

CONFERENCE

REPARATIONS IN THE INTER-AMERICAN SYSTEM: A COMPARATIVE APPROACH

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I. INTRODUCTION: DEAN CLAUDIO GROSSMAN¹

I am very pleased to write the introduction to the publication of the transcript of the conference *Reparations in the Inter-American System: A Comparative Approach* that took place on March 6, 2007 at *American University Washington College of Law*. This publication will enhance the understanding of what we call the law of reparations, developed in the Inter-American Court and Commission of Human Rights. Reparations have a special meaning for the victims of human rights violations and, in particular, the victims of mass and gross violations that took place in this hemisphere during the twentieth century. For those victims and their family members, reestablishing the rights as if no violation had occurred is not possible. Accordingly, to them, avoiding the repetition of those violations in the future is of paramount importance. In achieving that goal, what the victims want is the investigation and punishment of those who appear guilty as an essential component of the law of compensation. Material and moral damages, symbolic measures of redress, as well as legislative changes when needed are also crucially important.

The inter-American system's supervisory organs, within the limits of their jurisdiction, and in particular through the interpretation of Article 63 of the American Convention,² have creatively developed the law of reparations within the Americas. As a result of the decisions from the supervisory organs, what has emerged is perhaps the most comprehensive legal regime on reparations developed in the human rights field in international law.

Starting with the interpretation by the Inter-American Court of Article 1(1) of the American Convention, in the first contested case in front of the Court, *Velásquez Rodríguez v. Honduras*,³ the Court decided that it was the obligation of the state parties to the Convention to investigate and punish violations of human rights and moreover to develop a legal regime where impunity would not be tolerated. Later, the Court, basing its analysis on Article 2 of the Convention, laid down an obligation to reform domestic legislation that violated the obligations established in the Convention.

In the development of the law of compensation, we see a recognition that the Court is not just dealing with the subjective

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2. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter *American Convention*].

3. Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

rights of individuals. The nature of the issues before the Court requires consideration in its decision making of the need to ensure and guarantee compliance with the rule of law. In fact, what we are witnessing is a collapse of the distinction between subjective and objective rights, considering the fact that through its decision the Court does justice not only in a concrete case but promotes and restores the validity of the rule of law as a whole.

The decisions by the system's supervisory organs confirm time and again the importance of the qualities and backgrounds of the seven commissioners and seven judges. Their independence and knowledge have been fundamental in the development of the law of reparations. The quality of the legal argumentation presented by states, non-governmental organizations ("NGOs"), and private lawyers has also been crucial. Lawyering becomes an important narrative through which national and comparative jurisprudence strengthens hemispheric norms.

The *Washington College of Law* hopes to contribute to the quality of lawyering through many of our activities: the Academy on Human Rights, the moot court competition, and conferences like this one. The quality of the speakers, the organization of the themes, as well as the enthusiasm shown by our own students, makes me optimistic of the contribution this conference will have. The transcript that follows is concrete proof of the level and importance of this type of event. The *Washington College of Law* will continue, as an academic institution, to contribute to the system, creating an important domain for the exchange of views at the highest level. We see this as part of our strategic vision of addressing issues of our time in a diverse environment, drawing speakers from different cultures and legal traditions, united by the motivation of promoting the rule of law in the hemisphere.

The following are edited versions of speeches delivered at the conference.

II. REPARATIONS: A COMPARATIVE PERSPECTIVE

A. *Fernanda Nicola*⁴

My aim here is to narrow our focus on two detailed issues. First, I would like to look at reparations through a metaphor between the jurisprudence of the European Court of Human Rights on the one

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hand and the European Court of Justice on the other. Second, I would like to address a particular aspect of reparations in the current European regional system, namely assessing reparations by going beyond monetary damages and by casting light on the restoration of rights. In other words, how the European regional jurisprudence has brought member states into compliance with their obligations towards individuals, while at the same time shaping the domestic legal regimes.

I will start with a well-known story, the story of Cain and Abel from the Book of Genesis. You can imagine the two European courts as the two biblical brothers. Like Cain, or the bad brother, the European Court of Justice is the brother who was a farmer, who was into trade, and had fewer competences to deal with human rights issues. Like Abel, the European Court of Human Rights since 1950 was the court representing the good brother. In fact, this Court has exclusive and original jurisdiction on human rights, and thus it is considered the primary forum for human rights violations in Europe. By the end of my talk, I would like you to think about this story and consider whether this metaphor on the different roles of these two courts is still plausible.

My presentation on reparations in the European regional system focuses on four cases. Two of these cases were decided between 2004 and 2007 before the European Court of Justice, or the bad brother, and the other two were decided in 2004 before the European Court of Human Rights, or the good brother.

The two cases decided before the good brother, the European Court of Human Rights, are cases that many scholars have largely commented on because the Court showed for the first time an innovative approach towards reparations. The so-called "prisoner cases" are *Assanidze v. Georgia*⁵ and *Ilascu and Others v. Moldova and Russia*.⁶ In both cases the European Court of Human Rights moved beyond an old fashioned and limited approach to reparations. The Court had clarified on many occasions that when *restitutio in integrum* was possible, it was ultimately for the states to carry it out. In the words of the Court, "If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself."⁷ The Court had also clarified that in the cases in which *restitutio in integrum* cannot be attained, the state has the option to choose

5. App. No. 71503/01 (Eur. Ct. H.R. Apr. 8, 2004).

6. App. No. 48787/99 (Eur. Ct. H.R. July 8, 2004).

7. *Iatridis v. Greece*, App. No. 31107/96, ¶ 33 (Eur. Ct. H.R. Mar. 25, 1999).

measures to abide by the judgment, provided they are compatible with the conclusions set out in the Court's judgment.

In light of the prisoner cases, in 2004 the European Court of Human Rights took a more active role with regards to *restitutio in integrum*. In short, Abel is not only the good brother, but he is also showing his muscles. Mr. Tengiz Assanidze was the former mayor of Batumi, the capital of the Ajarian Autonomous Republic of Georgia. In October of 1993 he was arrested for illegal dealings with the Batumi Tobacco Manufacturing Company and unlawful possession of firearms. He continually argued that his detention was invalid and represented a gross violation. In 2000, he finally filed an application before the European Court of Human Rights. The Court found that there was a violation of Article 5 of the Convention,⁸ that everybody has a right to liberty and security of person. But the Court went further, holding that by its nature, the violation found in the case did not leave any choice as to the measure required to remedy. Thus, the Court ordered the Georgian Republic to secure the applicant's immediate release.

The other prisoner case, *Ilascu v. Moldova*, is a similar judgment of the Europe Court of Human Rights with similar facts. Four Moldovan nationals were convicted by the Supreme Court of the Moldavian Republic of Transdnistria, a region of Moldova which proclaimed its independence in 1991 but has not been recognized by the international community. The applicants contended that their detention was not lawful because it was ordered by an entity not recognized under international law. The European Court of Human Rights did it again! Namely, it held that any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolonging of the violation of Article 5 of the European Convention. As a result, the Court requested that the States take every measure to put an end to the arbitrary detention of the applicants. As of today, while the Georgian Republic has fulfilled the recommendations of the Court immediately after the *Assanidze* judgment, only one of the three applicants in the *Ilascu* case has been released.

Now, let me reason by analogy to address the other brother, Cain, or the bad one. The bad brother is the European Court of Justice, which has no explicit mandate to deal with human rights. But of course, the Court has clearly stated in its jurisprudence, and it was

8. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222.

later affirmed in the Treaty of Maastricht⁹ in 1992, that the Treaty on European Union includes the protection of fundamental rights as guaranteed by the European Convention on Human Rights and resulting from the constitutional traditions of the member states. Thus the European Court of Justice is competent to decide human rights issues, and it has actively addressed questions on fundamental rights in its jurisprudence. The bad brother is definitely becoming milder.

Let us look, for example, at immigration law in the European Union. The question is whether the member states on the one hand, or the European level on the other, is competent to deal with immigration law in Europe. Even though immigration law should fall under the competence of the member states as a typical police power, under the Justice and Home Affairs pillar of the European Union, the EU is also competent on immigration issues. Thus, two major cases were recently decided by the European Court of Justice in very interesting ways.

The first judgment is *Catherine Zhu*,¹⁰ and as you can tell, the last name Zhu is not a European name like Catherine, but rather it is a Chinese name. Mrs. Zhu was a pregnant Chinese woman who moved to Northern Ireland to deliver her baby. Under the Irish naturalization law, her baby, Catherine, became an Irish citizen and consequently, a European citizen. In taking residence in Northern Ireland, Mrs. Zhu's purpose was to obtain a long term permit to reside in the UK. However, under UK immigration laws, Mrs. Zhu did not get the permit to reside and was to be deported very soon. The UK court referred Mrs. Zhu's case to the European Court of Justice. The Court held that minors, like Mrs. Zhu's daughter, should benefit fully from the right of free movement granted to European citizens. Thus, Catherine had the right to reside not only in Ireland, but she could move freely to the UK. Moreover, the Court held that Catherine's mother was serving as a caretaker to a dependant family member; thus, she would provide sufficient resources for her baby, so as to not to become a burden to the public finances of the state. Therefore, Mrs. Zhu had the right of residence with her daughter, and, as Advocate General Tizzano claimed, the denial of such a right would have contravened the principle of unity of family life, as laid down by Article 8 of the European Convention

9. Treaty on European Union art. F, Feb. 7, 1992, 31 I.L.M. 253, O.J. C191 1992, at 1.

10. Case C-200/02, Kunqian Catherine Zhu v. Sec'y of State for the Home Dep't, 2004 E.C.R. I-9925.

of Human Rights,¹¹ to which the Court expressly attributed fundamental importance.

The second immigration law judgment of the European Court of Justice is *Jia*.¹² Again, the name is a Chinese one, and *Jia* is a case in which the Court decided whether a retired Chinese national, Mrs. Jia, could be granted a permit to reside in Sweden as a family member of a European community national who had exercised her right of free movement. Mrs. Jia was the mother of a Chinese national who was married to a German woman, who was a European citizen. Mrs. Jia's German daughter-in-law had gone to Sweden to work. Mrs. Jia planned to reunite with her daughter-in-law and her son in Sweden. However, the Swedish immigration board did not allow Mrs. Jia to live with her son, and she was going to be deported by the immigration authorities. Again, the European Court of Justice not only granted the right of Mrs. Jia to stay in Sweden, but it held that a dependant family member without the means to survive in China with her own salary had the right to stay and to move with her family to Europe.

Both sets of cases present a powerful analogy between the two European regional courts. In both cases these courts have addressed the issue of reparations in light of the restoration of rights by bringing the states into compliance with their treaty obligations. Both courts have clearly demonstrated their willingness to move beyond mere monetary damages when dealing with reparations for the violation of fundamental rights. Rather than pecuniary damages, these courts have directly addressed the States in order to force them to take action to stop the human right violation, or they have indirectly modified domestic immigration law regimes. The European Court of Human Rights, the good brother, has openly asked the States to immediately release the prisoners. The European Court of Justice, the bad brother, has held that third country nationals have the right to stay in a member state of the European Union. Perhaps the path of the two brothers is coming closer together than what we could have expected a few years ago as they are both showing their good will and their muscles.

11. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222.

12. Case C-1/05, Yunying Jia v. Migrationsverket, O.J. C42, 3 (2007) (quoting the operative parts of the judgment).

*B. Francisco Quintana*¹³

I will address the issue of reparations with a comparative perspective, dealing with the Inter-American Commission, the Inter-American Court, the European Court of Human Rights, and some of the different aspects of reparations that are dealt with within the inter-American system. First, I would like to talk about the criteria used by the Inter-American Court and how it has evolved. Then, I will do a comparative analysis of a case from the European Court and its inter-American counterpart. You will see that there is a big gap between the two systems that should be closed. Finally, I will address the issue of legal costs and expenses and how this has evolved in recent years in the jurisprudence of the Inter-American Court.

Due to the inadequate protection that thousands of victims of human rights violations received in the second half of the twentieth century on the American continent and, in some cases, the absence of appropriate remedies for the reparation of damages they suffered, the inter-American system has had the opportunity to create a significant and creative jurisprudence and doctrine on reparations, a task which the Inter-American Court has further developed.

First of all, I would like to mention the important role that the Inter-American Commission has had in the regional system in dealing with reparations. At the level of this forum this can be seen clearly through the establishment of friendly settlement agreements. By way of an example, we can cite *Verbitsky v. Argentina*,¹⁴ which led to the elimination of the notion of criminal libel from the criminal code of Argentina. Another very important case is *Mamérita Mestanza v. Perú*,¹⁵ in which the Peruvian Government was obliged to provide education, psychological and medical attention, and housing to the family of a woman who was victimized by the State's practice of forced sterilization. Unfortunately, because the reports on these cases are not published until the cases are settled, there is not much publicity of the reparations. That is why during my presentation I will address the issue of reparations from the Court's perspective.

The Inter-American Court issued its first sentence on reparations in 1989 in the *Velásquez Rodríguez* case.¹⁶ The Court addressed the

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14. *Verbitsky v. Argentina*, Case 11.012, Inter-Am. C.H.R., Report No. 22/94, OEA/Ser.L/V/II.88, doc. 9 (1995).

15. *Maria Mamerita Mestanza Chávez v. Peru*, Case 12.191, Inter-Am. C.H.R., Report No. 66/00, OEA/Ser.L/V/II.111, doc. 20 rev. (2001).

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

issue of the obligations of the state on how to investigate and how to organize the whole government apparatus when dealing with human rights violations. But in dealing with reparations, the Court, at that time, focused more specifically on compensatory or monetary reparations. Fifteen years later, in *Gómez-Paquiyaury Brothers*,¹⁷ you can see how the chapter on reparations is an individual, substantial part of the judgment, and it is divided into several subchapters.

The American Convention establishes in Article 63(1):

that if the Court finds that there has been a violation of a right or freedom protected by the Convention, the Court shall rule that the injured party be ensured the enjoyment of his right of freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or a situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.¹⁸

It is very important when talking about reparations in international human rights law, to keep in mind that cases that are brought to the inter-American system have the potential to seek both the remedy of a particular victim or group and to function as a useful tool for the resolution of underlying systemic or structural problems that permitted the alleged violations and impeded the adequate protections of the right violated.

What I would like to address is the different forms that these reparations, either collectively or individually, can have. Reparations in the inter-American system include those that seek to restore the situation that existed before the violation occurred. This is known as *restitutio in integrum*. When full restitution of a right or a situation is not possible, as for example in cases of people who have died, been disappeared, or suffered torture, the Court has determined a series of measures to guarantee the rights violated, repair the consequences caused by the infractions, and establish payment of indemnity as compensation for the harm caused, as well as other measures of satisfaction. These reparations may include public recognition of the state's international responsibility, requests for an official apology, acts of redress, and establishment of scholarships or grants. The Court has also instituted measures of reparations designed to avoid future occurrences of similar violations. Such examples include the amendment of legislation, investigation of the facts, punishment of

17. *Gómez-Paquiyaury Brothers v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 110 (July 8, 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_110_in_g.pdf.

18. *American Convention*, *supra* note 2, art. 63(1).

those responsible for an incident, human rights training of state employees, and implementation of a special form of registration of detainees.

We will now go in more detail through what each of these reparations I just mentioned mean. The integral redress of a violation usually includes payment of an indemnity ordered by the Court as a measure of economic compensation for pain and suffering, damage to or loss of assets, expenses incurred as a result of the violation, and monies expended on the search for legal redress. All of these reparations measures are included under the heading of material and moral damages.

The Court has also developed other very important concepts, as, for example, in the case of *Loayza Tamayo*.¹⁹ In *Loayza Tamayo*, the Court recognized the concept of "life plan," making a clear distinction with the concept of loss of earnings and expressing that such a concept deals with the full self-actualization of the person concerned, taking into account the victim's calling in life, the particular circumstances, and the potentialities and ambitions of the person. In another more recent case, the Court has also expanded these new concepts of reparations to include damage to family assets. This was done in *Molina Thiessen*.²⁰ The previous jurisprudence of the Court only dealt with monetary compensation under the heading of material damages, taking into consideration only the loss of the earnings and assets of the victims and their families due to the expense of seeking justice: going to tribunals, going to organizations, and moving from one city to another in order to find out the truth about their relatives.

In *Molina Thiessen*, the Court was faced with a new situation. This case dealt with the forced disappearance of a child that took place twenty-five years ago. At that time the family was threatened because of this situation. They had to abandon their jobs, their educations, and their universities, but the threats and the harassment from the government did not finish there. The family had to escape from Guatemala. Half the family went to Mexico. They went through four or five years of living in very difficult conditions. The other half of the family went to Ecuador. The entire family, after almost six or seven years, reunited in Costa Rica; during this time they did not have

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

20. Case of *Molina Thiessen v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 108 (July 3, 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_108_esp.pdf.

any communication each other. The Court was faced with a new form of reparations. The Court concluded that the family must be awarded some form of reparations for the consequences they suffered in this case, and it created the concept, or expanded on the concept, of damage to “family assets.”

Some measures of redress include, for example, the restoration of a victim to his previous employment. This was done in the case of *Cruz Flores*.²¹ Additionally in this case, the victim was reimbursed for her lost wages from the date of detention to the date of the Court’s sentence. The following chart presents some examples of the different forms of reparations that the inter-American system has offered:

I. Measures of Redress

- Ensure that any internal regulations adversely affecting a victim do not result in legal consequences;
- Permit the screening of a film;
- Order that the state not collect a tax or fine imposed on a victim.

II. Measures of Satisfaction and Guarantees of Non-Repetition

A. In Cases of Forced Disappearances and Extrajudicial Executions

- Locate, identify, and exhume the remains of a victim and return them to his or her family;
- Relocate and bury the remains of a victim in the location preferred by his or her family;
- Search for and identify the children of a disappeared person;
- Create a registry of genetic information;
- Implement a registry of detainees which would include information about each detainee’s identity, reason for detention, detaining authority, precise date and time of detention and release, and warrant information;
- Train members of the armed services and security forces on the principles and norms of the protection of human rights, and about limits on the use of force;
- Educate public officials about forced disappearances.

