passed in many States, which prohibit the prosecution of alleged violators, may not be compatible with the States' international obligations to provide an effective remedy.²¹⁶ These domestic laws should not be the concern of an international court, however. As provided in the Vienna Convention on the Law of Treaties, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."²¹⁷ Given this principle of international law, the Court in ordering reparations should require that the State, as satisfaction, investigate human rights crimes and punish the violators. If the State's duty to punish is

211. Aloeboetoe Case (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 109 (1993) (quoting the Godínez Cruz Case (Merits), 5 Inter-Am. Ct. H.R. (ser. C) para. 191 (1989) and the Velásquez Rodríguez Case (Merits), 4 Inter-Am. Ct. H.R. (ser. C) para. 181 (1988)).

212. Godínez Cruz Case (Compensatory Damages), 8 Inter-Am. Ct. H.R. (ser. C) para. 32 (1989); Velásquez Rodríguez Case (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 34 (1989).

213. Caballero Delgado and Santana Case (Merits), 22 Inter-Am. Ct. H.R. (ser. C) para. 69 (1995).

214. See generally Pasqualucci, *The Whole Truth*, *supra* note 26.

215. Van Boven Report, *supra* note 95, para. 130. Van Boven further stated that "[i]t cannot be ignored that a clear nexus exists between the impunity of perpetrators of gross violations of human rights and the failure to provide just and adequate reparation to the victims and their families or dependents." *Id.* para 126.

216. Van Boven stated:

In many situations where impunity has been sanctioned by the law or where de facto impunity prevails with regard to persons responsible for gross violations of human rights, the victims are effectively barred from seeking and receiving redress and reparation. In fact, once the State authorities fail to investigate the facts and to establish criminal responsibility, it becomes very difficult for victims or their relatives to carry on effective legal proceedings aimed at obtaining just and adequate reparation.

Id. at 51.

217. Vienna Convention on the Law of Treaties, *supra* note 13, art. 27.

made dependent on the internal law of the State, the fundamental objectives of the American Convention will be undercut by the ability of States to define this aspect of their human rights obligations without regard to the concerns of the international community.

2. Possible Limits on the Court's Authority to Order Satisfaction

The Inter-American Court may be concerned about limits on its authority to direct the State to take action.²¹⁸ Although the Court has broad powers to order remedial measures under Article 63(1),²¹⁹ it could be argued that its authority does not extend to an order to punish the violators. According to this argument, punishment of the violators may not be contemplated under any of the three prongs of Article 63(1), in that it may not ensure the victim enjoyment of the right violated, remedy the consequences of the situation that constituted the breach, or provide fair compensation. The Court has stated, however, that an order to investigate the facts of the violation or to punish those responsible "would constitute a part of the reparation of the consequences of the violation of rights or freedoms."²²⁰ The second prong of Article 63(1) would therefore encompass punishment of human rights violators as ordered by the Court.²²¹ In further support of its authority to order punishment, the Inter-American Court has interpreted Article 63(1) to require *restitutum integrum*, full restitution, in accordance with general principles of law whenever possible. As stated earlier, the remedy of full restitution includes the duty to

218. The Convention authorizes the Court to order a State to take provisional measures to protect certain persons. American Convention, *supra* note 14, art. 63(2). The Court does not generally determine the specific measures to be taken, leaving that decision to the States. If the State, however, fails to adopt adequate measures, the Court can make specific demands on the State. In its orders of provisional measures, the Court has also ordered the State to investigate violations and to punish perpetrators. See Jo M. Pasqualucci, *Provisional Measures in the Inter-American Human Rights System: An Innovative Development in International Law*, 26 VAND. J. TRANSNAT'L L. 803, 842-44 (1993). Whether the Court issues that order because the State will incur international liability if it does not investigate and punish, or because the State must do so as satisfaction for the victims, is irrelevant in this context.

219. See *supra* Part I.

220. Velásquez Rodríguez Case (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 33 (1989). The American Convention provides that the victim of a human rights violation must have recourse to a competent court even though the "violation may have been committed by persons acting in the course of their official duties." American Convention, *supra* note 14, art. 25(1). In this regard, the American Convention requires that the State undertake the obligation "to ensure that any person claiming such remedy shall have his rights determined by the competent authority." *Id.* art. 25(2) (emphasis added).

221. Bissonnette argued that the combined employment of satisfaction and other reparations "accomplishes the purpose of 'wiping out . . . all the consequences of the unlawful act or omission.'" GARCIA-AMADOR, *supra* note 45, at 573 (quoting P.A. BISSONNETTE, LA SATISFACTION COMME MODE DE RÉPARATION EN DROIT INTERNATIONAL 55-56 (1952)).

investigate and punish.²²² Consequently, domestic amnesty laws which legislate impunity should not inhibit the Court from ordering the State to punish those who violate human rights.

The question also arises as to whether the Court maintains the authority to rule on the international illegality of a domestic law after the State has already accepted responsibility for a human rights violation. In the *El Amparo Case*, the Commission requested that the Court assess the compatibility of particular provisions of the Venezuelan Code of Military Justice with the American Convention.²²³ The Court, in accepting the State's acknowledgement of responsibility, held that the subsequent phase of the proceedings would deal solely with questions of reparations and not with the question of compatibility. Although Judge Cancado Trindade concurred in the judgment of the Court, in a separate opinion he argued that the Court should have expressly reserved the authority to decide upon the compatibility of the Venezuelan law in question with the American Convention.²²⁴ Persuasive arguments exist on both sides of this debate. On the one hand, the State may be more likely to accept international responsibility if it can thereby avoid such a decision of the Court. On the other hand, the Court may have a duty to the development of human rights law to rule on compliance of domestic laws with the Convention.

3. Apology as Satisfaction

The Inter-American Court has never ordered a State to apologize for a violation, a form of satisfaction not uncommon under the principles of

222. Some international treaties and international legal scholars maintain that punishment of the violator is part of the remedy to be accorded the victim. Pasqualucci, *The Whole Truth*, *supra* note 26, at 353-56.

Responsibility involves for the State concerned an obligation to make good the damage suffered in so far as it results from failure to comply with the international obligation. It may also, according to the circumstances, and when this consequence follows from the general principles of international law, involve the obligation to afford satisfaction to the State which has been injured in the person of its national, in the shape of an apology (given with the appropriate solemnity) and (in proper cases) the punishment of the guilty person.