B. To Restore the Dignity of the Victims

- Carry out acts in which the state publicly recognizes its international responsibility;

21. Case of De la Cruz Flores v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 115 (Nov. 18, 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_115_esp.pdf.

- Refrain from executing any condemnatory sentences pronounced by the country's internal judicial bodies, by reason of these sentences having been issued in violation of the rights protected by the Convention;
 - Annul any existing judicial or administrative decisions or police reports against a victim and expunge these governmental acts from the corresponding records.
- C. *To Preserve the Victim's Memory*
- Dedicate official educational centers in the honor of victims, holding a public ceremony in the presence of their relatives, and place therein a plaque containing the victims' names;
 - Erect monuments in honor of victims, holding a public ceremony in the presence of relatives, and place thereupon a plaque containing victims' names;
 - Name a street or square after a victim;
 - Establish a scholarship in the name of a victim.
- D. *To Promote the Truth*
- Publish decisions of the Court, in total or partial form, in state and private publications with wide national circulation.
- E. *To Establish the Truth and Ensure Justice*
- Carry out an effective investigation of an incident, for the purposes of identifying, trying, and punishing the material and intellectual authors of the violations established by the Court;
 - Adopt necessary provisions of domestic law in order to comply with the obligation to investigate and punish;
 - Refrain from the application of measures—such as amnesty, period of suspension, or immunity from criminal responsibility—that impede investigation and punishment;
 - Divulge publicly the results of an investigation.
- F. *With Regard to Education and Health*
- Re-open a school and endow it with the necessary teaching and administrative personnel, in order to ensure its continued function;
 - Ensure that a clinic becomes operational;
 - Provide psychological and medical attention and treatment to victims and their relatives;
 - Award educational grants for primary, secondary, and university education to victims and their children.

G. *To Conform Domestic Legislation to International Standards*

- Suspend laws contrary to the American Convention;
- Ratify inter-American instruments that have not yet been ratified by the state, such as the International Convention on the Non-Applicability of the Statute of Limitations to War Crimes and Crimes against Humanity;²²
- Adopt legislation to protect the rights enshrined in the American Convention (such as categorizing extrajudicial executions or forced disappearances as criminal under domestic law).

III. *Measures of Compensatory Indemnity*

- Compensation for material damages, taking into account both lost wages and creditors' losses (*damnum emergens*).

One of the most important developments in the jurisprudence of the Inter-American Court can be found in the measures of satisfactions and guaranteeing of non-repetition that the Court has granted. For example, as was previously mentioned by Professor Shelton, in the cases of forced disappearances, one of the reparations that has been consistently granted by the Court is the government obligation to locate, identify, and exhume the remains of a victim and return them to his or her family. The case mentioned by Professor Shelton, *Velazquez Rodriguez*, has not been concluded in regards to this specific reparation. In the case that I mentioned above, *Molina-Thiessen*, after twenty-five years the remains of the victim have not been located. In other situations that we have litigated before the Court, for example in El Salvador, where we dealt with issues of children that were forcibly disappeared (for example, the *Hermanas Serrano-Cruz*²³ case), organizations in El Salvador have told us that they have found some of these children living in the United States because the army had sold them to families abroad. The efforts of these NGOs to implement the reparations are very important.

I will refer to another case, this time dealing with the obligation to relocate and bury the remains of a victim at a place that his family considers appropriate based on their traditions. This case was the second case by the Inter-American Court which dealt with Honduras, ten years after *Velazquez Rodriguez* was litigated, and is named *Juan*

22. Nov. 26, 1968, 8 I.L.M. 68, 754 U.N.T.S. 73.

23. Case of the Serrano-Cruz Sisters v. El Salvador, Inter-Am. Ct. H.R. (ser. C) No. 120 (Mar. 1, 2005), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_120_espl.pdf.

Humberto Sanchez.²⁴ In this case, Juan Humberto was disappeared and buried by the army, but fortunately we were able to locate his remains fourteen years after his disappearance. We were able to organize with the government of Honduras to take the family to the site of the remains; the family's reaction upon seeing the remains was impressive.

I'm not going to go through all the measures that were listed in my presentation due to time constraints, but I would like to mention just a few of them. Measure number four is to implement a registry of detainees that would include information about the detainee's identity, reasons for the detention, and the detaining authority. This type of reparation was also established in the case of *Juan Humberto Sanchez*. It was a very important decision by the Court because, for example, at this moment we are dealing with a situation of unlawful detentions in Venezuela, which are sometimes accompanied by unlawful executions. And one of the main problems that we have in Venezuela is that we have more than three hundred different police authorities. Venezuela is divided into twenty states. Each state is itself divided into local communities, with a different police authority for each state and community. Therefore, the implementation of a registry of detainees would be very useful in many countries, not only Honduras, but also in Venezuela.

There are also measures that guarantee the dignity of the victims, and I am not going to cover these right now. Diego Rodríguez-Pinzón mentioned some of these measures in the Colombian cases, which help to promote truth and preserve the victim's memory, such as the publication of the Court's decision or the establishment of a monument with the names of the victims. As an example, I listed some of the different forms of reparations that the Inter-American Court has awarded so that you can take notice of how creative this body has been in dealing with these cases.

Now, I will explain the difference between the inter-American and European human rights systems by way of comparison of two cases: one issued by the European Court of Human Rights and the other by the Inter-American Court, both in the same year. Both cases dealt with an unlawful detention that resulted in the loss of life. Professor Shelton stated that twenty years ago she asked her students to do a comparison of the inter-American and European systems and that the students were surprised by the confusion they found. Today,

24. Case of Juan Humberto Sánchez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 99 (June 7, 2003), available at http://www.corteidh.or.cr/docs/casos/articulos/serie_c_99_ing.pdf.

surprisingly, you will reach the same confusion when comparing the use of reparations in the two systems. *Nachova v. Bulgaria*,²⁵ issued by the European Court, only explicitly repaired the pecuniary damage and the loss of income suffered by the victim. Though the European Court also gave non-pecuniary reparations, it does not go into any further details and does not explain what it understands about non-pecuniary damages, or why it gave this reparation to one of the family members but not to the other. In comparison, the Inter-American Court goes into great detail explaining the reparations it awards. In *Gómez-Paquiyaúri*,²⁶ the Inter-American Court ordered the State to undertake an official investigation, make a public acknowledgement of responsibility, name a school after the two victims, and give a scholarship to one of the victim's daughters.

We can identify three stages of evolution in the Inter-American Court's dealing with reparations. From 1989 to 1996, we see the development of clear definitions and concepts for reparations through the establishment of the first standards on the subject. From 1996 to the year 2003, the Court went into more detail and expanded the concepts I previously mentioned, such as life plan, the damages of family assets, and the loss of assets. From *Juan Humberto Sanchez* to *La Cantuta*,²⁷ the Court created some interesting concepts of reparations such as the creation of DNA data banks and detainee registrations.

Finally, we shall discuss costs and expenses. In Europe, there is a legal aid fund that the ECHR grants to the applicants. Unfortunately, in the inter-American system we have seen some problems with the awarding of costs and expenses within the Inter-American Court. As an example, I will present three cases, and I will conclude my presentation with this. In the case of *Blanco Romero*,²⁸ the organizations representing the victims asked the Court for \$176,000 in legal assistance funds, but the Court only granted \$40,000. As you can see in the previously mentioned *Serrano-Cruz* case, the Court

25. Apps. Nos. 43577/98 & 43579/98, (Eur. Ct. H.R. July 6, 2005), available at <http://www.echr.coe.int/echr/> (follow "Case-Law" hyperlink; then follow "HUDOC" hyperlink; then type "Nachova v. Bulgaria" into the search box and click "search").

26. Case of the Gomez Paquiyaúri Brothers, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶¶ 231, 234, 236, 237 (July 8, 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_110_ing.pdf.

27. Case of La Cantuta v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_162_ing.pdf.

28. Case of Blanco-Romero v. Venezuela, Inter-Am. Ct. H.R. (ser. C) No. 138 (Nov. 28, 2005), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_138_esp1.pdf.

granted a similar amount to that requested. However, the uncertainty existent in the system has a strong impact on the lawyers who want to work in the inter-American system. If you spend seven or eight years litigating before the Inter-American Commission or the Court, you will have undoubtedly incurred significant expenses, and the Court should carefully analyze each individual case or at least set more clear guidelines when granting costs and expenses.

| Case | Amount Requested | Granted by Court |
|-----------------------------|------------------|------------------|
| <i>Blanco Romero</i> | \$176,000 | \$40,000 |
| <i>Masacre of Mapiripan</i> | \$180,000 | \$25,000 |
| <i>Serrano-Cruz</i> | \$47,000 | \$43,000 |

C. *Diego Rodríguez-Pinzón*²⁹

“Reparations of the Inter-American Human Rights System in Cases of Gross and Systematic Violations of Human Resources: The Colombian Cases”

I want to focus this presentation on one of the main problems that this region has confronted during the last couple of decades: gross and systematic violations of human rights. Throughout its history, Latin America has faced some of the worst violations of human rights. We have transitioned into a new democratic environment in most of the countries of the hemisphere, but unfortunately, there are still states that continue to face these types of violations.

I want to use the case of Colombia, a country with which the inter-American human rights system has dealt with in the last twenty-five years, as an example to try to illustrate how the Inter-American Human Rights Commission and Court have balanced the issue of remedies and reparations with the difficult task of repairing gross and systematic violations, as Professor Dinah Shelton indicated. The case of Colombia provides us with some insight on how international mechanisms are trying to respond in this region and, particularly,

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how some of Colombia's official institutions and non-governmental organizations are trying to engage in a dialogue at the international level in order to find a way to provide relief for the victims of violent groups.

Colombia has been permanently in the agenda and docket of the Inter-American Commission and the Inter-American Court for the last two decades. The Inter-American Commission, for its part, has engaged Colombia in many different ways. The Commission has an ample mandate and the institutional tools that are particularly well-suited to address these types of violations: on-site visits, the possibility of issuing reports of a general or special nature, and diplomatic intervention, among others. The Commission has resorted to all these institutional mechanisms to confront and induce improvement in the current human rights situation in Colombia.

Interestingly enough, the Inter-American Commission's practice in the late 90's provides us with the first examples of the type of reparations that the inter-American system could implement regarding the situation in Colombia, a practice that years later we will crystallize in the jurisprudence of the Inter-American Court in cases against this country. Under the Commission's auspices, several landmark events occurred in the context of several friendly settlement discussions in cases of massacres perpetrated by Colombian state agents. Among the most notable cases, *Massacre "Los Uvos" v. Colombia*,³⁰ *"Caloto" Massacre v. Colombia*,³¹ and *Villatina Massacre v. Colombia*³² were all being processed in the individual complaint system of the Commission. Surprisingly, in a hearing held in 1995, the government agreed to initiate friendly settlement discussions for those events.³³ The government offered the possibility of adopting several types of reparations to try to remedy the damage done. On July 29, 1998, Colombia's President publicly stated that government forces were internationally responsible under the American Convention on Human Rights for the violations committed in the massacres of Los Uvos, Caloto, and Villatina. This event had structural importance even though it occurred in the context of an

30. Case 11.020, Inter-Am. C.H.R., Report No. 35/00, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 446 (1999).

31. Case 11.101, Inter-Am. C.H.R., Report No. 36/00, OEA/Ser.L/V/II.106, doc. 6 rev. (1999).

32. Case 11.141, Inter-Am. C.H.R., Report No. 105/05, OEA/Ser.L/V/II.124, doc. 5 (2005).

33. The friendly settlement in the *Villatina Massacre* was successful, while it failed in the end in the *Los Uvos Massacre* because of a lack of full compliance with the agreement, mainly on the issues of prosecuting those responsible.

individual case because it had extensive political and social repercussions. The most significant effect, among several important outcomes, was the validation of human rights obligations as a legitimate issue and a positive force within the conflict in Colombia. Until then, human rights were rhetorically perceived as “the rights of the rebels” or “the rights of terrorists.” The fact that Colombia’s President came out publicly and stated that the actions by the security forces of Colombia were a violation of the human rights of the victims, as recognized in international norms, significantly empowered an important constituency of human rights defenders and victims, among others, that until then had been perversely associated, in most cases, with violent groups and accused of “using” human rights to embarrass the government.

It is worth mentioning that the government, in the context of the mentioned massacre cases, also agreed to several other types of reparatory measures. These included, among others, compensating the victims, establishing symbolic reparations, such as monuments and plaques in public places in remembrance of the massacres, as well as “formulating or implementing, as appropriate, the pending social compensation projects for attending to the displaced families and individuals, health, education, electric power, the Piedrasentada—Los Uvos road, and job creation.”³⁴ All these “enhanced” reparatory measures were developed in the context of international and national negotiations in cases pending before the Commission.

I believe there is a symbiotic relationship between these first Colombian cases in the Commission’s proceedings and what is happening now with the decisions of the Inter-American Court regarding Colombia. In the latest case docket of the Inter-American Court, there are several very important cases recently decided on gross and systematic violations. “*Mapiripan Massacre v. Colombia*,”³⁵ *19 Tradersmen v. Colombia*,³⁶ *Pueblo Bello Massacre v. Colombia*,³⁷ and *Ituango Massacres v. Colombia*³⁸ are all cases against Colombia and are dramatic examples of cases where the Court has been required to provide redress for massive violations of the most basic rights. The

34. *Massacre “Los Uvos”*, Case 11.020, Inter-Am. C.H.R., Report No. 35/00, OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 446 (1999) (quoting the Report of the Coordinating Committee for following up on the recommendations of the Comité de Impulso for the incidents of Los Uvos, Caloto, and Villatina).

35. Inter-Am. Ct. H.R. (ser. C) No. 122 (Mar. 7, 2005).

36. Inter-Am. Ct. H.R. (ser. C) No. 109 (July 5, 2004).

37. Inter-Am. Ct. H.R. (ser. C) No. 159 (Nov. 25, 2006).

38. Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006).

reparations afforded in those cases appear to reflect the earlier work of the Commission in the other Colombian massacres. This suggests that there is a relationship between the initial steps taken by the Commission in the 90's and the latest cases of the Court. The Commission explored the extent to which the Colombian institutions were able or willing to do regarding potential reparations in these types of cases. In the "voluntary" space of a friendly settlement procedure, the state is able to negotiate with the petitioners regarding the possibility of agreeing to provide extensive reparations, under the auspices of the Commission. Consequently, the State was able to accept appropriate and progressive reparations, which would later be used and expanded by the Court in its own judicial decisions.

When we refer to the notion of reparations for gross and systematic violations of human rights, one of the most important aspects that must be taken into account is the duty to investigate, prosecute, and punish. The inter-American system is especially oriented to confront impunity. Compensation for certain kinds of human rights violations is not enough. The inter-American system has consistently ordered states to prosecute and punish those responsible for massacres and other crimes against humanity and/or war crimes. In this regard, these organs have stated that amnesties for these crimes are incompatible with the American Convention. The Commission has decided several cases in which it has declared the amnesty laws of several states incompatible with the state's human rights obligations. Similarly, the Court in *Barrios Altos v. Peru*³⁹ declared that the Peruvian amnesty violated the American Convention. Additionally, the Court has recently stated that domestic legislation, such as amnesties or a statute of limitations, cannot be an obstacle for prosecution of the perpetrators of serious human rights violations.

Another important notion that has significant implications regarding reparations in certain cases is the "right to truth." The duty to investigate serious violations necessarily implies the right of the victims and their relatives to "know" what happened. The right to truth can be adequately addressed in different ways: the criminal investigation in a case can shed light about what really occurred; the state can establish *ad hoc* truth commissions with a mandate to find the truth in specific cases or specific periods of time in the history of a country; other judicial mechanisms could play such a role, as may happen with civil liability remedies; or the state can acknowledge the

39. Case of *Barrios Altos v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

truth publicly through official statements, monuments, or plaques. Additionally, the decisions of both the Court and the Commission can, by themselves, play such a role by officially recognizing the violations.

Regarding the right to truth, it's important to recall "*Mapiripan Massacre*" v. Colombia.⁴⁰ This case addressed the forced disappearance of persons in the framework of these horrible massacres. In the reparations judgment, the Court ordered the state of Colombia to publish extensively, on television, in newspapers, and on radio, information about the case and the need to find other persons that were affected so that they could benefit from the reparations ordered. This is significant because, even though the Court focused the decision on forty-nine victims that were identified then, it left the door open to subsequently identify additional victims. The Court specifically ordered the State to take certain measures to find the whereabouts of the disappeared persons, including the identification of victims by using DNA testing.

The Court in *Mapiripan* also made a brief reference to amnesties. The representatives of the victims called the Court to address the "justice and the peace law" that Colombia adopted in the framework of the demobilization process of self-defense groups. The Court refused to make a direct statement or a determination of the compatibility of this law with the American Convention. However, the Court stated once again that amnesties or any other obstacle to investigate and prosecute this type of serious human rights violations would be incompatible with the Convention. Any future determination by the Court in a case about the compatibility of this law with the Convention would have serious legal implications, not only in the international level but also in Colombia's constitutional framework, considering the doctrine established by the Constitutional Court of this country regarding the relevance of international human rights law in Colombia's legal order.

Another aspect that is worth noting regarding reparations is the notion of compensation. This is, according to the International Law Commission's ("ILC") "Articles on Responsibility of States for Internationally Wrongful Acts,"⁴¹ a reparation in international law that mainly seeks restitution, compensation, and satisfaction. The notion of proportionality of the reparations required from a state is essential.

40. Inter-Am. Ct. H.R. (ser. C) No. 122 (Mar. 7, 2005).

41. Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, U.N. Doc. A/56/10 (Dec. 12, 2001), available at http://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/9_6_2001.pdf.

The ILC rejected the idea of non-proportional reparations even though its draft articles considered the possibility that so-called “international crimes” of states could give rise to non-proportional reparations and that compensation issues could be the equivalent of “punitive” damages. The Inter-American Court has not explicitly recognized “punitive” damages.⁴² However, the Court’s assessment of compensation in the Colombian cases appears to have taken into account the grave and systematic nature of these violations and imposes particularly cumbersome payment amounts in favor of the victims. It is, of course, difficult to determine what would be proportional compensation in cases of massacres and massive forced disappearances, and when such compensation should amount to being punitive. But when confronting gross and systematic violations, I believe that the power of reason and justice will leave no alternative for the international community and international human rights bodies but to increasingly recognize the need for appropriate “enhanced” compensation in these types of cases.

There have also been some important measures related to social and institutional reparations in the framework of these cases. For example, forced displacement of persons is one of the most dramatic human rights situations in Colombia. In this regard, the Court has ordered that for the families displaced by the massacres (entire villages were emptied), the State will have to implement special measures to secure an adequate housing program and to ensure the safe and dignified return of these persons. Another measure ordered by the Court is the human rights education of the armed forces.

Finally, it is important to mention that Colombia has developed some unique domestic mechanisms that allow national authorities to compensate victims and re-open criminal cases where there was impunity, if the State has been declared internationally responsible for a human rights violation. Therefore, if the Inter-American Court or Commission finds that Colombia violated the Convention by adopting a judicial decision that unfairly exonerates a perpetrator of serious human rights violations, that decision can be re-opened. This is a very important development that will hopefully allow victims and their relatives to finally seek justice in Colombia’s national courts based on a decision of an international human rights body. This is of utmost importance due to the fact that reparations are only as

42. See “Mapiripan Massacre” v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 122 (Mar. 7, 2005) (Trindade, A., concurring) (asserting the need to examine this notion in the jurisprudence of the Court).

effective as the national mechanisms that are in place to receive these international decisions.

*D. Dinah Shelton*⁴³

I'm going to talk about the United Nations principles and guidelines on reparations, but I thought it might be appropriate to start with three brief anecdotes about how reparations have been a part of my work for the last twenty-five years.

It started—this is something all the professors will probably understand—by a question from a student in class. We had been discussing the various petition procedures in human rights law, and one of the students raised her hand and asked, “What do the victims get out of these procedures at the end?” I said, “Good question, why don't you write your paper on that topic.” She decided to study the European system and came to me after a few weeks and said, “I cannot make any sense of what the European Court of Human Rights is doing on reparations.” Her completed paper said that there is no coherence in the jurisprudence. I became intrigued by the matter and after looking into it much further wrote the book on reparations.

Along the way in writing that book, I had an occasion to speak with Zenaida Velasquez, the sister of Manfredo Velasquez-Rodriguez, the young man who disappeared in Honduras, and was the subject of the first case in the Inter-American system to address reparations. I asked her how she felt about the outcome of the case because the Court awarded substantial monetary damages. She said, “Well, we got money, but I still don't know where my brother is.” That lack of knowledge was something extremely important to the family. A year ago I ran into her again, and I said, “Have you gotten any further news?” She said, “No, we keep hearing that he might be paved over by a roadway somewhere.” She still doesn't know after all this time what happened to her brother, and that was the reparation she most wanted.

The third incident happened last Thursday when the Japanese Prime Minister announced that there is no proof that there was any misconduct by the Japanese military in forcible sexual bondage of women throughout Asia during World War II. One of the reasons that there is not much evidence publicly available is because there was no Nuremburg-like international trial for war crimes in Asia after

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the war. Many documents were destroyed, but now, sixty-five years later, the surviving victims have not forgotten and they continue to demand reparations. These issues don't go away simply because of government denials. They remain and in some cases can lead to further conflict.

The United Nations took up reparations relatively recently, and it took them fifteen years to draft and adopt the principles and guidelines. Ultimately, in 2005, the General Assembly approved the *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.⁴⁴ There's a common understanding about United Nations documents: the longer the title of the document, the more controversial it is. The title and the drafting history of this text indicate that states were not wholly in favor of expressing a legal obligation to afford remedies to victims of their abuse.

The text is rather interesting to examine. The aim was to provide a universal framework for considering the issue of reparations. As a starting point it makes clear that there are two dimensions to reparations. On the one hand, there is a procedural right of access to justice. While on the other hand, victims have a substantive right to redress for injuries suffered. A number of key questions arose during the drafting of the principles and guidelines on these two points: What violations trigger the duty to afford reparation—is it all human rights violations or, as the title of the UN principles suggests, only gross and systematic ones? How are “gross and systematic violations” defined, if that is the standard? What institutions and procedures satisfy the requirement for access to justice? Who is entitled to reparations? How do the various types of reparations interrelate? Is criminal justice a form of reparation or does it address harm to society generally? How can reparations be carried out when there are large numbers of victims? Finally, is there a consistent understanding of the aim of reparations?

The compromises that were necessary to get approval of the UN principles and guidelines indicate that some states still resist accepting a legal obligation to afford reparations, although it is a duty contained in all the major human rights instruments. The long process of drafting the guidelines illustrates the reluctance. The issue was first taken up in 1989 by the UN Sub-Commission on the

44. G.A. Res. 60/147, U.N. Doc. A/Res/60/147 (Mar. 21, 2006). The Principles and Guidelines were first approved by the Commission on Human Rights, Res. 2005/35 of April 19, 2005 (adopted 40-0 with 13 abstentions).

Protection and Promotion of Human Rights, long enough ago that it was still under its old name: the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. It was not an issue proposed by the Commission itself. Instead, the Sub-Commission put it on the agenda after some of its members attended a conference in Canada, like this one, that questioned why many of those held as slave laborers by Japan during World War II never received reparations. That year, the Sub-Commission adopted a resolution which somewhat timidly said that all victims of gross violations of human rights and fundamental freedoms *should be* entitled to restitution, compensation, and as full a rehabilitation as possible.

In addition to adopting the resolution, the Sub-Commission appointed a well-known expert, Theo Van Boven, to study the issue of reparations and examine the possibility of drafting guidelines.⁴⁵ He did a preliminary report in 1990⁴⁶ that was followed by progress reports⁴⁷ and a 1993 final report,⁴⁸ to which Professor Van Boven annexed draft principles on restitution, compensation, and

45. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Res. 1989/13 (Aug. 31, 1989). The Human Rights Commission authorized the study by resolution 1990/35 of March 2, 1990, and the Economic and Social Council approved by resolution 1990/36 of May 25, 1990. In his reports, Mr. Van Boven noted that there is no definition of "gross violations of human rights" but that the work of the International Law Commission regarding the draft Code of Crimes against the Peace and Security of Mankind as well as Common Article 3 of the Geneva Conventions of August 12, 1949 provide guidance for both the serious character of the violations and also the type of human right being violated. He also cited section 702 of the Restatement (Third) of the Foreign Relations Law of the United States to assert that

while under international law the violation of any human right gives rise to a right to reparation for the victim, particular attention is paid to gross violations of human rights and fundamental freedoms which include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.

U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, U.N. Doc. E/CN.4/Sub.2/1993/8, at 7-8. Efforts to define gross violations in the draft principles were subsequently dropped.

46. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Preliminary Report*, U.N. Doc. E/CN.4/Sub.2/1990/10 (July 26, 1990) (*prepared by* Theo van Boven).

47. ECOSOC, Sub-Comm. On Prevention of Discrimination & Prot. of Minorities, *Progress Reports*, E/CN.4/Sub.2/1991/7; ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Study: Second Progress Report*, U.N. Doc. E/CN.4/Sub.2/1992/8 (July 29, 1992) (*prepared by* Theo Van Boven);

48. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Study: Final Report*, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993) (*prepared by* Theo Van Boven).

rehabilitation. These were drafted with the participation of a number of experts during a meeting that he organized in Maastricht. The final report indicated that gross human rights violations are by their nature irreparable, and whatever remedy or redress is provided will fail to be proportional to the grave injury inflicted.⁴⁹ Remedies must, therefore, focus on three things: the restoration of rights, bringing a state back into compliance with its obligations, and the accountability of wrongdoers. The Final Report said it is “an imperative norm of justice that the responsibility of perpetrators be clearly established and the rights of the victims be sustained to the fullest possible extent.”⁵⁰ Nonetheless, the threshold for invocation of this imperative norm was the commission of gross violations of human rights.⁵¹

The matter proceeded from the Sub-Commission to the Commission, which called the text a “useful basis for continued discussion.” They asked Van Boven to re-draft the guidelines, which perhaps seemed a little too strong for many of the states represented on the Commission. Van Boven re-drafted the text twice between 1993 and 1997 and changed quite a few things, including taking out an illustrative list of gross violations and adding humanitarian law violations to the study. Two goals were apparent: to provide individual remedies for victims and to uphold the rule of law and public interest in deterring future violations.

In 1998, the Commission decided to replace Van Boven and appoint Cherif Bassiouni to prepare yet another version of the guidelines. In 2000, the revised text was circulated, and another draft was requested. In 2002, the Commission decided to take over the drafting, and it organized a consultation under the chairmanship of Mr. Alejandro Salinas, who submitted yet another (by now the fifth) draft in 2003.⁵² In 2004, the consultation group made the final changes that allowed the text to be approved but with thirteen states abstaining.⁵³ Only the German delegate explained why his country did not vote for the resolution. The statement is significant because

49. Study: *Final Report*, *supra* note 48.

50. *Id.* at 53.

51. *Id.*

52. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, U.N. Doc. E/CN.4/2003/63 (Dec. 27, 2002) (*prepared by the High Commissioner for Human Rights*).

53. The states abstaining were: Australia, Egypt, Eritrea, Ethiopia, Germany, India, Mauritania, Nepal, Qatar, Saudi Arabia, Sudan, Togo, and the United States of America.

the objections in the German statement are similar to those that the U.S. had raised throughout the drafting process. He said:

[We] deeply regretted having been unable to support the “Basic principles and guidelines” The text was an inaccurate reflection of customary international law. It erroneously sought to apply the principles of State responsibility to relationships between States and individuals and failed to differentiate adequately between human rights law and international humanitarian law. While certain instruments provided for the presentation of individual claims for the violation of human rights, such provisions did not exist for violations of international humanitarian law. The claim that such a right existed under the Hague Convention No. IV of 1907 or Protocol I Additional to the 1949 Geneva Conventions was entirely unsubstantiated. While the absence of a legal basis for individual reparation claims for violations of international humanitarian law might be regrettable, it must be taken into account.⁵⁴

Let us turn to the contents of the basic principles and guidelines and examine whether or not the German government was correct in its assessment. The text contains twenty-seven principles and guidelines. The accompanying commentary asserts that they do not create any new substantive international or domestic legal obligations but simply identify mechanisms, modalities, procedures, and methods to implement existing obligations. With considerable inconsistency, the commentary adds that “shall” was used when a binding international norm was in effect; otherwise “should” was used.⁵⁵ Despite the fact that the Commentary asserts the absence of new legal obligations, “should” appears liberally throughout the text. For example, paragraph 18 provides that victims of gross violations of international human rights and humanitarian law “should, as appropriate and proportional to the violation . . . be provided with full and effective reparation”⁵⁶ This principle was certainly a point at which “shall” might have been used. Another example is the statement that restitution should “restore the victim to the original

54. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, 61st Sess., *Summary Record of the 57th Meeting*, U.N. Doc. E/CN.4/2005/SR.57 (Apr. 29, 2005).

55. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, U.N. Doc. E/CN.4/2003/63 (Dec. 27, 2002) (*prepared by the High Commissioner for Human Rights*).

56. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Report of the Special Rapporteur on the Situation of Human Rights in Belarus, Adrian Severin*, U.N. Doc. E/CN.4/2005/35, Annex, ¶ 18 (Mar. 18, 2005).

situation before the gross violations . . . occurred,”⁵⁷ and “compensation should be provided for any economically assessable damage”⁵⁸ These examples do not demonstrate a great deal of support for the idea that there are pre-existing legal obligations of reparation.

The major part of the “Principles and Guidelines” addresses gross and systematic violations. The text actually has three sets of duties. The first set applies to all internationally guaranteed human rights and focuses on implementation, enforcement, effective and prompt access to justice, and reparations. The second part concerns gross violations of human rights and serious violations of humanitarian law. The third part addresses international crimes. The text also includes a definition of “victim” that is quite broad and gave rise to controversy because it explicitly includes the possibility of collective or group reparations.

As far as forms of reparations are concerned, the long list tracks much of what the International Law Commission has included in its *Articles on State Responsibility: Restitution, Compensation, Satisfaction, and Guarantees of Non-Repetition*. On compensation, the compensation, as mentioned before, is to be for any “economically assessable damage.” Non-monetary reparations may be provided as well.

What issues remain open after the adoption of these principles and guidelines? The text certainly raises the question of whether the Human Rights Commission correctly restated international law on the subject of reparations or whether, instead, it has attempted to deliberately weaken existing standards. Other issues that have not been adequately addressed include: How should reparations be afforded in cases of gross and systematic violations, where the sheer numbers of victims and perpetrators may overwhelm the state? Concerning historical injustices, how far back should we go in affording reparations long after events have occurred? A third, and a core issue to develop, should address the definition of economically assessable damages. How do we value the loss of a life? That value is certainly more than a matter of lost wages, but how should it be valued? Finally, when the direct victim is dead, how should the damages be divided among those who survive?

All of these issues remain to be studied. The guidelines certainly provide some answers, for instance, in making it clear that prosecution is only required for criminal conduct, not for every

57. *Id.* ¶ 19.

58. *Id.* ¶ 20.

human rights violation. The UN text is thus a useful base for developing the law in the future, with the aim of ensuring reparations for all victims of human rights violations.

*E. Darren Hutchinson*⁵⁹

It is hard to go last, especially when there have been many good presentations. I find myself in a difficult situation talking about the United States' domestic law on reparations. As the other panelists have demonstrated, international human rights law on this issue is complicated, even where formal structures permit claims of redress. In the United States domestic law context, however, no coherent, organized, sustained body of legislation deals with reparations as such. Instead, the reparations movement in the United States has consisted of individuals, discrete groups of individuals, or social movements making claims before state and federal lawmakers and courts for remediation of collective harms that they or their ancestors have experienced. Accordingly, in the United States context, we see appeals to common law, statutory law, and constitutional law as a basis for group remediation, and typically, these claims reach back into periods of history, rather than focusing on contemporary acts of injustice.

The lack of a precise definition of "reparations" also complicates the situation in the United States. International law, however, offers some interesting insight on this issue. Furthermore, general trends have emerged in jurisprudence and scholarship on this issue. From this research and international analogues, reparations are commonly viewed as judicial or legislative remedies for sustained past or present injustice towards a particular group. The essence of reparations is remediation for collective harms.

One final point complicates the United States' situation (and this subject did not receive much attention from the other panelists): how far into the past should state actors reach to remedy injustice? Culturally, in the United States' system, discussion of reparations typically centers around issues pertaining to slavery and Native American land claims. Although I generously support remediation of prior and ongoing injustice, reparations claims raise difficult matters including: (1) defining the class of "injured" people; (2) explaining why this present-day class is in fact injured when the actions upon

59. Darren Hutchinson is a Professor of Law at *American University Washington College of Law*. His areas of expertise include constitutional law, and Equal Protection Theory and equitable remedies.

which remediation is based took place in the past; and (3) considering whether some forms of remediation—for example, land redistribution—present fairness questions when implemented today. Although I agree with reparations advocates that compelling arguments justify the provision of reparations, these questions still form a legitimate part of the debate.

In this talk, I will provide a general overview of reparations discourse in the United States and offer some suggestions concerning how advocates of reparations might frame their claims. First, I will identify some of the policies that one might consider when advocating reparations in the U.S. context. As a remedies professor, I will invoke remedies law (judicial remedies doctrine) as an analogy for this discussion. Remedies law provides a helpful framework for thinking about reparations in the legislative context, and this subject matter necessarily shapes claims for reparations made in a judicial setting.

Second, I will examine some of the political and legal barriers to reparations in the United States. Reparations for racial injustice, in particular, are hindered by a common perception among many whites who see the United States as having attained equal opportunity and who view current racial inequality as a product of the lack of initiative among persons of color. Many whites also embrace remediation so long as they do not feel that they are potentially impacted by policies to remedy racial oppression.

Finally, I will discuss my personal preference for structural legislative remedies, as opposed to discrete, compensatory, and judicial remedies for past injustices. I hope to demonstrate that in terms of providing redress, structural reforms offer the best hope for broader improvement in the social and economic status of oppressed people in the United States.

1. *What are “reparations”? A remedies law analogy*

Proponents of reparations have framed their claims for redress around a variety of forms of relief, but their claims often include monetary compensation. Remedies law, or the body of doctrines and statutory rules the courts apply when supplying relief to litigants, provides a helpful structure for thinking about the range of possible instruments that might serve to redress prior, collective injustice. Remedies law identifies several categories of redress for litigants. Damages compensate for harm. Restitution removes the ill-gotten gains from the defendant and returns them to the plaintiff. Structural remedies seek to reform important social institutions to

bring them into compliance with legal norms. Also, ordinary injunctions prohibit future harms or rectify prior injustice. These different baskets of remedies can serve as a prism for thinking about reparations either as a legislative or as a judicial tool.

The historical and contemporary debates surrounding remedies in the United States demonstrate the relevance of the remedies analogy. For example, Japanese-Americans who were interned during World War II received monetary compensation for their injuries. Restitution has been a form of relief sought by individuals in reparations cases, as in litigation seeking disgorgement of profits of companies that benefited from slavery. And as early as Reconstruction, some former slaves demanded land and subsistence from plantation owners as a way of restoring the unjust gains of coerced labor and oppression. Also, during the Civil War and continuing into the earlier parts of Reconstruction, Congress created the Freedmen's Bureau, which distributed (with varying degrees of success and intensity) food, education, health care, legal services, and other important benefits to the freed slaves. Finally, in terms of injunctions, the post-Civil War era produced a body of constitutional provisions and statutory enactments designed to prevent future harms and rectify prior injustice.

2. *Political and legal barriers to reparations*

An important part of the debate over reparations in the U.S. context centers upon political and legal constraints. One element of contention concerns remediation of historical wrongs. Opponents to reparations argue that the injustices addressed by contemporary reparations movements, particularly for slavery and Jim Crow laws, took place in the remote past. Accordingly, they often view remediation as an unfair "punishment" of innocent individuals and an undeserved benefit to potential recipients of redress.

Additionally, the U.S. electorate tends to disfavor economic redistribution generally. Because reparations advocates simultaneously demand redistribution and seek to rectify prior wrongs, their claims receive very little public support, as opinion data persistently confirm.