GARCIA-AMADOR, *supra* note 45, at 572 (quoting Preparatory Committee of the Hague Conference, *Basis of Discussion No. 29*, League of Nations Publ. Ser. V. Legal 1929 V. 3 (1929)).

223. *El Amparo Case (Merits)*, 19 Inter-Am. Ct. H.R. (ser. C) para. 4 (1995).

224. *Id.* (A. A. Cançado Trindade, J., concurring). In the subsequent judgment on reparations, the Court held that it could not decide on the conformity of the Venezuelan Code of Military Justice with the American Convention on Human Rights because the Code had not been applied in the *El Amparo Case*. The Court quoted an earlier advisory opinion in which it stated that the Court could not resolve abstract cases through contentious procedures. *El Amparo Case (Reparations)*, — Inter-Am. Ct. H.R. (ser. C) para. 59 (Sept. 14, 1996), *to be reprinted in THE 1996 ANNUAL REPORT*, *supra* note 4. In his dissenting opinion, Cancado Trindade stated that an existing law can violate rights even when it has not been applied because of the actual threat to particular persons. *Id.* (A. A. Cançado Trindade, J., dissenting).

the International Law of State Responsibility for Injury to Aliens. Under traditional international law, the apology was extended from one State to another, and not from a State to an injured individual.²²⁵ In recent years, international law has evolved, and States now have direct obligations to individuals as well.²²⁶ It may not be acceptable at this time in history for a Court, whose very jurisdiction must be expressly accepted by the State Party, to demand that a sovereign State apologize to an individual. It will, however, be a sign of the true advancement of human rights when a Court such as the Inter-American Court can order the State to apologize for an egregious violation, or in the case where the State accepts international responsibility, that, as an act of grace, it voluntarily and publicly make such an apology to the victim or the family. An apology should not be considered a blemish on the honor of the State; it would instead be a mark of honor for the State to disown abusive acts and express its regret that those acts were perpetrated in its territory.²²⁷

F. No Punitive Damages

The Inter-American Court has not awarded punitive damages for even the most egregious of human rights violations. The Court interpreted the American Convention requirement that "fair compensation be paid to the injured party" to include only compensatory and not punitive damages.²²⁸ This interpretation is not surprising in that punitive damages are not authorized in civil law systems, and, even in the United States, they are often under attack.²²⁹ In the Anglo-American system, domestic courts may award punitive damages when a wrongful act was aggravated by violence, oppression, malice, or wanton and wicked conduct by the defendant.²³⁰ The award of punitive damages is then meant to punish the defendant for the evil behavior or outrageous conduct and to set a deterring example for similar wrongdoers.²³¹ Such an award is above and beyond the amount

225. GARCIA-AMADOR, *supra* note 45, at 569.

226. *See generally*, Sohn, *supra* note 11.

227. Unfortunately, current reality in many States is still far removed from this vision. In fact, States have often declared that those who even report human rights abuses are traitors to the State.

228. Velásquez Rodríguez Case (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 38 (1989).

229. *High Court Examines, Gingerly, Issue of Punitive Damages' Limit*, N.Y. TIMES, October 12, 1995, at A18.

230. KEETON ET AL., *supra* note 84, at 9–10.

231. *Id.* Attorneys for the victims in the Honduran disappearance cases requested punitive damages because the cases involved "extremely serious violations of human rights." Godínez Cruz Case (Compensatory Damages), 8 Inter-Am. Ct. H.R. (ser. C) para. 35 (1989); Velásquez Rodríguez Case (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 37 (1989).

necessary to compensate the plaintiff for loss.²³²

An award of punitive damages is often considered to be an unjustified windfall to the plaintiff. The families of the victims who requested punitive damages in the *Velásquez Rodríguez* and *Godínez Cruz* cases, however, did not intend to keep any punitive damages awarded. Instead, they formally promised the Court that all punitive damages would be donated to a fund to benefit the families of other Honduran disappearance victims.²³³ The Court did not grant this request.

Although the Inter-American Court did not award punitive damages in these cases, it did not preclude the possibility of a future punitive award. The Court acknowledged that punitive damages are awarded in some domestic courts, but held that the principle of awarding punitive damages "is not applicable in international law at this time."²³⁴ The limitation "at this time" allows for the possibility that at some future time punitive damages might be awarded in the Inter-American system. If punitive damages were not awarded in the *Velasquez Case*, however, where the violation was so egregious and the State did not accept international responsibility, it is difficult to imagine a case in which punitive damages would be awarded by the Inter-American Court.²³⁵

232. KEETON ET AL., *supra* note 84, at 9.

233. Briefs of the Velásquez Rodríguez and Godínez Cruz Families to the Inter-American Court, March 10, 1989 at 9-10.

234. Velásquez Rodríguez Case (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 38 (1989); Godínez Cruz Case (Compensatory Damages), 8 Inter-Am. Ct. H.R. (ser. C) para. 36 (1989).

Whiteman stated in DAMAGES IN INTERNATIONAL LAW:

Since the prevention of the crime is far more desirable than any later punishment of the guilty, no matter how promptly or effectively this latter may be accomplished, where it can be proven that the state was on notice of a pending disorder, or crime, and being able, nevertheless failed to prevent or suppress its commission, higher indemnities should be allowed than in those cases where there was no notice or opportunity to prevent the crime. Where the state fails in its duty to prevent, it would seem that justification may be said to exist here, if ever, for *punitive or exemplary damages*. A state which has knowledge that crime is brewing and, being able to prevent the injury, nevertheless does nothing to prevent it, is as culpable in its conduct as those who participate in the crime. Without using the language of complicity, it is possible to look at the wrong of the state under such circumstances as a separate wrong apart from the offense committed by its national.

WHITEMAN, *supra* note 7, at 36 (emphasis added). See also CHRISTINE GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 26-28 (1991) for a discussion of punitive damages in international law.

235. In approaching the issue of punitive damages in future cases, the Inter-American Court could consider the reasoning in *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 865 (E.D.N.Y. 1984). In *Filartiga*, the district court awarded punitive damages because it was "essential and proper to grant the remedy of punitive damages in order to give effect to the manifest objectives of the international prohibition against torture." *Id.* The court also emphasized that

G. Expenses, Costs, and Attorneys' Fees

Once State responsibility has been established, the Court may then order the State to pay the expenses borne by the families in investigating the whereabouts of the victim and in processing the case at the domestic level.²³⁶ The effort involved in investigating the fate of the victims, in taking the necessary actions to exhaust domestic remedies,²³⁷ and in bringing a case before the Inter-American Commission and Court can be costly.²³⁸ In the Inter-American system, most of the domestic expenses are initially borne by the victim's family. Subsequently, nongovernmental organizations and attorneys interested in the precedential nature of the cases often volunteer their services *pro bono* before the Inter-American Commission and Court. The families seldom, therefore, have incurred attorneys' fees for bringing their cases before the organs of the Inter-American system.