One thing that I find interesting in this debate is the failure of the opponents of reparations to treat remedies for gross human rights or civil rights deprivations as a public good, rather than as a series of private transactions that benefit or burden individuals. If we view rectifying prior and current injustice as a public good (that improves human capital or that fortifies our national commitment to justice,

etc.), then reparations can lose their individuated character. Seen in this light, reparations also become compelling for contemporary society, despite the passage of time between the wrongdoing and the remediation. If historical wrongs burden society today, then one could make a compelling argument to support contemporary redress.

3. *Structural/legislative relief*

In the little time that remains, I will discuss why I prefer legislative reparations over a litigation strategy. A litigation model provides very little hope for success in this area. First, in terms of the Supreme Court, public opinion serves as a powerful constraint upon Court rulings. Furthermore, the Court has defined rights and equality as protecting individuals rather than groups. Accordingly, groups face a difficult time pressing claims of injustice or convincing the Court that they require judicial solicitude. Moreover, equal protection doctrine requires that plaintiffs prove that governmental defendants acted intentionally to create harm. While many foreign jurisdictions, including international human rights structures, define inequality around intent or effects, federal court doctrine in the United States tends to dismiss evidence of disparate effects, which makes many conditions of extreme inequality (unequal distribution of educational resources, disparities in the administration of criminal justice, etc.) beyond judicial invalidation.

In addition to these doctrinal and institutional constraints, the litigation model also fails because it distorts the impact of broad abuses of human and civil rights. Litigation attempts to provide a particularized remedy to a discrete plaintiff or class of plaintiff for identifiable, contemporary activity. While this model might help to rectify some instances of injustice, on many levels it obfuscates the injurious nature of oppression, which creates pervasive and dispersed harms rather than discrete and particularized injuries. Litigation suggests that reparations implicate private harms and individualized wrongdoing, which simply reinforces the negative perception of reparations as a burden upon or unearned handout to individuals rather than as a benefit to society.

Legislation can better respond to the dispersed nature of the harms associated with oppression and provide the deep structural reform necessary to rectify social injustice and to invest in human capital. Along these lines, Alfred Brophy, who writes extensively on reparations in the U.S. context, has proposed a community “social welfare” model for framing reparations discussions, which deemphasizes litigation. Instead, he focuses on seeking legislation

that creates institutions that deliver resources to individuals who, due to past or current injustices, cannot adequately navigate and access these resources in the absence of governmental assistance. Due to the time constraints of today's panel, I am unable to elaborate on the content of Brophy's proposal or of similar writings, but this approach more accurately captures the structural nature of subordination, emphasizes the importance of sustained legislative treatment of prior and ongoing injustice, and demonstrates the limitations of private litigation strategies.

III. LAWYERING FOR REPARATIONS: INTER-AMERICAN PERSPECTIVE

A. *Agustina Del Campo*⁶⁰

My presentation today will address a slightly different issue than what other panelists have been addressing this morning. The analysis of reparations in the inter-American human rights system has mostly been focused on the Inter-American Court of Human Rights, rather than the Inter-American Commission on Human Rights. In fact, the Commission's recommendations are hardly ever addressed in research studies dealing with reparations for international human rights violations.

My presentation will be divided in two parts. First, I will briefly summarize the general competence of the Commission and its practice in affording remedies and reparations for victims under the American Declaration of the Rights and Duties of Man;⁶¹ then I will discuss challenges to the litigation of *Lorenzo Enrique Copello Castillo v. Cuba*,⁶² a case that we brought with *Washington College of Law's* ("WCL") Impact Litigation Project before the Commission in 2003 and was decided in November 2006.

Going to the first part of my presentation, the Commission is one of the two supervisory organs of the inter-American system for the protection of human rights. It was created in 1959 and was incorporated into the Charter of the OAS as one of its main organs in 1960. With the adoption of the American Convention on Human

60. Agustina Del Campo, J.D., LL.M., is Coordinator of the Impact Litigation Project at *American University Washington College of Law*.

61. Organization of American States, American Declaration of the Rights and Duties of Man, art. XVIII, 1948, O.A.S. Off. Rec., OEA/Ser.L./V./II.23, doc. 21 rev. 6.

62. *Copello Castillo v. Cuba*, Case 12.477, Inter-Am. C.H.R., Report No. 68/06, OEA/Ser.L./V./II.127, doc. 4 rev. 1 (2006), available at <http://www.cidh.org/annualrep/2006eng/CUBA.12477eng.htm>.

Rights,⁶³ the Commission acquired a dual character by maintaining its status as an OAS Charter organ, supervising states' compliance with the American Declaration, and becoming, through Article 33 of the American Convention, a treaty-based organ competent to supervise state parties' compliance with the American Convention. This dual character has allowed the Commission to track human rights violations and develop uniform regional standards for the interpretation of both the American Declaration and the American Convention.

The Commission applies either the American Convention or the Declaration depending on the state the petition was filed against and depending on whether that same state has ratified the American Convention or not. However, it may resort to a dual analysis, applying both the Convention and the Declaration. Such analysis has been applied to cases where certain events occurred before and others after the ratification of the Convention or where some of the alleged acts constituted violations of the American Declaration but not of the American Convention. The analysis of certain economic, social, and cultural rights serves as an example of this approach.

In analyzing states' compliance with the Convention, the Commission has the power "[t]o make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights."⁶⁴ Additionally, under Article 20 of its Statute,⁶⁵ and Articles 49 and 50 of its Rules of Procedure,⁶⁶ the Commission may also receive and examine petitions alleging violations of the human rights set forth in the American Declaration and issue recommendations when it considers it appropriate for furthering the protection and promotion of human rights.

Regarding the Commission's recommendations, it is worth noting that, unlike the Inter-American Court, the Commission cannot

63. *American Convention*, *supra* note 2, arts. 13 & 14.

64. *Id.* art. 41.

65. Statute of the Inter-Am. C.H.R., O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, OEA/Ser.L/V/11.50 doc.13 rev. 1 at 10 (1980), *reprinted in* ORGANIZATION OF AMERICAN STATES INTER-AMERICAN COURT OF HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 144 (2003).

66. Inter-American Commission Rules of Procedure, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V//II.71 doc.6 rev.1 at 117 (1987).

“order” reparations for the victims in the individual case but only “recommend” that the state take measures to remedy the situation and compensate the victims. While this may be perceived as a shortcut to the effectiveness of the Commission’s decisions, it does serve as international acknowledgment of the violations and damages. It provides clear and specific guidelines for the state to follow in repairing the violation and improving human rights protections for future cases, and ultimately, recommendations serve to further inform the inter-American standards, unifying interpretation criteria for the rights enshrined in both the Declaration and the Convention. As clearly stated by the Commission itself in the 1996 *Seminar on the Future of the Inter-American Human Rights System*, the Commission has an important role in developing a clear jurisprudence capable of orienting local political and judicial authorities within the states in their implementation of inter-American rules and standards for the protection of human rights.⁶⁷ In that sense, the clearer and more specific the recommendation, the better it orients future state action.

The Commission does not have a consistent practice regarding the specificity of its recommendations. Although the recommendations generally suggest appropriate measures or conduct for the state to follow upon corroborating a certain violation, it generally grants significant interpretative discretion to the states. Still, throughout its history, there have been certain cases where recommendations are specific enough to clearly guide—through proposed actions, measures, omissions, or legislation—the state and its conduct. These have been the cases of *Mr. Martínez Villareal v. United States*⁶⁸ and *Elias Biscet v. Cuba*,⁶⁹ both brought before the Commission for violations of the American Declaration.

In the first case, Mr. Martinez Villarreal was a Mexican national prosecuted, convicted, and sentenced to death for murder and burglary in the state of Arizona. The authorities had not informed the Mexican consulate of the case and failed to inform Mr. Martinez Villarreal of his right to communicate with the consulate himself, contrary to their obligation under the Vienna Convention on

67. “La Comisión también debe desarrollar una jurisprudencia que sirva para orientar a las autoridades e instancias judiciales internas en la aplicación de las normas interamericanas en material de derechos humanos.” *EL FUTURO DEL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS*, INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS 79 (Juan E. Méndez & Francisco Cox eds., 1998).

68. *Martinez Villareal v. United States*, Case 11.753, Inter-Am. C.H.R., Report No. 52/02, OEA/Ser.L./V/II.117, doc. 5 rev. 1 (2002).

69. *Elias Biscet v. Cuba*, Pets. 771/03 and 841/03, Inter-Am. C.H.R., Report No. 57/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1 (2004).

Diplomatic Relations.⁷⁰ The petitioners alleged that the victim did not speak English and had mental problems that made him incapable of standing trial or being executed. Additionally, they argued that the court-appointed lawyer who represented him at trial was inexperienced and did not speak Spanish, suggesting that their attorney-client communication would have been seriously challenged, if not impossible. In analyzing the case, the Commission found a violation of the rights to a fair trial and due process and within its merits analysis, stated that:

In a case such as the present, where a defendant's conviction has occurred as a result of proceedings that fail to satisfy the minimal requirements of fairness and due process, the Commission considers that the appropriate remedy includes a re-trial in accordance with the due process and fair trial protections prescribed under Articles XVIII and XXVI of the American Declaration or, where a re-trial in compliance with these protections is not possible, Mr. Martinez Villarreal's release.⁷¹

A similar provision was later included in the recommendations section of the report, thus clearly indicating what the appropriate remedy in this case would be.

The second case I mentioned, *Biscet*, involved the persecution, prosecution, and conviction of seventy-nine political dissidents in Cuba—including journalists, political opponents to the government, writers, and the like—under a domestic law that criminalized acts against the “Revolution.” The Commission in this case went even further in recommending: (1) the immediate and unconditional release of the victims and the overturning of their convictions; (2) the State's adoption of necessary measures to adapt its laws, procedures, and practices to international law, including repealing Law No. 88 and Article 99 of its criminal code (those pursuant to which the victims were convicted); (3) granting redress to the victims and their next of kin for the pecuniary and non-pecuniary damages suffered; and (4) the adoption of measures necessary to prevent a future recurrence of similar acts.

These two cases, *Villareal*⁷² and *Biscet*,⁷³ were instances where the Commission provided detailed and specific recommendations. These varied from suggesting monetary compensation or recommending specific changes to either general or specific pieces of legislation to

70. United Nations, Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95.

71. *Martinez Villareal*, Case 11.753, ¶ 86.

72. *Id.*

73. *Elias Biscet*, Pets. 771/03 and 841/03.

suggesting re-trial or annulment of criminal proceedings and serve, in some instances, to provide appropriate guidance for the state to harmonize their conduct and norms with international human rights standards.

The acknowledgement of a violation, regardless of whether it is made through a binding judicial decision or a Commission report and recommendation, has social and individual significance beyond its tangible effects and brings about the state's obligation to repair. The definition, scope, and content of such an obligation are as important as the acknowledgement of the violation itself. In this context, the Commission's recommendations in terms of reparations may record damages for the future and show the practical side of the acknowledgment of violations, even if the specific measures recommended are not complied with.

I will now turn to the challenges in litigating the case of *Lorenzo Enrique Copello Castillo*,⁷⁴ explaining first some of the facts and procedural history of the case, emphasizing the Project's challenges in determining and requesting appropriate reparations for the victims and their next of kin, and, finally, the decision in this case. Lorenzo Enrique Copello Castillo, Bárbaro Leodán Sevilla Garcia, and Jorge Luis Martinez Isaac, along with eleven other individuals, were convicted of hijacking a vessel while trying to escape from Cuba to the United States. The vessel ran out of gas, and they were all detained by the Cuban coastguard. In a process that lasted only three days, the three men were convicted and sentenced to death against Cuba's own laws that did not provide for the death penalty for these kinds of crimes. The two appeals that followed upheld the decision in a process that lasted less than a day each. None of the hearings were public, and none of the victims could freely choose their own lawyers. The three men were executed six days after they were apprehended.

The petition was brought to the Commission in 2003. In 2004, it was declared admissible, and in 2006, the Commission issued a report on the merits declaring the violation of Articles I, XVIII, and XXVI of the American Declaration. In the Brief on the Merits, submitted in August of 2005, WCL's Impact Litigation Project mainly focused on the effects of the violations and appropriate reparations, rather than re-addressing the extensively documented legal and factual basis for requesting the acknowledgement and declaration of a violation of the

74. *Copello Castillo v. Cuba*, Case 12.477, Inter-Am. C.H.R., Report No. 68/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 (2006), available at <http://www.cidh.org/annualrep/2006eng/CUBA.12477eng.htm>.

American Declaration included within the original petition in 2003. The Project was concerned with stating damages suffered by the victims, identifying the victims' next of kin, trying to gather information about the victims' occupations and incomes, determining the consequences of their deaths for their families and loved ones, etc. In asking for specific remedies, compensation, and measures of non-repetition, we attempted to bring a more tangible approach to the violations, while trying to show that international human rights violations, whether the standard is set in the American Convention or the Declaration, not only deal with theoretical or abstract questions but have specific practical repercussions that are serious and require immediate and appropriate redress.

First, requesting reparations in a case against Cuba proved to be a difficult task. In litigating this case, the Impact Litigation Project had several problems, including technical and practical challenges and defining our approach to the issue of reparations before the Commission. Initially, both students and attorneys at the Project had a very hard time identifying past petitions and denouncements that dealt with reparations under the Declaration in the level of detail that we were intending to enter into. This, in turn, brought about a second issue: since most petitions dealt almost exclusively with merits and legal argumentation rather than exhaustive claims for relief, we needed to bring the jurisprudence of the Court and the language of the pleadings submitted into the structure of the Declaration, which does not contain any article even remotely similar to Article 63 of the American Convention.

Additionally, the Project had to deal with the usual challenges in asking for reparations, whether at the Court, the Commission, or even domestically proving material and moral damages to determine compensation and other means of redress. This particular case was against Cuba and dealt with human rights violations, which translated into constant difficulty in gathering even general and broad information, as well as much more specific data about the victims themselves, their families, their occupation, and their individual situations.

Cuban organizations in the United States aided the Project in the preparation, facilitating interviews with some of the victims' family members and providing other relevant information about the general situation of the country. Still, communicating with Cuba and getting the questions answered was a logistical nightmare, and the factual information gathered, other than that related to the facts themselves, was very limited. The information showed that some of the victims

were employed at the moment of committing the criminal acts that led to their arrest, prosecution, and execution. Although it is not clear where they were employed, or what the terms and conditions of employment, including salary or benefits, were, the interviews facilitated by some Cuban organizations provided a sense of what the victims' roles were within their families: if they had dependants, how many, if they were single providers for their families, and their lifestyle. The lack of individualized information drove a need to research Cuban laws and policies to establish minimum hourly wages or salaries and basic living expenses and costs. This, in turn, showed that official minimum hourly wages in Cuba oftentimes differed significantly with the Cuban reality. In fact, official Cuban information suggested that the minimum wage was significantly less than the minimum life costs, which made it even harder to calculate what fair compensation would be for the victims in this case. We finally referred to some of the jurisprudence of the Inter-American Court in defining the minimum wage according to fairness and equity, as well as the general social and economic situation of the region.

From the legal analysis perspective, some of the challenges faced were due to the fact that the criteria of the Court and the Commission (although less specific) in determining compensation for damages, including pecuniary, non-pecuniary, and moral damages, as well as legal costs and fees, lack consistency. For the most part, the terms "equity" and "fairness" come up to fill voids in the rationale of the Court and Commission. Moral damages, for example, vary significantly from one case to another, even in cases addressing similar violations and circumstances.

Still, the Project's Brief on the Merits emphasized the reparations element of the violations. The brief was finally based on the limited individual information available: the information gathered regarding the general situation of Cuba at the time, the general costs and minimum wages established by some of the Court's past decisions in cases where the victims' occupations or salaries were unknown, and the Court's general criteria to identify the beneficiaries, determine the scope and content of appropriate and proportional remedies, and seek measures of non-repetition.

The Commission's report on the merits was transmitted to the State and unfortunately went unanswered. The Commission, on its part, chose a conservative approach, issuing general and vague recommendations instead of specific, tangible ones. The Commission repeated a common formula generally used in cases

involving Cuba, recommending that the State: (1) adopt the necessary measures to adapt the laws, procedures, and practices to the international human rights standards; (2) provide reparations to the victims for pecuniary and non-pecuniary damages suffered; and (3) adopt the necessary measures to avoid repetition of the facts that gave rise to this petition.⁷⁵ In doing so, it failed to specify which laws should be amended to guarantee the independence of the judiciary, to guarantee the right to an independent lawyer, or any specific means to achieve the fair compensation of the victims.

However, the report of the Commission did include an entire section under "Position of the Parties" on remedies and reparations and transcribed the most important parts of our brief and claim for relief. The publication of our request, in and of itself, besides any technical and practical difficulties, made the effort worthwhile. Despite the fact that the Commission did not really pronounce itself on the reparations aspect and chose instead a conservative approach, it did state for the future that there were damages. Furthermore, the Commission stated that those damages were tangible and affected specific people in specific ways and left a record for the future that reparations were sought and should be fulfilled, if not now, then in the near future.

Let me conclude by saying that requesting reparations at the Commission, whether under the Declaration or the Convention, may contribute significantly to the development of new standards and to the strengthening of existing ones. Placing more emphasis on reparations at the Commission level may help the system issue more specific recommendations to states, which in turn may serve as historic records and strengthen domestic claims. These may also provide better orientation for states' political and judicial organs in adjusting their norms to international human rights law. Finally, in developing a more rigorous and specific analysis of remedies and reparations, the Commission can also develop more uniform criteria and standards on this issue, thus, helping to bridge the gap between state parties and non-state parties to the American Convention.

*B. Carlos Ayala*⁷⁶

I have chosen the topic of litigating against state normative acts within the inter-American system. International law establishes the general obligation of those states that have ratified a human rights

75. *Id.* ¶ 124.

76. Carlos Ayala is President of the Andean Commission of Jurists.

treaty to introduce the necessary modifications into their domestic laws in order to ensure proper compliance with the treaty's provisions. State parties must comply with the American Convention on Human Rights not only through specific measures but also through general or normative measures in their domestic laws. When litigating a case, one has to analyze if a violation is based on the application of specific laws that are not compatible with the American Convention. In those cases, complete reparation can occur and be effective only when the state adjusts its domestic laws to conform with the American Convention. By challenging the noncompliance of state normative acts with the Convention and thus having the international human rights system rule on these issues, we can obtain justice in the specific case but also in other cases where the violation is based on the same domestic law, and we can prevent new violations from occurring.

Under Article 63 of the Convention, the Inter-American Commission and Court have made major advancements in this field. The Court, for instance, has requested that states modify their constitutions to make them compatible with the Convention. It has also requested that states modify or repeal laws that are not compatible with the Convention or that impede the exercise of human rights enshrined in the Convention. These measures are considered part of the remedies in cases of human rights violations, and the Inter-American Court refers to them as non-pecuniary reparations.

Let me give you some examples. In the case of the censorship of the film, *The Last Temptation of Christ*,⁷⁷ the Court ruled that Chile failed to comply with its international obligations by keeping the normative basis for censorship in the Constitution after ratifying the American Convention. Therefore, the Inter-American Court ordered Chile to adjust its domestic law to guarantee and respect the right of freedom of expression embodied in the Convention. The Inter-American Court ordered Chile to modify Article 19(12) of the Constitution and Decree Law 679. The Court declared that the State must amend its domestic law in order to eliminate prior censorship and allow the exhibition of the film.

It is important to recognize that Chile did comply with the requests of the Court or with its order on compliance. The Court determined that the constitutional reform designed for the elimination of

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

cinematographic censorship was promulgated and incorporated into the Constitution. Chile also informed the Court that a new Classification of Cinematographic Protection Act was adopted. In the end, the film was reclassified and shown to Chilean society.

In the case of *Caesar v. Trinidad and Tobago*,⁷⁸ the Court declared that the imposition of corporal punishment by flogging is an absolute violation of the Convention's prohibition against torture and other cruel, inhumane, and degrading treatment. The Court held that Mr. Caesar's physical and psychological problems persisted and had not been treated. Consequently, the Court directed the State to provide Mr. Caesar with proper medical and psychological care as recommended by qualified specialists.

The Court determined that those violations occurred due to the application of normative acts contained in the State's law and the Constitution. In this respect the Court directed the State to adopt, within a reasonable time, such legislative and other measures as may be necessary to abrogate the Corporal Punishment Act. Similarly, the Court held that as far as the "savings clause" under Section 6 of Trinidad and Tobago's Constitution immunizes the Corporal Punishment Act from challenge, it is incompatible with the Convention. Therefore, the Court ordered the State to amend Section 6 of the Trinidad and Tobago Constitution insofar as that prohibition denies persons effective recourse to a court or tribunal and a remedy against violations of their human rights.

In the case of *Herrera-Ulloa v. Costa Rica*,⁷⁹ even though the Inter-American Commission did not find a violation of the right to appeal to a higher court, the petitioners requested it, and the Court declared such a violation. In its decision, the Court declared that the appeal of cassation in the Code of Criminal Procedure, filed to challenge a conviction, did not satisfy the requirements of a remedy because it did not permit the higher court to do a thorough analysis of all the issues debated and analyzed by the lower court. The Court decided that the State must nullify the judgments of the Criminal Court of the First Judicial Circuit of San José and take all the measures needed to adjust its domestic legal system to conform with the provisions of Article 8(2)(h) and Article 2 of the American Convention on Human Rights. Costa Rica recently informed the Court that it complied with this order by amending the Code of

78. Inter-Am. Ct. H.R. (ser. C) No. 123 (Mar. 11, 2005).

79. Inter-Am. Ct. H.R. (ser. C) No. 107 (July 2, 2004).

Criminal Procedure to allow the challenge and review of legal, as well as factual, findings in lower court convictions.

In its decision in the case of *Barrios Altos v. Peru*,⁸⁰ the Inter-American Court found that Peru failed to comply with Articles 1.1 and 2 of the American Convention, as well as the rights to life, to humane treatment, and to a fair trial and judicial protection as a result of the promulgation and application of Amnesty Laws No. 26479 and No. 26492. As a natural consequence of that ruling, the Court found that the amnesty laws are incompatible with the American Convention and consequently lack legal effect. The Commission requested that the Court clarify the meaning and scope of this judgment. The Commission asked the Court whether the effect of the judgment delivered in this case applied only to this case or to all the cases of human rights violations involving amnesty laws. The Court decided that, given the nature of the violations of amnesty laws, the decision of the judgment on the merits of the *Barrios Altos* case applies generally to all cases. On the judgment on reparations delivered in this case, the Court decided that Peru must take, as a non-pecuniary reparation, necessary actions to apply the ruling of the Court regarding its interpretation of the merits and the meaning and scope of the declaration of ineffectiveness of the amnesty laws. We must note that the ruling that the amnesty laws lack legal effect is equivalent to decisions on the constitutionality of laws made by high domestic courts. In these cases, the Inter-American Court is acting more like a real constitutional court with equivalent powers to those exercised by those high constitutional courts in Europe and Latin America. When the Inter-American Court declares a law to be incompatible with the Convention, it is like a decision rendered by the courts in these states because it declares the law null and void for all the land.

Another interesting example of a normative act that was declared, not as a whole but in its pertinent part, incompatible with the Convention was in the case of *Blanco Romero y Otros v. Venezuela*.⁸¹ In its judgment, the Court found a violation of Articles 8 and 25 of the Convention based on the inefficacy of habeas corpus due to the courts in Venezuela requiring the petitioners to identify the exact location of a disappeared person in order to admit the case. The Court ordered the State to adopt the necessary legislative and other measures needed to make habeas corpus affirmative and effective in

80. Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

81. Inter-Am. Ct. H.R. (ser. C) No. 138 (Nov. 28, 2005).

the cases of forced disappearances. The Court also declared that the Criminal Code of Venezuela did not define forced disappearances, as defined in the Inter-American Convention of the Forced Disappearance of Persons, because it distinguished between State actors and those working on behalf of the State authorities. The Court requested that Venezuela conform the laws to make them compatible with international legal standards.

One final example of this series of cases I want to mention is the case of *Montero-Aranguren (Detention Center of Catia) v. Venezuela*.⁸² The Court found that the abuses and killings of inmates in that penitentiary facility were due to the lack of implementation of the international human rights standards applicable to detained persons under the American Convention. Those standards were not enshrined and guaranteed in Venezuelan legislation. As a consequence of that finding, the Court ordered the State to prevent future violations by adopting all necessary legislation to comply with the Convention.

Let me finish with a general conclusion that I have reached after litigating and being an active participant in some of these cases. When litigating a human rights case in the inter-American system, it is important to determine if a violation of the rights of the victims is based on, caused by, or related to normative acts including, but not limited to, the constitutions or laws. In cases where this violation is identified, the normative act must be challenged as incompatible with the American Convention in order to have the Commission and/or the Court declare its incompatibility and order non-pecuniary reparations. Reparations might include either an order saying that the normative act “lacks legal effect” or that the state must take all necessary actions to either adopt a law or amend an existing one in order to comply with the international obligations under the American Convention. Through this litigation strategy of challenging normative acts, we can obtain a broader impact not only on the reparations for the victims in the individual case but also on the rest of the society. We can improve the general situation and the advancement of human rights by creating the conditions for repairing other existing violations and preventing new violations from occurring.

82. Inter-Am. Ct. H.R. (ser. C) No. 150 (July 5, 2006).

*C. Viviana Krsticevic*⁸³

Well, like a stone in a pond, pain creates many ripples of destruction. Many human rights cases can illustrate the impact of one single painful event on the lives of dozens of people, hundreds, and then thousands of individuals. Each mother that disappears leaves a grieving husband and children that will grow without her love. Parents feel they have failed in their duty to protect their children and that they have challenged the natural course of events, which requires that they die first. Sometimes, when they leave us, they also leave communities behind that will survive weakened by the loss of their leaders.

The litigation in the inter-American system exposes us to many mothers, daughters, sisters, men, and children that have been ripped by pain. Their lives have been changed forever and ours as well. One of the tasks of us as lawyers and litigators is to not be blinded by their pain but neither to be unaware of it. One of the ways in which I have viewed our task is the challenge of using anger, pain, and passion in order to give shape to the law. Namely, it is the challenge to be an effective legal translator for the victim and her cause before the courts. Early on, one of my teachers, a victim of abuse herself, told me about the empowering use of rage. As human rights activists, with our work, we can also help build those walls and guarantees against abuse. We can hope that, through our work in the inter-American system, some of the pain that we have to deal with by working with human rights victims through this justice path will be transformed into ripples of hope for many others. Some of the most interesting developments in the inter-American system and its jurisprudence are that it has been founded in listening carefully to the victims and using their own language and plights, and shaping them into legal arguments and translating them into legal terms and argumentation. I am not dismissing the impact that precedents, philosophy, or politics have had in some of the legal decisions that we make as legal representatives or in the judgments that the Commission and the Court have made. However, I believe that giving an important space for the voices of the victims themselves has made some decisions of the inter-American system truly unique. It distinguishes them from their prestigious European counterpart. It made them much more adequate to the needs of our hemisphere, to

83. Viviana Krsticevic is the Executive Director of the Center for Justice and International Law.

the needs of the victims themselves, but also to the needs of the societies in Latin America.

One of the best examples of how the voices of the victims have helped shape the inter-American system was the case of *El Amparo*,⁸⁴ where one of the mothers of one of the men that had been killed in this massacre committed by the Venezuela military on the border with Columbia grabbed one of the litigators in this case and crying, said, "My son was not a cow, I don't want money, what I want is justice." We were faced in the litigation of that case with the fact that *Velásquez-Rodríguez*⁸⁵ as a precedent has been wonderful in establishing that there was an obligation to prosecute and punish, but it had not been clear enough in the operative paragraphs to establish that obligation. In the litigation of that case, the Commission and the representatives of the victim made a distinction in Article 53 of that Convention, which eventually led to the inclusion of that specific right of justice for the first time in the decision of the Court. Here, you have the Court deciding that the state of Venezuela shall be obliged to continue investigations and to punish those that are responsible. We also, thinking about Venezuela at that point, asked the Court to consider asking the government to change the military justice code because this massacre was being investigated in the military justice system. We were unsuccessful in that case, but as litigants, we not only listen to the victim, but we get so convinced that we keep on asking even when the Court denies some of the reparations.

In another case, *Villagrán Morales*,⁸⁶ several years later, we also asked the Court, without the backing of the Commission, to modify the legislation. The Court took an incredible step in *Villagrán Morales* in creating a more structural guarantee for the protection of children. As our colleague, Carlos Ayala, described, that in time led to a very rich jurisprudence of the Court in terms of overturning and declaring some laws without effect. Currently, we are also litigating a case where we ask for not a whole law to be overturned but specific aspects of a law in a more refined challenge to one of the obstacles against impunity. In the case of *Maria Elena Loayza Tamayo*,⁸⁷ you can

84. Case of *El Amparo v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 19 (Jan. 18, 1995).

85. Case of *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

86. Case of the "Street Children" (*Villagrán Morales*) v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 32 (Sept. 11, 1997).

87. Case of *Loayza Tamayo v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 33 (Sept. 17, 1997).

see how the voice of the victim and her sister were key to the development of the jurisprudence of the Court. Maria Elena had been wrongly imprisoned. Through the anti-terrorism legislation of Peru, her life had been changed forever. She lost a big part of her life. She lost her ability to continue her academic endeavors by being wrongly imprisoned. She lost a key part of rearing her children. She had two children that when she had finally been released from jail had gone through a big chunk of their adolescent years without her. They were not the children that she left behind anymore, and she was not the mother that they shared before she had been in prison. Her sister, Catalina, recognized how her imprisonment had created that level of turmoil on Maria Elena's life and on the lives of their family. Her story inspired one of her colleagues and friends to put forth to the Court in the reparations stage the concept of a life plan and how a life plan had been damaged for Maria Elena. In the Court's award, it recognized this in its reparations decision. The Court not only recognized that her life plan had been changed but also took some measures of restitution, reinstating Maria Elena or asking for the reinstatement and reinstitution of Maria Elena to her academic life and her teaching.

Another case that illustrates part of this shaping of the jurisprudence by what the victims have asked is the case of *Helen Mack*.⁸⁸ The case of *Helen Mack* is a very interesting case. Myrna Mack, Helen's sister, had been killed Guatemala in an unfortunate incident on September 11, 1990. She had been killed by a state actor. By the determined work of her sister, Helen, there were investigations that were carried out domestically, and some of the perpetrators of her killing had been punished. However, Helen was not satisfied. She wanted everybody that was responsible for the killing of Myrna, a social activist and an anthropologist, to be punished. She was not satisfied with only getting those who had had their hands covered in blood—she asked for those that had given the orders and those that had participated in the cover-up as well.

By litigating the case in the Court, she asked us to take that into account in the way that we asked for some of the reparations. You see how the Court responds to her plight. It is not just by a general provision or order that you have to investigate and punish, but the Court talks very specifically about what the State has to investigate, trying to identify and punish the direct perpetrators and other

88. Case of Mack Chang v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 101, (Nov. 25, 2003).

people responsible, including those that participated in the cover-up, and that the results of the investigation have to be made public. That is, the government has to remove de facto and legal mechanisms that maintain impunity. It has to give safety to those people who are involved in the search for justice. One of the strengths of Helen is that she is not a lawyer, and she was able to see how important it was to have a culture change, to have some of the public authorities carry out an acknowledgement of responsibility that have enough weight as to create some of the ripples of hope in Guatemala.

When implementing the decision of the Court, Helen made sure that not only the President was there for the acknowledgment of responsibility, but also a hundred members of the military attended. Everybody in the upper ranks of the armed forces was there, members of the police came, and members of those in the community that her sister had worked with came by buses from the countryside. It was an incredible and moving act of recognition of responsibility that created a seismic change in the normal events in Guatemala—those that were always disenfranchised were given a space of recognition and acknowledgement of the wrong done to them. Those that had been in power for so long and had been harmful to society were sitting down and listening to what the President had to say and what Myrna's daughter and Myrna's sister had to say. These are some of the ways that the voices of the victims have been key to shaping the decisions of the Court. Those decisions have helped to build the jurisprudence and have contributed in a way and catalyzed some changes in the culture and institutions that give hope to the victims and activists in our democracy, and it shows the role that the inter-American system has played and can keep on playing in this respect.

To finish, I would like to pose some questions about some of the challenges that we are still facing in the inter-American system in continuing to reflect the voice of the victims, and I would just like to name some of them. I cannot even start giving responses to them, especially with the scholars and the activists and members and former members of the system that are here. Some of the challenges have to deal with multiple voices. Voices of multiple victims that have been affected by one type of violation: it could be a massacre; it could be a prison riot; it could be the displacement of a community. How can we give space and adequate voice to those different interests? That tears us sometimes as litigants because we try to go down that path, but it is not always easy and sometimes there are conflicts of interest. In giving voice, how to give a voice that differentiates gender, culture,

and impacts not only individuals but communities? How do we deal with the impacts of some of these violations on whole peoples? How do we take into our strategy the well-being of persons, individuals, and communities? How to take care of their psychological well-being in going through that long and sometimes not easy path of looking for justice in international area? How do we respond to their safety needs as well? What is the role as human rights activists and representatives? What is the role of the orders of protection of the system? What's the role of the OAS? What's the role of the states in that and what's the link of those, as Rick was saying, of provisional and precautionary measures, insuring that the victims can be also heard? Who has access and a voice is also sometimes limited by money, and this is something we are starting to see right now in the inter-American system. It is difficult to keep a close link with the people that we represent because of the types of situations they are in, because of issues of safety, costs, and exploring the different avenues in the inter-American system like friendly settlements. Keeping the victim as a central participant in the litigation costs a lot of money. As my colleague, Francisco Quintana, was saying, sometimes what is recovered from the costs of the litigation at the Commission is nil, and at the Court it is a symbolic amount. In a case against the Dominican Republic, we, after years of litigation, recovered \$6,000 for three parties that litigated a humongous case. Given that my list of issues is much longer than the time allows, I would just like to thank you very much for giving me this opportunity to share some of our experiences and our thoughts.

D. Pablo Jacoby⁸⁹

“In Search of an Integral Remedy For Human Rights Violations: Reflections from the Argentine Israelite Mutual Association Case”

I shall concentrate on how the remedies are made effective when a state is declared responsible for the violation of human rights set forth by the Convention.

Everyone here is aware that when a report is filed before the Inter-American Convention on Human Rights, the petitioners must prove that the rights of the victims have been affected and that the state failed to satisfactorily deal with their complaints.

89. Pablo Jacoby is an Argentine lawyer who represents *Memoria Activa*, an NGO that gathers the victims of the terrorist attack against the Asociación Mutual Israelita Argentina (AMIA) in Argentina. He specializes in freedom of expression litigation.

Persons whose human rights have been violated are twice victimized. First, they are victimized due to an action or omission that affects their rights, either from the state or from a private individual. Second, they are victimized by the state that failed in its duty to prevent, investigate, or punish that violation. This perspective is crucial in order to understand the significance of the subject because if, after going through all the necessary stages to reach an international decision which acknowledges a violation of human rights, the remedies are not effective in due time and proper form, the inter-American system as a whole would then repeat a re-victimization of the petitioner, something which doubtlessly, the system itself seeks to avoid. In other words, the inter-American system of human rights protection is a justice system in danger of losing legitimacy if its decisions are merely testimonial and cannot be made effective in the places where the violations were committed.

The questions that will be raised, the criticism, and the future perspectives that will be outlined, will be mainly influenced by my personal experience in the litigation of the Argentine nongovernmental organization *Memoria Activa*, whose purpose is to clarify the terrorist attack perpetrated on July 18, 1994 against the headquarters of the Argentine Israelite Mutual Association (“AMIA”) and to punish those responsible.

In searching for remedies for the human rights violations in the inter-American systems, two stages can be distinguished. The first stage, from the plaintiff’s point of view, is intended to get to an international organization, whether it be the Inter-American Commission or, if it should be the case, the Inter-American Court, to accept that there has been a violation of a right acknowledged by the American Convention. Occasionally, the mere acceptance of the case by the Inter-American Commission represents a remedy for the victim because, bearing in mind the contexts in which the petitions take place, that might be the first time the victim has been heard. The second stage, which can be called the “execution stage,” is oriented to effectively achieving the restoration of the violated right or, failing that, to get an integral remedy.