Originally, the Court required that expenses, which must actually be incurred by the victims or their families, be pleaded and proved by the Commission.²³⁹ It is often difficult, however, for the Commission to provide adequate proof of expenses incurred where the living conditions

punitive damages aim to deter similar wrongful conduct and that "[t]o accomplish that purpose this court must make clear the depth of the international revulsion against torture and measure the award in accordance with the enormity of the offense. Thereby the judgment may perhaps have some deterrent effect." *Id.* at 866.

236. See Caballero Delgado and Santana Case (Merits), 17 Inter-Am. Ct. H.R. (ser. C) paras. 71 and 72(6) (1995); Aloeboetoe Case (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) paras. 94, 95, and 111 (1993).

However, the Court has dismissed the Commission's requests for all costs and expenses, including presumably those incurred by the family, when the Court has inferred State responsibility because the State has failed to provide information requested by the Court. See *supra* Part IV.B.4. This decision could have the unfortunate repercussion of encouraging States to withhold incriminating information to minimize the extent of their financial responsibility to the victims.

237. American Convention, *supra* note 14, art. 46(a).

238. There are no filing fees to bring a case before the Commission and the Court. There are other expenses, however, such as the costs of providing the necessary documents and attending the public hearings.

239. In the *Velásquez Rodríguez* and *Godínez Cruz* cases, the Court stated that the expenses incurred by the family in investigating the whereabouts of the victim are theoretically a part of the damages which may be awarded, but it did not award expenses in these cases because they had neither been pleaded nor proved. *Godínez Cruz Case* (Compensatory Damages), 8 Inter-Am. Ct. H.R. (ser. C) para. 40 (1989); *Velásquez Rodríguez Case*, (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 42 (1989). In the *Aloeboetoe Case*, the Court awarded the amounts claimed as expenses by the families for investigating the disappearance of the victims. *Aloeboetoe Case* (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 94-5 (1993). The Court did not award the costs of exhausting domestic remedies, however, because these had not been incurred directly by the families. When these expenses have been borne by the family, the practice of the Court should require that the State reimburse them.

of the families hampered conservation of receipts.²⁴⁰ The Court dealt with this recurring problem in its most recent reparations judgments. In *El Amparo* and *Neira Alegria* cases, the Court ruled that “[e]ven when no evidence whatsoever has been presented as to the amount of expenses, the Court considers it equitable to award \$2000 to each of the families of the . . . victims as compensation for expenses incurred in taking domestic action.”²⁴¹ Again, the decision of the Court to award a set amount obviates the socio-economic difficulties of providing proof of expenses and provides a basis for settlement of the case. On the other hand, it leaves the Court vulnerable to charges that the awards are arbitrary. For instance, in *El Amparo*, the Court ordered Venezuela to pay fourteen families of victims and two surviving victims two thousand dollars each, for a total of \$32,000 in expenses.²⁴² One would assume that the families acted in concert in bringing actions before the domestic authorities and that the award, therefore, probably multiplies the expenses actually incurred. It is also an open question as to whether the Court will award a greater amount of actual expenses if the Commission presents adequate proof of additional expenses.

As to attorneys’ fees, the Court has refused the Commission’s requests to order the State to pay the fees of private attorneys who represent the victims before the Commission and who serve as advisors to the Commission before the Court.²⁴³ To date, all of the attorneys who represented complainants before the Inter-American Commission, in cases that then were sent to the Court, have been employed by nongovernmen-

240. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 18 (Sept. 14, 1996), *to be reprinted in* THE 1996 ANNUAL REPORT, *supra* note 4.

241. *Id.* para. 21; *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 42 (Sept. 14, 1996), *to be reprinted in* THE 1996 ANNUAL REPORT, *supra* note 4. In the *El Amparo Case*, the Court also granted the amount of \$2000 in expenses to each of the surviving victims.

242. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 21 (Sept. 14, 1996), *to be reprinted in* THE 1996 ANNUAL REPORT, *supra* note 4.

243. *See, e.g., Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) paras. 112–14 (1993). In the Inter-American system, the complainant has the right to name an attorney to assist in the action before the Commission. Regulations of the Inter-American Commission on Human Rights, art. 27, modified June 29, 1987, *reprinted in* 2 HUMAN RIGHTS, *supra* note 32, Booklet 9.2, at 10. Subsequently, however, if either the Commission or the State refers the case to the Court, the claimant does not have the status of “party” to the case, and therefore does not have the right to legal representation before the Court. Only the Commission and the State Party involved have standing before the Court. American Convention, *supra* 14, at art. 61. The Court has partially remedied this situation by providing in its rules of procedure that the Commission may name the victims’ attorneys as assistants to the Commission before the Court. RULES OF THE COURT, *supra* note 56, art. 22. *See* Pasqualucci, *The Inter-American Human Rights System*, *supra* note 17, at 320; *see generally*, Claudio Grossman, *Disappearances in Honduras: The Need for Direct Victim Representation in Human Rights Litigation*, 15 HASTINGS INT’L & COMP. L. REV. 363 (1992).

tal organizations and have served pro bono.²⁴⁴ Consequently, the claimant has not been under an obligation to pay them. Nonetheless, the Commission has requested that the Court award attorneys' fees. The Court has refused this request, stating that if the Commission fulfills its function by "contracting outside professionals instead of using its own staff," it could not demand attorneys' fees.²⁴⁵ Presently there are qualified and dedicated lawyers who are willing to undertake uncompensated assistance; thus, the current arrangement may continue to function in the Inter-American system. If, however, nongovernmental organizations lose other sources of funding, victim representation in the Inter-American system may be adversely affected.

In the European human rights system, the compensation awarded by the Court includes attorney's fees and other expenses paid by the victim to bring a case at the domestic level and before the European Commission and Court.²⁴⁶ The applicant's attorney is generally awarded attorneys' fees when the Court rules that the State violated the applicant's rights. In determining the amount of an award of costs and expenses, the European Court ascertains "whether the costs and expenses claimed were actually incurred, necessarily incurred and reasonable as to quantum."²⁴⁷ Thus, if the applicants are not under an obligation to pay the attorney, the European Court holds that the costs have not been "actually incurred"

244. For example, Dr. Claudio Grossman was a professor for American University at the time that he represented the applicants in *Aloeboetoe*. He specified to the Court that he had rendered his services *pro bono* and that any recovery for attorney's fees would accrue to the nongovernmental organizations he represented. Padilla, *supra* note 23, at 548-49.

245. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 114 (1993). The Commission operates on a limited budget with a small staff which does not have the time or resources to fully prepare each case. See Pasqualucci, *The Inter-American Human Rights System*, *supra* note 17, at 355-59.

246. VAN DIJK & VAN HOOF, *supra* note 41, at 170 (citing Judgment of April 7, 1961, 2 Eur. Ct. H.R. (ser. A) at 24 (1961)). The European Court amended the Rules of the Court to allow the original applicant to present his own case or to have it presented by his representative independently from the Commission. The applicant is usually represented by an attorney. *Id.* at 170. The European Commission is not a party to the case before the Court, as is the Inter-American Commission; it is rather a "representative of the public interest." *Id.* at 161-62.

247. *Inze v. Austria*, 126 Eur. Ct. H.R. (ser. A) at 21 (1987). See VAN DIJK & VAN HOOF, *supra* note 41, at 178-79. Article 50 of the European Convention provides:

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

European Convention, *supra* note 12, art. 50. The European Court awarded the costs incurred by the victim for an expert witness who testified in proceedings before the domestic court. *Inze v. Austria*, 126 Eur. Ct. H.R. (ser. A) at 21 (1987).

and does not compensate for them.²⁴⁸

Unlike the European human rights system, the Inter-American Court refuses to reimburse any costs of litigation before the Commission and the Court, whether these costs are borne by the Commission or by nongovernmental organizations.²⁴⁹ The Court recently adopted a procedural rule specifying that the party that proffers evidence must cover the costs associated with bringing that evidence before the Court.²⁵⁰ In the *Caballero Delgado and Santana Case*, the Commission requested that the State be ordered to pay the costs incurred by the counsel of the Commission in bringing witnesses to testify.²⁵¹ The Court denied this request, stating that "the Commission cannot demand that expenses incurred as a result of its own internal work structure be reimbursed through the assessment of costs. The operation of the human rights organs of the American system is funded by the Member States by means of their annual contributions."²⁵²

It is generally recognized, however, that the funding of the Inter-American human rights organs is inadequate.²⁵³ The Court's failure to

248. *McCann and Others v. the United Kingdom*, 33 Eur. Ct. H.R. (ser. A) at paras. 220–21 (1995). The European system provides indigent complainants with legal aid to pay attorneys' fees as well as travel, hotel, and other necessary expenses for the victim and attorney to appear before the Commission and the Court. See VAN DIJK & VAN HOOF, *supra* note 41, at 64 (citing *Rules of Procedure of the European Commission of Human Rights*, Addendum to the Rules, art. 4(2), in COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS, COLLECTED TEXTS 117, 139 (Strasbourg 1987)). Should the victim be vindicated and the Court award attorney's fees, the amount of legal aid received by the victim may be subtracted from the award. *McCann and Others v. the United Kingdom*, 33 Eur. Ct. H.R. (ser. A) at para. 222. The Inter-American system does not currently have the funding to provide legal aid. Should adequate funding be available in the future, it would be beneficial if the OAS allocated funds for legal aid in that it would encourage local attorneys to pursue cases within the Inter-American system.

249. Originally, in the *Velásquez Rodríguez and Godínez Cruz* cases, the Court did not rule on the costs of litigation because of the Commission's failure to plead them. *Velásquez Rodríguez Case (Merits)*, 4 Inter-Am. Ct. H.R. (ser. C) para. 193 (1988); *Godínez Cruz Case (Merits)*, 5 Inter-Am. Ct. H.R. (ser. C) para. 202 (1989). In the *Aloeboetoe Case*, it appeared that the Court denied costs in part due to the Government's acceptance of international responsibility. The Court held that as "Suriname has expressly accepted its international responsibility and has not in any way hindered the proceedings for the fixing of reparations, the Court dismisses the Commission's request for reimbursement of costs." *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 115 (1993). See also *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 63 (Sept. 14, 1996), *to be reprinted in THE 1996 ANNUAL REPORT*, *supra* note 4; *Neira Alegria Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. (Sept. 14, 1996), *to be reprinted in THE 1996 ANNUAL REPORT*, *supra* note 4.

250. RULES OF THE COURT, *supra* note 56, art. 45.

251. *Caballero Delgado and Santana Case (Merits)*, 17 Inter-Am. Ct. H.R. (ser. C) para. 23(6) (1995).

252. *Id.* para. 70 (quoting *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 114 (1993)).

253. See Pasqualucci, *The Inter-American Human Rights System*, *supra* note 17, at 355–59.

award costs may result in a serious limitation on the number and types of cases that the Commission can afford to refer to the Court.²⁵⁴ It is not in keeping with the spirit of the enforcement of human rights if the Commission must first consider whether the financial burden of bringing a particular case before the Court is acceptable. The Commission's decision should be based solely on the merits of the individual case and its precedential value for international human rights law. If the States that are liable for human rights violations are not required to pay the costs of the case, all States in the Organization of American States (OAS) should pay toward adequately funding the Commission and the Court.

V. DISTRIBUTION OF DAMAGE AWARDS TO BENEFICIARIES WHEN THE VICTIM IS DECEASED

The Inter-American Court has established definitive criteria for the distribution to beneficiaries of damages when the direct victim of the human rights violations is deceased or remains disappeared. In general, the Court divides the damages between the children, spouse, and parents of the victim. To date, the married deceased victims have all been male. The Court has awarded the wife of the victim only a one-quarter to one-third share of each category of damages.²⁵⁵ The larger portion is paid to the victim's children, and, in some cases, the compensation is also divided with the parents of the victim. In both the *Velásquez Rodríguez* and the *Godínez Cruz* cases, the Court awarded only one-fourth of the amount of material compensation to the wife and three-fourths to the children.²⁵⁶ This apportionment was used even when there was only one child with whom to share the award. Thus, in the *Godínez Cruz Case* the daughter received three-quarters of the judgment in trust and her mother the remainder.²⁵⁷

254. As mentioned above, the Commission and the Court do not receive the funding necessary to staff and investigate effectively complaints and cases. *Id.* The costs of a case would presumably include the expenses of hiring expert witnesses or bringing witnesses to the Commission in Washington and the Court in Costa Rica for the hearings on the case. Costs could also include the expenses of fact-finding missions to the State. The Court also refrains from assessing any expenses incurred by the Court in investigating the case. *Aloeboetoe Case* (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 114 (1993).

255. The Court used the term "wife" rather than spouse. Presumably the same criteria will apply if the victim is a deceased, married female.

Only in the *Gangaram Panday Case*, in which the Court awarded \$10,000 for the illegal detention of the victim who died in custody, did the Court grant the widow one-half of the compensation. The other half was to be paid to the children if the victim had children. *Gangaram Panday Case* (Merits), 16 Inter-Am. Ct. H.R. (ser. C) para. 70 (1994).

256. *Velásquez Rodríguez Case* (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 58 (1989); *Godínez Cruz Case* (Compensatory Damages), 8 Inter-Am. Ct. H.R. (ser. C) para. 53 (1989).

257. *Godínez Cruz Case* (Compensatory Damages), 8 Inter-Am. Ct. H.R. (ser. C) para. 53 (1989).

Another important factor in the distribution of damage awards is the Court's requirement that trust funds be established for awards to children and even, in some instances, for adults. In the *Velásquez Rodríguez* and *Godínez Cruz* cases, the Court specified that the children receive monthly payments from the trust fund.²⁵⁸ In the *Aloeboetoe Case*, however, the Court required that the mothers themselves provide the children with assistance, food, clothing, and education.²⁵⁹ The money held in trust for the children of the victims was "to cover subsequent study expenses, or else to create a small capital when they begin to work or get married."²⁶⁰ The *Aloeboetoe* judgment also specified that the money in trust for the children be used for ordinary expenses only when "grave problems or health or family finances require it."²⁶¹

The Court has not stated its reasons for granting widows only a small share of the award. The Court's holding may reflect societal factors more common in Latin America such as that children are expected to care for their aging parents, that it is more acceptable for nonmarried women to work outside the home, or that the woman may remarry and be supported by her husband. Whatever the societal influences on the Court, the small proportion of the award appears to be inequitable to the mothers who must now provide for their children alone and who may not have spousal assistance in their old age. The American Convention specifies that the responsibilities of the spouses should be balanced adequately in marriage.²⁶² The husband, had he lived, would have contributed his wages to the support of the family. The actual damages awarded for lost wages, which represent the amount that the victim would have contributed to the support of the family, should therefore be allocated for that purpose. It seems unfair that the wife should now shoulder that burden alone and that the husband's share be reserved for the children's later needs. None of the families awarded compensation to date have been wealthy.

The Court has recently clarified its criteria for the division of damages between the beneficiaries. The Court apportions the actual damages, including lost wages, between the beneficiaries as follows. One-third is

258. *Velásquez Rodríguez Case*, (Compensatory Damages), 7 Inter-Am. Ct. H.R. (ser. C) para. 58 (1989); *Godínez Cruz Case* (Compensatory Damages), 8 Inter-Am. Ct. H.R. (ser. C) para. 53 (1989).

259. *Aloeboetoe Case* (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 106 (1993).

260. *Aloeboetoe Case* (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 106 (1993).

261. *Id.*

262. American Convention, *supra* note 14, art. 17(4). Article 17(4) of the American Convention requires that "[t]he States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution." *Id.*

awarded to the spouse of the deceased and two-thirds to the children who divide their share equally.²⁶³ If the victim was not married but had a companion, the spouse's portion is to be paid to the companion.²⁶⁴ If the victim had both a spouse and a companion, presumably only the legal spouse will be compensated.²⁶⁵ Should the victim have neither a spouse nor a companion, the corresponding part of the damages is to be paid to the victim's parents, even though they may not be involved in supporting the victim's children.²⁶⁶ In most cases, the criteria developed by the Court for the distribution of damages to the beneficiaries will be equitable in that the money will be used to support any children of the victim. The situation could arise, however, wherein the children are orphaned and are not in the care of the parents of the victim who receive the spouse's allocation of the damages. In this case, the actual damages, a portion of which is lost wages, will not be used for the support of the victim's children. This situation could be avoided if the Court would alter its criteria to put the deceased spouse's share of actual damages in trust for the children of the victim, if there are children, rather than awarding it to the victim's parents. The trust could be structured to allow monthly interest payments for the children's support to be made to the guardians of the children.

The Court apportions moral damages one-fourth to the spouse, one-half to the children, and one-fourth to the parents of the victim.²⁶⁷ If there is no surviving spouse or companion, that share will be divided among the children.²⁶⁸ In all cases in which the parents of the victim are deceased, their share of the damages is awarded to the victim's children.

263. *El Amparo Case (Reparations)*, __ Inter-Am. Ct. H.R. (ser. C) para. 41 (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

264. *Id.* para. 41(c). Poor couples in some Third World States sometimes do not marry formally but rather become "companeros" (companions), live together, and raise children together as if they were legally married. In such a case, the Court has sagely apportioned a share of the damages to the victim's companion.

265. When a poor couple does marry, however, they seldom have the money or the access to the legal system to divorce legally if there are problems. Consequently, when they separate, each may take on another companion and start a new family. Accordingly, the criteria laid down by the Court in the *Neira Alegria Case*, in which it awarded a share of the damages to the legal wife, but not to a companion if the wife is living, does not account for social reality. Although it may be public policy to encourage men to stay with their original families, in countries that are largely Catholic, and where divorce (if available) is expensive, it is also unjust to women to disinherit the "companion" who may be raising the victim's young children. The Court should consider the particular circumstances of each case in determining beneficiaries.

266. *Id.* para. 41(d).

267. *Id.* para. 41(b).

268. *Id.* para. 41(d).

If only one parent is living, that parent receives the share of both parents.²⁶⁹ Surviving victims receive all the damages corresponding to them for their actual and moral injuries.²⁷⁰

VI. METHOD OF PAYMENT

The Court generally orders the State to pay compensation in U.S. dollars or in the equivalent amount in local currency.²⁷¹ This method of payment eliminates the problem that arose in the Honduran cases, where the Court-ordered payment in Honduran currency lost a significant portion of its purchasing power through a devaluation that occurred before the Government complied with its payment obligation.²⁷² Moreover, the Court-ordered compensation is to be free from any form of taxation.²⁷³ The Court also generally sets a time limit for payment. It may do so by specifying an exact date by which the State must pay²⁷⁴ or by specifying that the State pay within a number of months. The usual time limit for payment established by the Court has been six months.²⁷⁵ The Court then supervises compliance with the judgment and maintains the case on its docket until full compensation is made.²⁷⁶

269. *Id.* para. 41.