The inter-American system has proved to be an effective tool to accomplish the first of the mentioned stages. Nevertheless, present-day jurists, analysts, and even the actors of the system themselves, admit there are serious deficiencies in the execution phase of the

cases, particularly regarding Inter-American Court sentences,⁹⁰ which are non-fulfilled to a greater extent than the cases in which the Inter-American Commission is to decide. These deficiencies conspire against the inter-American system as a whole, since an ineffective justice system is an unfair one. However, not all these alerts are to be considered insurmountable obstacles, and it is our job, as operators of the system, to identify the problems and to adopt solutions so that countless efforts are not in vain.

Next, I shall refer to the experience of the AMIA case that is in the process of “friendly settlement” before the Inter-American Commission. Concerning this experience, I shall outline some proposals that can improve the effectiveness of the system.

1. *The AMIA case*

On March 4, 2005, in a hearing celebrated before the Inter-American Commission on Human Rights, the Argentine State formally accepted its responsibility regarding the attack perpetrated on July 18 on the seat of AMIA for failure to comply with the duty of prevention, taking into account that two years before there had been a terrorist attack against the Israeli Embassy in Buenos Aires.⁹¹ Furthermore, the Argentine State accepted the existence of a serious and deliberate cover-up from the authorities in charge of investigating the unlawful act, which meant a clear denial of justice.

Four months later, the Argentine President, Nestor Kirchner, issued Decree No. 812/2005,⁹² committing to adopt a series of measures that included:

The public diffusion of the acceptance of the Argentine State’s responsibility and the final report made by the overseer designated by the Inter-American Commission, Dean Claudio Grossman, who followed the entire judging process during the oral trial.

The advance in the investigation of both the attack and the cover-up and the punishment of those responsible.

The adoption of measures intended to avoid the repetition of these kinds of cases. He committed to create a unit that specialized in catastrophes, both for the attention of medical emergencies and

90. See *Case of Caesar v. Trinidad y Tobago*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 123 (Mar. 11, 2005) (Robles, J., concurring) (highlighting the concerns associated with Trinidad and Tobago’s lack of enthusiasm for working with the Court, including its failure to submit requested information or appoint representatives).

91. Press Release, Inter-Am. C.H.R., IACHR Expresses Satisfaction at the Argentine State’s Acknowledgment of Liability in the AMIA Case (Mar. 4, 2005), available at <http://www.cidh.org/comunicados/english/2005/5.05eng.htm>.

92. Decree No. 812-2005, Mar. 4, 2005, 30.694, B.O.1., available at www.derhumanjus.gov.ar/normativa/pdf/DECRETO_812-2005.pdf.

for the recollection and protection of evidence in criminal cases, which include a contingency plan in case of attacks, and to modify certain laws related to the access to intelligence information by the judges who investigate terrorist acts.

The promotion of the sanction of a remedy law for all the victims of the attack.

To take responsibility for the fees of both the internal and international process.

The NGO, *Memoria Activa*, accepted the proposal of the Argentine State of starting the process of friendly settlement. We find ourselves before an unprecedented and very particular case in which the State accepted its international responsibility at the very start of the friendly settlement process.

Two years later, the State has fostered some crucial measures, even though it has not fulfilled most of the promised points. In general, the State is halfway through the fulfillment of all the points, particularly those regarding the executive and legislative powers. Thus, on the one hand, at the judicial level, a judge who initially took part in the investigation and the prosecutors who had endorsed the irregularities have all been removed. Although there is a strong compromise from the highest governmental authority—materialized with the presidential decree of responsibility acceptance—we come across problems with ministers and second-tier officers who hinder or delay the realization of the solution to the specific points.

2. *Criticism and proposals*

The criticism mentioned does not have the intention of underestimating the importance of the role performed by the Inter-American Commission on Human Rights in the mainframe of the friendly settlement process, since it has proved at all times a strong commitment to reach the solution to the conflict, which is particularly complex, owing to the fact that it arises from a terrorist attack. This experience forces us to study some proposals so that these kinds of processes acquire a greater effectiveness and contribute to the strengthening of the system.

The greater deficiency of the system is concentrated on how the duties assumed internationally are carried out internally. I shall outline some proposals intended to solve these deficiencies:

(a) Regarding the duration of the processes of friendly settlement, it would be of great importance to establish deadlines to fulfill the duties assumed by the states. The task of the Inter-American Commission would be to establish, together with the parties, a

reasonable deadline for the fulfillment of the assumed duties. In this way, we would avoid falling into what at first we called “revictimization,” since those involved would have a clear idea of the deadlines of the process. It will be agreed that one or two years in a proceeding does not represent too much time for a state, but for a person who has been a victim to a violation of the Convention, each passing day or month is valuable and irretrievable.

(b) Regarding the remedies, the Inter-American Court has already stated that “remedy” is a generic term that includes the different ways in which a state can face the international responsibility it has incurred.⁹³ This concept includes the material and moral compensation of the victims, the fees and expenses generated in the national and international processes, as well as other non-financial reparation measures that operate as non-repetition guarantees.⁹⁴

One of the most evident deficiencies in the process of the attack against the AMIA seat is the complete lack of communication between the State and the victims of the terrorist attack. Even though *Memoria Activa* has requested that the financial remedies reach not only the petitioners but also the rest of the victims, no officer has called them at least to inform them about the process of friendly settlement. On this point, the State has the unavoidable moral duty of listening to each one of the victims, and they should also apologize to each of them on behalf of the State.

In the case of the attack against the AMIA seat, it would have been perfectly possible to form a commission—such as the one led by Kenneth Feinberg in the United States concerning the terrorist attacks of September 11, 2001—so that the State could get acquainted with all the cases about the needs of those affected, with

93. Cf. Case of Garrido & Baigorria v. Argentina, Inter-Am. Ct. H.R. (ser. C) No. 39, ¶ 78 (Aug. 27, 1998) (noting that there were no disagreements between the parties over the damages claimed by the victims’ families); Case of Garrido and Baigorria v. Argentina, Inter-Am. Ct. H.R. (ser. C) No. 26 (Feb. 2, 1996) (ordering the Argentine government to investigate the whereabouts of the victims, release information on their detention, compensate the affected families for material and moral loss, and provide any other remedies necessary to compensate for harm).

94. See Case of Mack Chang v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 301 (Nov. 25, 2003) (deciding, among other things, that Guatemala must publish within three months the judgment and the facts from the case in the nation’s official gazette); Case of Bulacio v. Argentina, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 162 (Sept. 18, 2003) (setting forth a condition that Argentina must make the legislative changes necessary for compliance with international law); Case of Cesti Hurtado v. Peru, 2001 Inter-Am. Ct. H.R. (Ser. C) No. 78, ¶ 80 (May 31, 2001) (ordering Peru to pay damages, investigate the incident in question, and punish those responsible); Case of Suárez-Rosero v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 44, ¶ 113 (Jan. 20, 1999) (directing Ecuador to provide financial reparations and remove the victim’s name from certain criminal listings); *Garrido*, No. 39, ¶ 91 (providing for not only financial reparations but also a government search for the victim’s natural children).

the objective of suggesting or at least trying to focus their requirements or needs regarding financial remedy. For the time being, and despite its commitment, the Argentine State has not passed any financial remedy law, nor has it formed a commission to study the subject of compensation.

Concerning the fees and expenses of the process, everybody is aware that any case brought before the Inter-American Commission or Court implies a series of expenses for those involved that very often they cannot afford. For that reason, many times the petitioners find themselves with the dilemma of either having to invest a lot of money or leaving everything to chance. For most of the inhabitants of the American continent, it is not possible to afford a plane ticket and accommodation in Washington, D.C. in order to attend the hearings of the Commission or to hire trusted lawyers experienced in this kind of litigation. That is the reason why it would be of great importance, each time a process of friendly settlement is opened or admitted, to stipulate from the beginning who will meet the expenses. That would establish from the very start the intention to get to a solution and the interest in avoiding useless delays. In the first place, if the state agrees to a dialogue, it should be able to provide the petitioners with the necessary means so that they can take part in all the processes in the same conditions as the officers. In this case, the Inter-American Commission could invite the state involved to formulate a proposal. Thus, they would avoid asymmetries that, in the end, result in prejudice to the right to access justice in equal conditions. Many times, the amounts set by the Inter-American Court and Commission as expenses and fees turn out to be low considering that on most occasions, the process implies many years of work and transportation for the professionals. It is true that many cases are very efficiently followed by nonprofit NGOs that have their own financing specifically designed to continue these litigations and that therefore, do not depend on the money fixed by the international organizations as fees. However, fixing higher professional fees would act as an incentive and would mean a greater opening-up of the system to law professionals of the region who practice privately.

(c) Apart from that, any problematic situation in this kind of process is increased if there are federal states involved that, in accordance with the internal organization of that state, allow the provincial states to also take part in the search for a solution. Frequently, when two state organizations are part of a controversy, they mutually reproach each other, having been the ones that caused

the conflict or being the obstacle to the solution. In that case, it would be interesting if, when a case with those characteristics appears in a process of friendly settlement, the Inter-American Commission invites the federal state to share the board of friendly settlement with representatives of the provincial state. In that way, delays or excessive bureaucratization of the dialogue process could be avoided.

(d) Besides, it can be noticed that state officers are unaware of how the inter-American system of human rights protection works. Setting aside a few "experts," the rest of the public officers are unaware of the implications and consequences that arise when the state has affected human rights acknowledged by the American Convention. This lack of knowledge, or at times, rejection of the inter-American system, lies on the false and wrong conception that when the states acknowledge international responsibility or are punished, they are being influenced by foreign organizations or that their national sovereignty is being affected. The collaboration with the system, the fulfillment of a court sentence, or generally speaking, the acceptance of international responsibility implies increasing the standard of respect for human rights, which in no way means a defeat for the state.

The solution to this problem is to train each officer who works with this kind of topic. It is clear that this proposal will take a lot of time and that it will not be easy to carry it out in the short-term. In order to overcome this lack of knowledge and treat all cases equally, I consider it would be very useful that every state party to the Convention pass laws internally to establish how the Convention is to be implemented in the mainframe of a process of friendly settlement, or else, how the decisions of the Inter-American Commission and Court are to be carried out. This law could clearly establish who would be the application authority, the deadlines for the negotiations or for the fulfillment of the sentences, who would be in charge of the expenses and fees of the litigation, and who would do it and how. That law could also make clear which state officer can act as delegate before the Inter-American Court or Commission, according to each case.

With an implementation law, a number of questions would be organized, and, in my opinion, the inter-American system of human rights protection would be strengthened. Due to the difficulties in executing the Commission's resolutions, some victims of the attack have asked me to start civil actions before the Argentine courts against the alleged responsible of the massacre, among whom I believe are the Hezbollah organization and the Islamic Republic of Iran.

IV. KEYNOTE SPEAKER: SERGIO GARCIA RAMIREZ⁹⁵

It is a pleasure for me to see that there are so many Spanish speakers here. This is proof that there is a big tide of Spanish conquerors in this country. It is a cause for joy and for sadness because I will have to interrupt this nice luncheon and the nice siesta that we would take after lunch in my country. This presentation will be half as long as it is supposed to be because there will be a Spanish and an English version (and the English version will probably be better). I would first like to thank everyone, particularly Dean Grossman and Agustina Del Campo, the organizers of this event.

I imagined coming here in a spirit of sportsmanship, almost like a swimmer standing before a pool full of water, about to enjoy the nice weather. Over the course of this morning, I noticed that the water in the pool was slowly decreasing, as each speaker talked. I wonder now if I should dive into this pool that now seems to be empty and whose floor I'm staring at.

I would like to share with you a few of my ideas and viewpoints that I have developed over the years working in the reality of the inter-American system. Reparations are a fascinating and crucial theme for the exercise of jurisdiction. The American Convention only has one short and brief article on reparations. This is not a model of legislative technique, but it is all we have. The big question for a judge that needs to satisfy the demands of justice—which means reparations—is how far can we go to compensate the victims who come in search of justice? Where do we draw the line?

An international human rights judge is similar to a constitutional judge, in that constitutional judges liberate themselves from the strict text of the instruments they are interpreting. The judge explores precedent, past, present and future perspectives, and makes decisions that go beyond the mere text of the law. Constitutional judges do not encounter anyone to correct their work; similarly, we, as international judges, do not have a supervisory body either. We base our decisions on the American Convention. International judges also interpret a text, like the American Convention, and they explore the values, hopes, principles, and requests, and convert all that into a judicial resolution that satisfies justice. But it cannot be just a flight of the imagination or a literary license. When I decide my vote in a case, I ask myself where are the limits? Where do we draw the line? The lines have been moving over the last twenty years due to the Court's

95. Sergio Garcia Ramirez is President of the Inter-American Court of Human Rights.

dynamic interpretation of the Convention. This is particularly true in the area of reparations. We have advanced from talking about indemnification to reparation. We need to advance further and discuss it not in terms of reparations but in terms of the consequences of illicit conduct, which encompasses many effects.

Therefore we have undergone a change from the ancient figure of the judge from the laws of Montesquieu. Historically, Montesquieu saw the judge as the mouth that pronounced the law. Now, the national constitutional judges are no longer just the mouth that pronounces the law, articulating the formulas of a convention or a constitution. Now, judges are readers of the law, and quasi legislators, and I would even get rid of the prefix quasi and describe judges as legislators—in both the national and international arenas. Additionally, international judges influence domestic judges. This is reflected in the Court's generous and progressive interpretation of reparations. I do not mean the moral dimension implied by the word generous, but I am referring to the expansive and progressive approach of the Court to charter and extend into new territory. We have seen this development in a very short amount of time. The evolution of the system from its beginnings in 1945 has been long and difficult, complicated and accidental. I am referring only to the Court, and not the advances of the Commission, because others are more qualified than I to speak about the Commission's work. The evolution of the Court in reparations over the last fifteen or twenty years has been enormous. The Court's decisions on the merits have not been many, but even if not many and within that short period of time, the Court has advanced many issues and has demonstrated considerable advancements in the legal consequences of illicit conduct. This is the first point I wanted to raise about the history of the reparations jurisprudence.

Secondly, I would like to mention a general element of the jurisprudence. The jurisprudence is consistent with the concern, preoccupation, and what is almost an obsession of the Court with the *pro homine* principle of interpretation. It is more than a method of interpretation. It seems to me, if I am not mistaken, that from the first moment up until now, it has been the guiding principle of the Inter-American Court. We heard earlier today about the Court's caution with reparations. In some of the original opinions, the Court was cautious when attempting to fix the consequences of certain

conducts. For example, in *Velásquez Rodríguez*,⁹⁶ there was certain reluctance towards reparations. (The *Velásquez* decision was an excellent decision and it goes to the core of the history of the Court.) After this decision, the Court continued to grow and grow under the guiding *pro homine* principal to further develop the protection of human rights.

Do not doubt that I, in the bottom of my heart and conscience, along with everyone else, wish that the Court would act more expeditiously and with a wider scope. However, this is not always possible. Yet, we have always treaded a straight path of growth. We have had moments when we have stumbled, but fortunately, we have never gone back. The Inter-American Court still offers great judicial protection to the people of the Americas. That is a second point.

The third point I want to raise in order to facilitate the understanding of the Court's jurisprudence on reparations is that the Court has been invariably rigorous in examining the sources of the violations. Some have criticized the Court for overstepping its boundary in analyzing the sources of the violations. The Court has gone beyond this limited scope; it has done more than note the facts of the violations and leave it there. It has looked to domestic case law and legislation to determine the source of the violations to the Convention. The Court is obligated to analyze those sources and establish relevant parameters of the domestic legislation or case law, *vis-à-vis* the American Convention. Even though some critics argue that this goes beyond the role of an international court, through this approach we have deepened the scope of and created new spaces for reparations.

The developments in the interpretation of liberties and rights also expand the scope and nature of possible reparations that the Court can order. The Court said in a recent decision that depriving a person of access to information under the State's control violates the Convention. It automatically analyzed and interpreted the articles and sources of Article 13 of the Convention and created new space for awarding reparations. Similarly, in other cases, the Court has analyzed the illicit conduct of individuals who are not agents of the state but whose conduct can be attributed to it. This opened up new space for reparations and a new situation for the victims. This approach of analyzing the sources of violations, incorporating developing concepts to liberties and rights, and holding the state

96. *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

liable for certain conduct of non-state agents, has been part of the Court's global examination of reparations during the last fifteen or twenty years.

The fourth point I would like to raise is the manner in which the Court has developed appropriate forms of reparations, of compensation, and of the definition of the international legal consequences of the illicit conduct of violations. How has the Court worked on this theme from the earliest cases to the latest cases? The idea of integral reparations means to give the most ample and complete reparation possible. It is in that sense that I speak about appropriate reparations.

From my viewpoint, the text of Article 63 is insufficient. If we rewrote the American Convention today, we would need to redraft this article. Even less generous is the European Convention's counterpart. The European Court has a very restrictive mandate, and they refer reparations to the national systems. I don't want to be a political psychologist and examine all the reasons why this system exists, but maybe in the European system there is greater confidence in domestic systems. They declare the violation, and it automatically leads to a reasonable revision of the case within the domestic legislation and jurisdiction. That is something that Article 63 of American Convention does not provide for and that the Court has rejected from the very beginning. There is nothing in the early decisions about referring cases from the Court back to the domestic legal systems for a decision on appropriate reparations. The Inter-American Court, from the beginning, decided that it would resolve the cases and the reparations, principally and exclusively. What better practical expression of the idea that the system of reparations is an integral part of the international human rights system? It is crucial that an international tribunal completely assume the responsibility and decide the reparation, ensuring that they are appropriate and adequate. That has had positive effects from all viewpoints.

It is true that in some circumstances, the Court has referred some aspects of a reparations decision back to the domestic system. The Court, for those that know the Court's jurisprudence, has only done this in certain exceptional circumstances, only when the violation is clear and after it has dealt with the larger reparations issues. The Court has charged the domestic or national tribunals with certain details related to reparations, already screened by the Inter-American Court. The Court has never gone further than referring minor reparations issues back to the domestic jurisdictions.