270. *Id.*

271. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 99 (1993). The Court has even specified the exchange rate should the State pay in local currency. In that case, the rate of exchange shall be the "selling rate for the United States Dollar and the Dutch Florin quoted on the New York market on the day before the date of payment." *Id.*

The European Court of Human Rights generally orders payment in the currency of the State of the victim. This does not present problems if the value of the currency does not fluctuate wildly. It will be interesting to note if the European system continues this practice with the entry of the Eastern European States, some of which do not have such stable currencies.

272. In the Interpretation of its judgment, the Court ordered the State to pay interest on the amount owing from the due date and to adjust the amount paid by the government to compensate for the decline in the purchasing power of the currency during the delay in payment by the government. *Godfnez Cruz Case (Interpretation of the Compensatory Damages Judgment)*, 10 Inter-Am. Ct. H.R. (ser. C) para. 40-43 (1990).

273. *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) para. 57 (1989).

274. In the *Aloeboetoe Case*, the Court held that Suriname had to pay the compensation before April 1, 1994. This allowed the State a little over six months from the September 10, 1993 date of judgment. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 116 (1993).

275. *Gangaram Panday Case (Merits)*, 16 Inter-Am. Ct. H.R. (ser. C) para. (1994). In the Honduran cases, the Court ordered Honduras to pay within ninety dates of notification of judgment or in six equal monthly installments beginning in ninety days provided that the State paid interest on the balance. *Godfnez Cruz Case (Compensatory Damages)*, 8 Inter-Am. Ct. H.R. (ser. C) para. 52 (1989); *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) para. 57 (1989). If the State delays payment past the date set by the Court, it is obligated to pay interest.

276. *Gangaram Panday Case (Merits)*, 16 Inter-Am. Ct. H.R. (ser. C) res. 5 (1994);

The Court has adopted a paternalistic role toward child beneficiaries and uneducated adult beneficiaries who are not accustomed to dealing with large sums of money. Whereas in *Velásquez Rodríguez*, *Godínez Cruz*, and *Gangaram Panday* cases the Court ordered that the State make payments directly to the adult beneficiaries,²⁷⁷ in *Aloeboetoe* the Court permitted the tribal adults to withdraw only twenty-five per cent of the sum due them immediately upon the State's payment.²⁷⁸ The remainder of the compensation to the adults in *Aloeboetoe*, and the compensation to the children in all cases,²⁷⁹ was to be placed in trust.²⁸⁰

The Court prefers to designate payments through a trust, rather than a bank account, because it has found that trusts are institutions designed to increase the real value of the assets.²⁸¹ Furthermore, the Court has not only ordered the establishment of the trusts, it has even specified many of their operational details.²⁸² In *Aloeboetoe*, the Court ordered that the trust funds be set up in dollars, "under the most favorable conditions consistent with banking practice."²⁸³ The Court interpreted the term "most favorable conditions" to mean that "any act or measure by the trustee must ensure that the amount assigned maintains its purchasing power and

Aloeboetoe Case (Reparations), 15 Inter-Am. Ct. H.R. (ser. C) para. 116(6) (1993); *Godínez Cruz Case (Compensatory Damages)*, 8 Inter-Am. Ct. H.R. (ser. C) para. 55(5) (1989); *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) para. 60(5) (1989).

277. *Gangaram Panday Case (Merits)*, 16 Inter-Am. Ct. H.R. (ser. C) para. 70 (1994); *Godínez Cruz Case (Compensatory Damages)*, 8 Inter-Am. Ct. H.R. (ser. C) para. 53 (1989); *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) para. 58 (1989).

278. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 102 (1993).

279. One possible exception is *Gangaram Panday*, in which the Court ordered that half of the nominal compensation awarded be paid to the children "if any." If there were children, the Court did not set up a trust fund. This may be due to the fairly small amount of the children's share, which was \$5,000. *Gangaram Panday Case (Merits)*, 16 Inter-Am. Ct. H.R. (ser. C) para. 70 (1994).

280. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 101-02 (1993); *Godínez Cruz Case (Compensatory Damages)*, 8 Inter-Am. Ct. H.R. (ser. C) para. 53 (1989); *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) para. 58 (1989).

281. *Godínez Cruz Case (Interpretation of the Compensatory Damages Judgment)*, 10 Inter-Am. Ct. H.R. (ser. C) para. 32 (1990); *Velásquez Rodríguez Case (Interpretation of the Compensatory Damages Judgment)*, 9 Inter-Am. Ct. H.R. (ser. C) para. 32 (1990).

282. In the *Aloeboetoe Case*, the Court specified that the duration of the trusts for the adults was to be not less than three years and not more than seventeen years. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 102 (1993). The Court further ordered that upon the death of any beneficiary, he or she is to be replaced by the heirs. *Id.* para. 100.

283. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 100 (1993). The trusts set up for the children in the Honduran cases were also to be operated "under the most favorable conditions permitted by Honduran banking practice." *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) para. 58 (1989).

generates sufficient earnings or dividends to increase it."²⁸⁴ In further reflecting on the extent of the fiduciary duty of the trustee to the beneficiaries of the trust, the Court has noted that the "trustee must faithfully perform his task as would a good head of family."²⁸⁵

The Inter-American Court has even involved itself in crafting the administrative structure of the trust funds. In the *Aloeboetoe Case*, the Court set up a foundation to administer the trusts and went so far as to name the foundation members and to oversee the drafting of its statute and bylaws.²⁸⁶ This paternalistic stance could result in complaints from beneficiaries who were not given control of their money, if the foundation trustees named by the Court abuse their fiduciary duties. In the future, it might be prudent for the Court to consult the beneficiaries as to the naming of the trustees and to state that fact in the judgment of the Court.

VII. STRUCTURE OF THE PHASES OF THE COURT'S PROCEEDINGS

The Inter-American Court has treated reparations issues inconsistently, in part by varying the structure of its proceedings. Although procedurally the Court may determine reparations during the merits or in a subsequent phase of the proceedings,²⁸⁷ the Court has allocated some reparations issues to the decision on the merits and some to the later phase of the proceedings.²⁸⁸ The result has been procedural

284. *Godínez Cruz Case (Interpretation of the Compensatory Damages Judgment)*, 10 Inter-Am. Ct. H.R. (ser. C) para. 31 (1990). The Court clarified that the term "permitted by Honduran banking practice" meant that the trustee has both the power and the obligation to diversify investments including the option of depositing the money in stable currencies such as the dollar. *Id.*

285. *Godínez Cruz Case (Interpretation of the Compensatory Damages Judgment)*, 10 Inter-Am. Ct. H.R. (ser. C) para. 31 (1990); *Velásquez Cruz Case (Interpretation of the Compensatory Damages Judgment)*, 9 Inter-Am. Ct. H.R. (ser. C) pars. 31 (1990).

286. *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 103 (1993). A meeting was held at which all the members of the Foundation and the Executive Secretary of the Court defined the organization and drafted its statute and bylaws.

287. RULES OF THE COURT, *supra* note 56, art. 56(1).

288. In the *Velásquez Rodríguez* and *Godínez Cruz* cases, for instance, the Court treated aspects of reparations in the judgment on the merits and labeled the subsequent phase "compensatory damages." In its judgment on the merits, the Court ordered the State to continue to investigate the violations and to punish the perpetrators. It did not make this order a part of the resolutions of the Court on the merits. Furthermore, it did not extend this order in the damages phase of the proceedings. In its decision on compensatory damages, the Court stated that such measures "would constitute a part of the reparation of the consequences of the violation or rights or freedoms and not a part of the indemnity, in accordance with Article 63(1) of the Convention." *Godínez Cruz Case (Compensatory Damages)*, 8 Inter-Am. Ct. H.R. (ser. C) para. 31 (1989); *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) para. 33 (1989). In the *Aloeboetoe Case*, in which the Government accepted responsibility, the Court retained the case on its docket to fix "reparations and costs." It later issued a judgment entitled "reparations" which dealt with more than just financial compensation. *Aloeboetoe Case (Merits)*, 11 Inter-Am. Ct. H.R. (ser. C) para. 23 (1991); *Aloeboetoe Case (Reparations)*, 15 Inter-Am. Ct. H.R. (ser. C) para. 116 (1991).

confusion that could limit Court authority in the future.

The final stage of the Court's proceedings should consistently be entitled "Reparations (Art. 63(1) of the American Convention on Human Rights)." ²⁸⁹ During this reparations stage, the Court should determine all aspects of reparations, regardless of whether it has dealt with any aspect of reparations in the judgment on the merits. Such a procedural arrangement will assist the Court in handling the more varied types of human rights abuses it will likely confront in the future. With living victims before it, the Court will be able to make fuller use of the authority conferred on it under the American Convention to order the State to take remedial measures. ²⁹⁰ In such cases the Court will have the opportunity to order "that the injured party be ensured the enjoyment of his right or freedom that was violated." ²⁹¹ The Court may also confront cases in which it may be appropriate to order that certain "consequences of the measure or situation that constituted the breach of such right or freedom be remedied" ²⁹² Although the final phase of the proceedings should include compensatory damages when appropriate, it should not necessarily be limited to them, unless pecuniary damages are the only reparations that the Court chooses to order. Even so, as shown above, financial compensation is one form of reparation. Thus, if the Court orders only financial damages in a particular case, it would still be correct to identify that stage of proceedings as "Reparations (Art. 63(1) of the American Convention on Human Rights)."

In the *Neira Alegria Case* and the *El Amparo Case*, the Court did not deal with any aspect of reparations during the merits, but stated that the subsequent stage of proceedings would deal with compensation and the expenses of the family. In the judgment on the merits of the *Neira Alegria Case*, the Court did not refer to the State's duty to further investigate the violations, determine the whereabouts of the victims, or punish the violators. Moreover, it stated that the parties had six months to decide on "the form and extent of the compensation and the reimbursement of the expenditures" incurred by the families of the victims. *Neira Alegria Case* (Merits), 20 Inter-Am. Ct. H.R. (ser. C) para. 91(4) (1995). See also *El Amparo Case* (Merits), 19 Inter-Am. Ct. H.R. (ser. C) 21 (1995). In the *Caballero Delgado Case*, the Court stated in the judgment on the merits that as reparations the State had to punish the violators. It then held that the subsequent proceeding would fix compensation and reimbursement of expenses. *Caballero Delgado and Santana Case* (Merits), 22 Inter-Am. Ct. H.R. (ser. C) paras. 69 and 72(6) (1995).

289. *El Amparo Case* (Reparations), __ Inter-Am. Ct. H.R. (ser. C) (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4; *Neira et al. Case* (Reparations), __ Inter-Am. Ct. H.R. (ser. C) (Sept. 14, 1996), to be reprinted in THE 1996 ANNUAL REPORT, *supra* note 4.

290. See Part I *supra*.

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

292. *Id.*

The Court should not appear to be limiting its demands for reparations solely to financial payments.²⁹³ Correctly or incorrectly, when only financial compensation is ordered by the Court in the reparations phase of the proceedings, without an accompanying directive to investigate the crime or punish the violators, it may appear that it is sufficient for the State to remedy its violations if it makes a financial payment. By delineating the final stage of the proceedings as reparations and dealing with all forms of reparations in that stage, the Court avoids even the appearance of allowing the State to commit human rights violations provided that it eventually pays the victims or their families.

VIII. THE EXECUTION OF JUDGMENTS ON REPARATIONS

All judgments of the Court are final and not subject to appeal,²⁹⁴ and the States Parties agree to comply with "any judgment of the Court in a case to which they are parties."²⁹⁵ Moreover, any judgment ordering compensatory damages may be directly executed in the State in accordance with the domestic procedures that govern the execution of judgments against the State.²⁹⁶ If the State does not comply with a judgment of the Court, the Court shall note the specific instances of noncompliance and formulate pertinent recommendations in its annual report to the General Assembly of the OAS.²⁹⁷ The General Assembly may then discuss the noncompliance and, if desirable, adopt appropriate political

293. In the *El Amparo Case*, in which Venezuela took responsibility for the deaths of fourteen fishermen, the Court ignored certain requests for reparations made by the Commission. It failed to order Venezuela to sanction those responsible for the crime and to consider whether sections of the Venezuelan Code of Military Justice were incompatible with the American Convention. The Court merely ordered Venezuela to repair the damages and pay just compensation to the survivors. *El Amparo Case (Merits)* 19 Inter-Am. Ct. H.R. (ser. C) (1995). Judge Cançado Trindade, a well-known international law scholar, filed a concurring opinion stating that the Court should have reserved the right to decide on the compatibility of certain sections of the Venezuelan Military Code with the American Convention. *Id.* (A. A. Cançado Trindade, J., concurring).