Behind the idea of appropriate forms of reparations, which are constantly growing, there is a philosophy of reparations in the Court's jurisprudence. Implicitly, it is understood that what we are doing with the judgments and with the reparations is more than just compensating the victims monetarily for economic harm (it is not only to repair someone physically or rehabilitate someone's memory). It is more than satisfying the debts to the next of kin. There are priorities of a larger nature. The legal order of the American Convention has been violated and attacked, and it must be reestablished. A fundamental right has been denied, and it must be resuscitated. We must reaffirm the rights that have been violated, reaffirm and rehabilitate the legal order that has been violated. This is one of the primary objectives for those involved in the reparations process.

The second is to create conditions of security, peace, and of justice that permit the flow of manageable social relations. Without those conditions, the system would be constantly stumbling. The decision alone is not enough; the decision alone does not repair the illicit conduct. It is necessary to establish new conditions for the reestablishment of the legal order. In essence, the measures we order attempt to contribute to establishing these conditions and the integrity of the legal order. Every decision looks from the outside in and from the inside out. Every ruling has a value in and of itself in terms of establishing the facts and an external value. When we speak about guarantees of non-repetition, obviously we are not talking about preventing the state from killing someone who has already been deprived of life. That would be an absurd definition. Instead, we are speaking generally about non-repetition in the practical relationship between the state and its citizens, which is a true guarantee of non-repetition. That is why the Court needs to have an even more powerful impact when it analyzes the facts in its decisions and the terms of the holding and ruling.

The third term is to rescue the rights of the individual victim and redressing the harm caused. That is the key in accessing the system for most people. Below the subjective right, we are reestablishing and rescuing the general legal order. We are protecting the legal order under the subjective right. Here I remember the brave English explorer who always protected his rights, not because it was his right but because it was a right belonging to everyone. By protecting each small subjective right, we are also protecting the rights of everyone. This, in part, goes to explain why the resolutions of the Court are not excessive when they order that houses be rebuilt, new housing

programs developed, new hospitals or new school constructed, or requiring new trainings for the security forces. None of that is excessive. All of it has a rational purpose because all of it contributes to reestablishing the legal order, creating new conditions for peace and justice, and protecting the rights of the individual victim.

What is the impact of all this? How does this affect the reality of the states, and the lives of the citizens? How have the Court's decisions on reparations been translated into acts? There have been advances and progress in this area. We are winning some battles for reparations and human rights. It is impossible to give an absolute answer because there are many shades of gray; there are zones illuminated and others still in shadows, but generally, we can be optimistic because things have changed. We heard this morning about decisions that states have actually complied with, including some that were extraordinarily difficult to implement. This was not always the case in the past. When I first arrived at the Court, I was one of the youngest members. Now, I have been there for nine years, and I am the president of the Court. Nine years ago, I imagined that most of this would be possible to implement but after a significant amount of time. I thought that for some of the complex decisions on reparations we issued, we would have to wait a generation, or another democratic chapter of our societies, before we could see compliance. Some states do comply quickly with the judgments; others take more time. Without a doubt, in this short time—long for my life but short for the life of the states—what we thought was impossible has been achieved. The Court has ordered radical changes in the jurisprudence and in settled, authoritative domestic legislation. In some cases, the Inter-American Court has ordered constitutional reforms. It would be much easier for the Court to order the state to give a reasonable payment to the victim and have that be the entire reparation. That is usually much easier than enacting a new constitutional amendment. But we have seen all these changes. Still, we have not yet seen all the progress and advances that we want. The young people here in the audience will see many more changes in the future because things keep progressing.

Now we need to ask ourselves what are the obstacles that exist whenever there is a judgment passed by the Court to repair particular victims of human rights violations. For example, it would usually be much easier for the executive branch of government who was ordered to pay \$50,000 to pay that \$50,000, since this is just a mere matter of budgeting, than complying with a decision ordering the state to change its laws or even its constitution, since there is a whole

process involved. The Court is like a bolt of lightning from the sky ordering a constitutional change. A constitutional amendment involves political forces, different powers, parties, citizenry, and the legislature. How do you modify constant and fixed law? How do we do this? We need to bring the magistrates, ministers, and judges together to receive, execute, and implement an order from an international court to modify the constitution.

The superficial aspect of all of this is that the Court orders something and that change happens. In the interim many things happen in this long, complicated, and hard process. These changes require many wills. It also requires coordination among two fronts: the internal and external. The external front exists outside the State and includes international mechanisms, the international public, organizations, and all of us—the human rights groups and academia. We see what needs to happen and what does not need to happen. Without the external front, progress would either stop or would be much slower. If the external front were the only front, we would lose these human rights battles. We also need a vigorous, favorable, intelligent, and sufficient domestic front that pushes from the inside for change—change that would be impossible to do from the outside. The state is not homogenous; it is not a unitary monster, a Golem. Rather, civil society is the concentration of democratic currents in the internal front. When the Court orders the constitution to be changed, it is the open internal front that enables those changes to happen.

I offer the example of Chile that amended its Constitution. Chile reformed its Constitution because the Court ordered it to change its Constitution and because Chilean society wanted it to change. There was an internal, democratic reaction that pushed in that direction. Without this democratic force there would not have been a constitutional amendment, instead there would have been a conflict between the Court and the Chilean State. That has happened in other cases, where a state's internal forces are not strong enough, and the state resists the Court's decision.

It is important from a practical standpoint that decisions made by the Court be correct and satisfactory to the external front, but they also need to be manageable to the internal front. The people need to be able to handle what the Court decides, not only in terms of monetary payment but also the serious legal, political, and social changes proposed by the Court to the system of the states in general.

V. REPARATIONS AND THE ISSUE OF CULTURE, GENDER, INDIGENOUS
POPULATIONS AND FREEDOM OF EXPRESSION

A. *Ignacio Alvarez*⁹⁷

The Inter-American Court on Human Rights has issued seven judgments in which it declared, *inter alia*, a violation of freedom of expression. In those cases the Court ordered different measures to repair the violation. Some of them are directly related to the victim, while others are related to measures that have a broader social and structural impact and are oriented to prevent the reoccurrence of the same type of violations. In my presentation, I will address the specific individual reparations established by the Court. Then I will address the different measures of satisfaction and guarantees of non-repetition ordered by the Court with social and structural impact.

In February 2001, the Inter-American Court issued a judgment in the Peruvian case of *Ivcher Bronstein*.⁹⁸ In this case, the Peruvian government took away the control of a television channel from him. The Court decided that this was an indirect violation of the freedom of expression and ordered the State to reinstate Mr. Bronstein in the property and in the control of the channel.

In relation to prior censorship, in *Palamara-Iribarne*,⁹⁹ a case against Chile, the State had prohibited Mr. Palamara from publishing a book related to military intelligence and seized almost 1,000 copies of the book. The State deleted the electronic version of the book from his computer. In order to repair this violation, the Court ordered the State to return the books to the author and to allow him to publish it. It also ordered the State to type the book in order to hand the author an electronic version of it.

In relation to reparations in cases of illegitimate imposition of subsequent liability, the Court has issued three judgments related to cases in which the victims were denounced by public officials for committing crimes against honor through their expressions, and they were sentenced for criminal offenses such as defamation or contempt ("*desacato*"). These cases are *Herrera Ulloa*,¹⁰⁰ *Ricardo Canese*,¹⁰¹ and

97. Ignacio Alvarez is the Special Rapporteur for Freedom of Expression at the Inter-American Commission on Human Rights.

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

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

100. Case of *Herrera-Ulloa v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 107 (July 2, 2004).

Palamara. In all of them the Court decided that the procedure and the judgment of these persons had the effect of violating the right to freedom of expression, and, for that reason, the Court considered that the state had to nullify the judgments.

There is also a very recent case of the Court, a very interesting one. The name of it is *Claude Reyes v. Chile*,¹⁰² and it is related to the violation of the right to access information. This was a complaint that was presented to the Court in 2005, and on September 19, 2006, the Court delivered a decision in which it recognized that the right to the access of information in the hands of the State is a human right and that it is part of the right to freedom of expression. Since in this case the State had not provided part of the requested information and had not issued a justified decision to do that, the Court decided that the State violated the right to freedom of expression and ordered it to provide the information requested by the victim or, if appropriate, to adopt a justified decision explaining why it was not providing the information.

I would like to mention briefly some of the reparations of a more abrupt nature that the Court has ordered. In two cases related to freedom of expression, the Court ordered States to change laws in order to adapt them to the provisions established in the American Convention on Human Rights.

In *The Last Temptation of Christ*,¹⁰³ related to the prohibition of the exhibition of the movie, the Court decided that the State had to modify its legal system in order to eliminate prior censorship and allow the exhibition of the movie because it was obligated to respect the right to the freedom of expression and to guarantee free and full exercise to all persons subject to its jurisdiction. In order to comply with the decision of the Court, Chile did modify its Constitution. In the *Palamara* case the Court noticed that there were still norms that established the “*desacato*” crimes in Chile, and the Court ordered Chile to modify those laws.

In *Claude Reyes*, the Court appreciated the significant normative progress that Chile made concerning access to state-held information: that a draft law on access to public information was being processed and that efforts were being made to create a special judicial recourse to protect access to the public. Nevertheless, the

101. Case of Ricardo Canese v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 111 (Aug. 31, 2004).

102. Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006).

103. Case of “The Last Temptation of Christ” v. Chile, Inter-Am. Ct. H.R. (ser. C) No. 73 (Feb. 5, 2001).

Court found it necessary to reiterate that the general obligation contained in Article 2 of the Convention involves the elimination of norms and practices of any type that result in violations of the guarantees established in the Convention, as well as the enactment of laws and the development of practices conducive to the effective observance of those guarantees. Hence, Chile must adopt the necessary measures to guarantee the protection of the right of access to state-held information, and these should include a guarantee of the effectiveness of an appropriate administrative procedure for processing and deciding requests for information, which establishes time limits for making a decision and providing information and is administered by duly trained officials.

The Court also ordered other kinds of reparations with collective effects. In *Claude Reyes*, the Court recognized that public officials do not respond effectively to requests for information, and the administrative authority responsible for deciding the request for information adopted a position that violated the right of access to state-held information.

To this regard, the Court considered that, within a reasonable time, the State should provide training to public entities, authorities, and agents responsible for responding to requests for access to state-held information on the laws and regulations governing this right. This should include the parameters established in the Convention concerning restrictions to access to this information that must be respected.

In conclusion, the reparations model developed by the Inter-American Court of Human Rights in its case law related to the right of freedom of expression has shown how, based on the different international grounds and interpretations, the Tribunal answered to the individual and to the social dimension of the said right.

Resolutions of the Court in a specific case helped the victims to publish the book that was censored, to be restored in the direction of a channel, to stay without any criminal record related to crimes of defamation, and to oblige the state to handle information it held or answer why it is not possible to give it.

In addition to these individual effects, the reparations ordered by the Court also have helped to promote structural changes and prevent further violations of this right. As it was shown, the Court's decisions obliged a state to change its legislation and even reform its constitution to avoid all references in the domestic law to any norm that allows prior censorship.

Those effects, individual and social, must be taken into account by the states as guidelines to comply with their international obligations under Article 13 of the American Convention.

B. Alice Riener¹⁰⁴

“Children & Reparations”

Children, like women and indigenous groups, are another vulnerable group particularly susceptible to human rights violations. By examining the reparations ordered in the *Case of the “Street Children”*¹⁰⁵ and the *Case of the Serrano-Cruz Sisters*,¹⁰⁶ we can see the Inter-American Court’s development of non-monetary reparations.

The American Convention gives children special protections. Article 19 of the American Convention states that “every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”¹⁰⁷ Article 27 states that even in times of war or states of emergency, the rights of children cannot be suspended, putting the rights of children in the special category of non-derogable rights.¹⁰⁸ These articles indicate that the rights of children have a unique place within the text of the American Convention, and this is echoed in the United Nations Convention on the Rights of the Child.¹⁰⁹

Street Children involved five youths who were burned, tortured, and shot in the head in Guatemala City in 1990. One of the youths was fifteen, and two were seventeen years old. Four of them were abducted in broad daylight by armed men, tortured for one or two days, and then killed. The corpses were left in the woods for days and then buried in unmarked plots. The fifth was shot on the street.

In its decision, the Inter-American Court noted that at the time of these events there was an ongoing pattern of violent acts by the security agents against street children as part of an effort to combat juvenile delinquency and vagrancy in Guatemala. A Guatemalan court dismissed a case against two national police officers citing insufficient evidence. In a unanimous decision, the Inter-American Court found that Guatemala violated the right to life, the right to be

104. Alice Riener is a recent graduate of *American University Washington College of Law*.

105. *Case of the “Street Children” (Villagrán Morales) v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 77 (May 26, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_77_ing.pdf.

106. Inter-Am. Ct. H.R. (Ser. C) No. 120, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_120_esp1.pdf.

107. *American Convention*, *supra* note 2, art. 19.

108. *Id.* art. 27.

109. Nov. 20, 1989, 19 U.S.T. 6223, 1577 U.N.T.S. 3.

free from torture, the right to personal liberty, the rights of the child, and the right to judicial protection under the American Convention.

Serrano-Cruz involves two sisters that disappeared in 1982 during the internal armed conflict in El Salvador. They were three and seven years old at the time. The girls disappeared when the family fled a military operation. Before the Inter-American Court, witnesses testified that the military had a systematic plan to disappear children during its military operations. Hundreds of children during that time were kidnapped and adopted by couples within the country or internationally. After the hostilities ended, the family attempted to locate the children without success. The Court held that El Salvador violated Articles 8 and 25, involving the access to justice. The Court did not reach the true merits of the violation because El Salvador only ratified the Convention in 1995, thirteen years after the sisters disappeared.

In both cases, the Court went far beyond ordering just monetary reparations. Through symbolic and non-monetary reparations, the Court attempted to redress the past violations and modify the future, both for the individual victims and their families, and for the society at large.

The Court held in both cases that the sentence itself was a form of reparation to the victims because it brought out the truth. In some cases this is particularly important for vindicating the memory of the victims. For example, in *Street Children*, the children were labeled juvenile delinquents. In *Serrano-Cruz*, one of the state witnesses claimed that the two girls simply did not exist and that the family made them up. The birth records had all been destroyed during the war; it was the State's word against the family's. The Court's sentence places the victims in a context and re-humanizes them.

In *Street Children*, the Court ordered that an educational center should be named after the victims, complete with a memorial plaque. The Court also required the exhumation and transfer to the family of the mortal remains of one of the victims, enabling the family to give him a proper burial. In *Serrano-Cruz*, the Court required a public act acknowledging responsibility and the publication of the Court's sentence in the newspaper. The Court furthermore required that El Salvador create a national commission dedicated to finding all the disappeared children and reconnecting them with their families. The Court ordered the creation of a website database with specific information and DNA testing to facilitate family reunification.

The purpose of this requirement is to ensure the protection of rights, to uncover the truth, to combat impunity, and to prevent the

repetition of these violations. This requirement also repairs the society, and secondarily, the victims. In both cases, the Court ordered the States to conduct a real and effective investigation, prosecution, and punishment of those persons that committed the violations. The Court emphasized that the amnesty laws in El Salvador should not apply to these prosecutions.

Other reparations are designed to change the legal structure. Guatemala was ordered to change its laws and any administrative procedures to bring them into compliance with Article 19 of the American Convention, which protects the rights of children. The representatives of the street children requested the implementation of specific legislation, but the Court left the details up to the Guatemalan Congress. Four years later in *Serrano-Cruz*, the Court eliminated the State's discretion on implementation. It ordered El Salvador to bring its criminal code in line with the international standards on forced disappearances and to ratify the Inter-American Convention Against Forced Disappearances.¹¹⁰

There are inherent limitations to the reparations ordered by a court in cases of human rights violations. Under international law, reparations attempt to make victims whole again, restoring them to the situation that existed before the violation occurred. Obviously, in cases of egregious human rights violations, where the direct victims have been tortured and killed as in the *Street Children case*, or when the victims disappeared over twenty years ago, as in the case of *Serrano-Cruz*, this is largely a legal fiction. Even for the family members, the trauma of what happened is often so deep and pervasive that they can never return to who they were before.

The Inter-American Court seeks to repair the injuries of specific individuals, but the Court cannot directly address other similarly situated victims whose cases are not before the Court. As a corollary, how appropriate or effective is it for the Court—as a court—to deal with embedded societal problems such as the extreme poverty of street children? Are reparations in a court really the appropriate and best place to address these concerns?

Monetary reparations are even more limited. Victims continually argue that money alone cannot adequately repair human rights violations. The torture and murder of street children by agents of the state are not just crimes. They are acts that strip away people's dignity and rights as human beings. Embedded in *Street Children* is

110. Organization of American States, Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1529.

the idea that these Guatemalan children were a nuisance and that society regarded them as disposable. The kidnapped children in El Salvador were almost seen as property, to be taken and given away or sold off. Money alone cannot “re-humanize” the victims.

Despite the limitations of all reparations, the Court uses creative and narrowly tailored non-monetary reparations in an attempt to address the psychological, moral, and symbolic elements of the violations. The extensive non-monetary reparations ordered by the Court in these cases were adapted to fit their child victims and illustrate the protected status of the children. Listening to the victims’ requests for reparations and tailoring the reparations to what they ask for and who they are, expands the role of victims in human rights proceedings. The publications, apologies, and memorials restore dignity to the victims. Changes in the legal structure help prevent similar violations from occurring in the future.

What can we in the United States learn from the Inter-American Court’s exploration of non-monetary reparations? In the United States, reparations for human rights violations have mostly taken the form of money. The U.S. Congress passed the Civil Liberties Act, apologizing and giving \$20,000 from a specially created trust fund to each of the Japanese-American citizens interned during World War II.¹¹¹ The U.S. government gave \$1.65 billion to Native American tribes who lost land through treaties signed under duress.¹¹² Florida paid one hundred and fifty thousand dollars to each of the nine survivors of the Rosewood Massacre.¹¹³ President Clinton publicly apologized for the Rwandan genocide and the Tuskegee experiment. When the U.S. government has ordered reparations, it is almost always money, followed, occasionally and belatedly, by an apology.