294. American Convention, *supra* note 14, art. 67. A party may request the interpretation of a judgment if the parties disagree as to its meaning or scope. *Id.*; see, e.g., *Godínez Cruz Case (Interpretation of the Compensatory Damages Judgment)*, 10 Inter-Am. Ct. H.R. (ser. C) (1990); *Velásquez Cruz Case (Interpretation of the Compensatory Damages Judgment)*, 9 Inter-Am. Ct. H.R. (ser. C) (1990).

295. *Id.* art. 68(1).

296. *Id.* art. 68(2). The observer from the European human rights system, in commenting that the Inter-American Court has "considerably wider powers than the European Court," added, "Thirdly, not only do Contracting Parties undertake (as in the European Convention) to abide by the judgment of the Court (Article 68), but an order for damages will be directly enforceable in the State concerned (*idem*)—a provision recalling Articles 187 and 192 of the Rome treaty." *Council of Europe Report, supra* note 36, at 81.

297. American Convention, *supra* note 14, art 65.

measures against the delinquent country.²⁹⁸ Commenting on this procedure, the European system's observer to the American drafting conference commented that "the reporting of a state for non-compliance to the General Assembly, which will be attended by several hundred delegates and widely publicized, is undoubtedly a procedure which most governments would prefer to avoid."²⁹⁹ Thus, the Convention foresees the application of international political pressure to encourage State Parties to comply with the judgment of the Court.

The Court's attempted use of this procedure to force Honduras to comply with its judgment as interpreted in the *Velásquez Rodríguez* and *Godínez Cruz* cases was unsuccessful, however. Although Honduras had paid the compensation originally ordered by the Court in these cases, albeit late, it refused to pay the Court-ordered interest and additional amount resulting from its failure to pay on time before the devaluation of its currency. Consequently, the Court included a resolution detailing Honduras' noncompliance in its yearly report, which it expected to present to the General Assembly of the OAS. Due to the extensive lobbying campaign of Honduras, however, this statement was never officially presented to the General Assembly. Honduras reportedly threatened to withdraw its acceptance of the contentious jurisdiction of the Court if the General Assembly were to read the Court's condemnation. The General Assembly's refusal to even mildly denounce Honduras for its failure to fulfill the judgment of the Court limits the Court's ability to command enforcement of its judgments.³⁰⁰ The application of international publicity and political pressure on a recalcitrant State can be

298. Thomas Buergenthal, *The Inter-American System for the Protection of Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 439, 466-67 (Theodor Meron ed., 1984). This provision was introduced to compensate for the Committee of Ministers in the European human rights system, which can supervise the execution of a judgment.

299. *Id.*

300. The Honduran Government, however, after an extended delay, has fully paid the compensation ordered by the Court in the *Velásquez Rodríguez Case (Compensatory Damages)*, 7 Inter-Am. Ct. H.R. (ser. C) (1989) and the *Godínez Cruz Case (Compensatory Damages)*, 8 Inter-Am. Ct. H.R. (ser. C) (1989), including the additional compensation ordered as a result of the Government's failure to pay in the time provided. *Velásquez Cruz Case (Interpretation of the Compensatory Damages Judgment)*, 9 Inter-Am. Ct. H.R. (ser. C) (1990); *Godínez Cruz Case (Interpretation of the Compensatory Damages Judgment)*, 10 Inter-Am. Ct. H.R. (ser. C) (1990). LA TRIBUNA (Tegucigalpa, Honduras), February 8, 1996, Nacionales Section, at 13 (on file with the author).

Suriname made the initial payment to set up the foundation ordered in the *Aloeboetoe Case*, although it is not current on subsequent payments. Victor Manuel Rodríguez Rescá, *Eficacia Jurídica de la Jurisprudencia de la Corte Inter-Americanos de Derechos Humanos*, in LA CORTE Y EL SISTEMA INTERAMERICANOS DE DERECHOS HUMANOS 459, 469 (Rafael Nieto Navia ed., Corte IDH 1st ed. 1994). Rodríguez is a staff attorney with the Inter-American Court.

an effective means of encouraging the State to comply with its international obligations.³⁰¹ After Honduras' successful campaign to block OAS efforts to oversee compliance with Court judgments, other States may also apply such pressure, making that avenue untenable.

CONCLUSION

Although complex issues will continue to confront the Inter-American Court in the area of reparations, its rulings to date on these issues have contributed to the progressive development of international human rights law. In accordance with its broad statutory authority to order the State to take remedial measures, as well as provide financial compensation to the victims of human rights abuses, the Court has declared that the State must investigate the abuse and, if possible, punish the violators. In this regard, the Court has also ordered the State to locate the bodies of disappeared victims and return them to the families. Moreover, the Court has taken the stance that both victims and indirect victims may receive moral damages and as such must be compensated for emotional distress. Furthermore, unlike the European system, all damages owing to deceased victims are awarded to their beneficiaries. The Inter-American Court has also taken into consideration the cultural values and social structure of isolated groups in determining reparations.

In recent years, however, the Court appears to be retreating on some of these earlier progressive holdings. Although the Court initially declared that the State was obligated to make full restitution for human rights violations, it has more recently held that in some cases full restitution may not be appropriate. Moreover, the Court has also limited its holding that the State must investigate human rights abuses and punish the violators to what is required under the domestic law of the State. This would absolve States that have passed amnesty laws from their international duty to investigate and punish human rights violations. The Court also appears to be limiting what should be the reparations phase of the proceedings to financial compensation only. Should it do so, it will be abdicating its authority under the American Convention to order the State to take remedial measures.

301. The case of Nicaragua serves as an example. After a resolution was passed at the OAS Meeting of Consultation of Ministers of Foreign Affairs condemning the Somoza government's inhumane conduct with its people, Somoza finally resigned. In doing so, he stated, "What role do I play when I have the OAS down my neck?" For a complete description and analysis of these events, see Cerna, *Human Rights in Conflict with the Principle of Non-Intervention: The Case of Nicaragua Before the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs*, in *DERECHOS HUMANOS, DIREITOS HUMANOS, HUMAN RIGHTS EN LAS AMERICAS, HOMAGE TO THE MEMORY OF CARLOS A. DUNSHEE DE ABRANCHES* (OAS 1984).

Another important problem cannot be handled effectively in the Inter-American system as it is now structured. In a region which has been plagued with gross and systematic violations of human rights, there is no way to compensate more than the families of a few of the victims, those whose cases actually reach the Inter-American Court. All other victims and their families remain uncompensated. The system needs restructuring to deal with this situation.