The flexibility and creativity of the reparations ordered by the Inter-American Court is a challenge to us in the United States. If we enacted these types of reparations, there would probably be skepticism, particularly from the legal community. Yet, we already have precedent for this—in a case involving children. After *Brown v. Board of Education*,¹¹⁴ the Court ordered the racial integration of the

111. 50 U.S.C. § 1989b (1988).

112. See M. Cherif Bassiouni, *International Recognition of Victim’s Rights*, 6 HUMAN RIGHTS L. REV. 203, 221 n.79 (2006) (noting that the reparation program was created in 1946 and was the first one to address Indian claims).

113. See Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 490 (1998) (explaining that the reparations were viewed in terms of damage to property).

114. 347 U.S. 483 (1954).

schools through a structural injunction.¹¹⁵ Creative, non-monetary reparations would be an extension of this idea.

As we begin to address the current human rights violations facing our country—the victims of torture at Guantanamo Bay or Abu Ghraib, or the survivors of Hurricane Katrina in New Orleans—the United States can learn a tremendous amount from the success and creativity of reparations for human rights violations ordered by the Inter-American Court.

*C. Elizabeth Abi-Mershed*¹¹⁶

I am going to speak briefly about gender and reparations. When I was thinking about what I wanted to share with you today, I thought about why it is important for there to be a gender perspective in reparations. I also wanted to talk to you about our experience in the inter-American system. You have been talking today about why reparations are important, and I am just going to add that they have a fundamental importance because they demonstrate that a violation of rights has a real cost. An award of reparations prioritizes the adoption of the measures that are necessary to bring state conduct into compliance with its obligations. Reparations can play a tremendous role in legitimating rights and ensuring that those rights receive the respect they require. Reparations have specific significance with respect to human rights violations that have specific causes or consequences based on gender.

When and where should gender be a factor in considering and establishing reparations?

If we start from the point that the violation of an international obligation that caused harm generates the obligation to adequately address that harm, then we also start from the point that adequate redress requires either full restitution of the situation that existed before the violation or the next best alternative. It only makes sense that reparations for a human rights violation with a gender-specific component should take into account the causes and the consequences of the violation in question. The challenge for the Inter-American Commission and Court is knowing when and how to

115. *Brown v. Bd. of Educ.*, 349 U.S. 753, 757 (1955) (commanding that the school districts implement their desegregation plans “with all deliberate speed”).

116. Elizabeth Abi-Mershed is a Staff Attorney at the Inter-American Commission on Human Rights of the Organization of American States (OAS). The opinions expressed are those of the author and do not necessarily reflect those of the Inter-American Commission or OAS.

identify the specific characteristics of human rights violations with regard to gender.

What is it that we are looking for? Within the inter-American system we have some special tools to apply to gender-specific human rights situations. We have the American Convention on Human Rights¹¹⁷ as the transversal axis of the system and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women as the more specific basis of obligation.¹¹⁸ As guidance for interpretation, we look to the UN Convention on the Elimination of All Forms of Discrimination Against Women.¹¹⁹ Since international law has to be interpreted and applied as a whole, these instruments form a corpus of law that the Commission and Court look to in dealing with human rights violations that concern gender.

I am going to focus on a few examples of individual cases before the Commission in which the approach to reparation incorporated the perspective of gender. In any given case in which the Commission has established the violation of a protected right, it generally recommends that the state in question investigate, prosecute, and punish those responsible for the violation and that it proceed to make just reparation to the victim.

How has the Commission incorporated a gender perspective in these basic recommendations? We can take the example of *María da Penha v. Brazil*.¹²⁰ This was the first case before the Commission concerning the issue of domestic violence. The case examined the obligations of the State vis-à-vis domestic violence, including the duty to take reasonable measures to prevent and respond to such violence. The particularities of the case had to do with a woman who had been subjected to abuse by her husband for many years. Twice he tried to kill her, and she had been left paralyzed. The domestic legal proceedings against him had spanned seventeen years and were still pending at the appellate level at the time the Commission decided the case. He was out on bail and had never been imprisoned.

In dealing with the issue of reparation, the Commission recommended the completion of the criminal proceedings. Along

117. American Convention, *supra* note 2. Information, including the basic documents of the system, can be found online at www.cidh.org.

118. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *adopted* Sept. 6, 1994, 33 I.L.M. 1534 (1994).

119. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, ¶ 34, U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (Dec. 18, 1979).

120. Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 704 (2000).

these same lines, it recommended an investigation to determine responsibility for the irregularities in the judicial process. It referred to compensation as well, but also issued recommendations in terms of more structural reforms. The latter recommendations included that the state in the country of concern, Brazil, bring its legislation into compliance with the norms of the American Convention and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, and that it take measures to train and raise awareness among police and judicial personnel. Additionally, the Commission indicated that criminal proceedings in this area had to be made more agile so that they could respond to the needs of victims, and that there had to be an increase in the number of specialized police stations dealing with the issue of domestic violence. These were some of the gender-specific measures that the Commission recommended as required to remedy the violations established.

We can also refer to the case of *María Eugenia Morales de Sierra v. Guatemala*,¹²¹ which had to do with nine articles of the civil code of Guatemala which set forth the rights and duties of men and women in marriage. Pursuant to these Articles, men were legally authorized to administer all the property of the couple, as well as that of their children. Women were allocated the special duty of caring for the home and taking care of the children. The Civil Code allowed that women could work outside the home as long as their husbands did not oppose them in that decision. That was the state of the law at the time that the Commission decided the case. The Commission recommended, first and foremost, that these Articles of the Civil Code be brought into conformity with the rights to equality and nondiscrimination. It was precisely on the basis of that recommendation that the legislation was reformed to bring it into conformity with the American Convention.

We also have the case of *X & Y v. Argentina*,¹²² which had to do with body cavity searches in prisons. Part of the remediation in that case was actually the judgment itself, which sets standards for any body cavity search of a woman who is a visitor to a prison. Another aspect of the reparations was the recommendation that the legislation, the normative framework, be brought into compliance with the Convention. We have other cases that deal with the issue of the

121. Case 11.625, Inter-Am. C.H.R., Report No. 4/00, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 929 (2000).

122. Case 10.506, Inter-Am. C.H.R., Report No. 38/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 50 (1996).

systematic use of rape as a form of torture. There is a need for due investigation and prosecution in crimes of that nature to avoid impunity, because impunity ends up being a factor that promotes the repetition of those kinds of human rights violations.

We also have a number of friendly settlements that have been negotiated as an alternative means to resolve cases before the Commission. The kind of remedies that are negotiated in those processes end up having a tremendous importance in trying to understand the issue of reparations and the incorporation of the gender perspective. A result that comes out of a friendly settlement has a special significance because, in a sense, the state is saying, "We hear your claim, and we think you have something." It may even go to the point where the state is saying, "We think you are right, we are willing to accept our responsibility, and we are willing to negotiate. What are the measures of reparation that are required to resolve the situation?" Friendly settlements have a tremendous importance in terms of legitimating the rights concerned.

We have just a few examples to give you, such as the case of *Mónica Carabantes v. Chile*,¹²³ which involved the expulsion of a pregnant secondary student from her high school. It was a publicly subsidized private school. It raises an interesting issue for you constitutional law students. When her family challenged the expulsion through the courts, the expulsion was upheld all the way through the Chilean Supreme Court. The settlement that was reached before the Commission involved the adoption of legislation concerning the access of pregnant students to education. The recognition by the State of the violation demonstrated its concern for the particular victim's higher education.

We also have two cases from Peru, one of which concerned a sterilization carried out absent informed consent,¹²⁴ and one which concerned sexual abuse by a doctor within the public health system.¹²⁵ To highlight what was important in the case concerning sterilization absent consent, there were a number of typical recommendations, including investigation and sanctions for those who were responsible for subjecting the victim to the situation. There were also measures that were more structural in nature that had to do with changes in the law and public policy on reproductive health and family

123. Case 12.046, Inter-Am. C.H.R., Report No. 33/02, OEA/Ser.L/V/II.117, doc. 5 rev. 1 ¶ 521 (2002).

124. *María Mamerita Mestanza Chávez v. Peru*, Case 12.191, Inter-Am. C.H.R., Report No. 71/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 ¶ 668 (2003).

125. *M.M. v. Peru*, Case 12.041, Inter-Am. C.H.R. (Mar. 6, 2000), available at www.reproductiverights.org/pdf/ww_peru_MMsettlement.pdf.

planning. Those included such innovative measures as conducting a judicial review of all criminal cases involving violations of human rights committed in the execution of the family planning program and that those would be brought to completion. Additional recommendations included the adoption of disciplinary measures against those responsible for the deficient evaluation of the women concerned, training, and making sure that women would receive adequate medical treatment at these facilities. The idea was to use this case not just to respond to the particular situation of that victim, but to use the reparations to look forward to more structural changes, and that is one of the important contributions of reparations in the inter-American system in general.

To take a last example, I would mention the case of *Castro–Castro against Peru*,¹²⁶ recently decided by the Inter-American Court on Human Rights. It is an interesting case for many different reasons. It involved the violent reassertion of control over a large prison population and the violent transfer of the prisoners. It left over forty people dead and many people seriously injured. It led to an ongoing situation of prisoners' rights abuse. It was not litigated by the petitioners or examined by the Commission as a gender-specific case. When the case was processed by the Inter-American Court, however, the Court took the initiative and looked at the case from a gender perspective. The Court, in its judgment, gives special attention to the situation of the women prisoners in a specific wing of the prison. The judgment looks most specifically at the treatment of the women who were pregnant at the time of the takeover of the prison, the kinds of abuses that those women were subjected to, and the specific harm that resulted from that treatment. The sentence is particularly interesting in the way it looks at the reasons and motivations that informed the way those women were treated. The judgment has a special heading under the compensatory clauses for the women who were subjected to those violations.

That brings us back to the overall point. If you are going to incorporate the perspective of gender in reparations and case law, you need to be able to read the situations, listen to the victims, and understand what they are saying in terms of gender-specific causes and consequences.

I would like to conclude by commenting on what all of this means, and why it is important. Violations of the rights of

126. *Case of Miguel Castro-Castro Prison v. Peru*, Inter-Am. Ct. H.R. (ser. C.) No. 160 (Nov. 25, 2006).

women—violations that are based on gender—have an underlying component of discrimination. It is this element of subordination, and of the effects of the historically unequal power relations between men and women, that underlies all the different kinds of cases that we see in our work at the Commission. If there is going to be adequate remediation for violations within this context, reparations must take that discrimination into account as a means of addressing the underlying cause of the violation. This is particularly important because reparations end up being a concrete manifestation of what the recognition of a right actually means. Reparations are a necessary way of making visible aspects of human rights violations that tend to be invisible. Referring back to what Judge Garcia Ramirez said, if you do not recognize and redress the specific causes and consequences of violations, you cannot reestablish the judicial order, and you cannot move towards the guarantee of non-repetition. In order to move forward to an enhanced protection of human rights and a more democratic society, specificity of gender violations needs to be recognized and repaired.

*D. Armstrong Wiggins*¹²⁷

I am a Miskito Indian from Nicaragua. I have also been a political prisoner twice: once during the Samosa regime and once during the Sandinista regime. We have been involved in this process for such a long time, not just to raise human rights issues within our own communities but also to bring indigenous issues to the attention of the international community. How can we go about educating the Inter-American Commission and the Inter-American Court regarding this issue? It is not an easy process.

In our humble opinion, as a general principle, all reparations dealing with indigenous peoples that result from a violation of our collective rights—regardless of the specific right being addressed—should consider the special nature of the collective rights of indigenous peoples. The special nature of these rights can be interpreted based on the following: (1) indigenous peoples' special relationship with their ancestral lands—in terms of governance and culture, rather than only in terms of property; (2) customary indigenous law; (3) our particular nature and status as distinct peoples; (4) indigenous self-determination and self-government;

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(5) the particular world view of the people in question; and (6) the administration of indigenous justice, among other elements.

The Inter-American Court, to a certain extent, has considered some of these elements when establishing reparations for the violation of rights. For example, in the case of *Aloeboetoe v. Suriname*,¹²⁸ when determining the reparations for a violation of the right to life (Article 4 of the American Convention), the Court applied the customary law of the Maroon People instead of Suriname's Civil Law, to determine which heirs of the executed members of the community would be the beneficiaries of the reparations.¹²⁹ In the case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,¹³⁰ the Court took into account the special relationship that the Mayagna (Sumo) people have with their ancestral lands to uphold their property rights and strike down a logging concession granted by the government of Nicaragua.¹³¹ This consideration was primarily based on indigenous peoples' collective right to property as protected by the Convention (Article 21) with regard to the lands and natural resources they have traditionally used and occupied. In *The Mayagna (Sumo) Awas Tingni Community Case*,¹³² the Court did not apply the relationship that indigenous people have with their territory to recognize a right of self-governance, nor did the decision address their right to permanent sovereignty over natural resources. Nevertheless, we note that both of these issues were raised in 2004 by the UN Special Rapporteur, Ms. Erica-Irene Daes, in her report *Indigenous Peoples' Permanent Sovereignty Over Natural Resources*.¹³³

In the case of *Yatama v. Nicaragua*,¹³⁴ the Court addressed the particular type of collective organization that is practiced by indigenous peoples of the Atlantic Coast based on their customs, within the context of political rights protected by the Convention (Article 23). The Court did not, however, even in the most preliminary or cautious manner, make any reference to indigenous self-government. Law 28, the Law of Autonomy of the Indigenous

128. Inter-Am. Ct. H.R. (ser. C) No. 15 (Sept. 10, 1993).

129. See *id.* ¶ 83 (concluding that all persons, in addition to being members of their own families and citizens of a state, also belong to intermediate communities).

130. Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

131. *Id.*

132. Inter-Am. Ct. H.R. (ser. C) No. 66 (Feb. 1, 2000).

133. U.N. Econ. & Soc. Council [ECOSOC], Sub-Commission on the Promotion and Protection of Human Rights, Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples' Permanent Sovereignty Over Natural Resources, U.N. Doc. E/CN.4/Sub.2/2003/20 (July 21, 2003).

134. Inter-Am. Ct. H.R. (ser. C) No. 127 (June 23, 2005).

Peoples of the Atlantic Coast of Nicaragua, approved in 1987, and still in force at the time the sentence was rendered, could have shed some light.

The position taken by the Court in the case of the *Moiwana Community v. Suriname*¹³⁵ deserves special comment. In this case, the Court wisely linked the violation of the right to personal integrity (Article 5 of the Convention) suffered by members of the community, to the special relationship that connected them to their ancestral lands from which they were separated. The Court took into account the special relationship between indigenous peoples, land, and culture when it determined the violation of a right other than the right of property. This consideration could have easily been missed or overlooked, but the Court wisely demonstrated a clear understanding of the connection between land, culture, and fundamental human rights of the indigenous people concerned. The judgments rendered by the Court in cases related to the collective rights of indigenous peoples are inter-related, yet distinct and complex, given that they attempt to remedy or correct historically discriminatory treatment of indigenous peoples. The nature of the measures of non-repetition should be illustrative of this.

With this in mind, we should be conscious of the fact that there are certain violations of the collective rights of indigenous peoples that—even if reparations are granted—cannot restore the affected peoples to the situation they enjoyed prior to the violation. This is particularly true in cases dealing with reparations for indigenous peoples that are forcibly relocated after being separated from their ancestral lands due to the special relationship that connected them to those lands. Nevertheless, reparations for the violation of these rights can be accompanied by the adoption of measures necessary for remedying the harm suffered by a people. Such measures should be designed to reflect cultural and social dynamics and to prevent similar events from occurring again in the future. In general, these measures should lead toward the establishment of a new relationship between the state government and the indigenous government. In particular, adjustments to domestic laws should develop with proper consideration of indigenous people as a distinct people with their own forms of government.

Finally, we would like to take advantage of this opportunity to express our concern regarding the implementation of the Court's decisions, which is of fundamental importance for the entire inter-

135. Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005).

American system. Timely and effective implementation by state parties should be one of the priorities for making the established reparations—in particular, measures of non-repetition—a reality. Reparations involve restitution for past conduct. In the human rights context, however, the goal is not only restitution but also assurance that human rights violations will not continue to occur in the future.

In this regard, allow us to reflect on two issues. First, the need for those of us that utilize the system to apply public and political pressure on our states to ensure they implement the Court's decisions. We should not just use the system to reach a favorable decision regarding the issues that concern us; we must also support the work of the inter-American supervisory bodies.

Second, there is a need to study and discuss the creation of a new body reporting directly to the Permanent Council of the OAS. This body would be dedicated to promoting implementation of the inter-American supervisory bodies' decisions. With regards to indigenous peoples, we believe that it is of critical importance that this body be equipped with a special agency that would help states implement reparations related to demarcation, delimitation, and titling of lands and natural resources of those indigenous peoples whose territorial rights were found to have been violated by the Court.

For example, consider the experiences and implications of similar endeavors undertaken in other international systems, such as the European System of Human Rights. At one time, the Committee of Ministers of the European Council exercised important powers regarding the processing of individual and inter-state petitions before the Commission and the Court. Following the coming into force of Protocol 11 and the reform of the system—involving the fusion of these organs and the establishment of a permanent Court in November 1998—the powers of the Committee of Ministers became exclusively focused on controlling or overseeing the implementation of the Court's judgments. This experience should serve as a framework for reflection and comparison when analyzing our regional system.

Another reference point, although it is not specific to the field of human rights, is the precedent that has been set regarding the implementation of the judgments rendered by the International Court of Justice. According to Article 94(1) of the UN Charter, all member states of the United Nations that have accepted the jurisdiction of the Court should implement the Court's decisions. In the case that one of the state parties to the decision fails to comply with the Court's decision, the other state party is able to request the

intervention of the UN Security Council to ensure compliance with the decision of the Court. In this regard, the Council can make recommendations or adopt other measures based on Article 94(2) of the Charter of the United Nations. This capability or procedure should be analyzed in the discussion about how best to support the decisions of the Inter-American Court with the objective of strengthening the system.

This is a concern to us because we see that the implementation is slow and often inadequate. Recognition of indigenous human rights is not helpful if there is no effective way for indigenous peoples to realize any remedy, nor to prevent future violations. I am concerned that indigenous people of the Americas might lose faith in the Commission or the Court. Everyone should therefore be aware of these issues. This is one of the reasons that at the Indian Law Resource Center, where I work, we are giving workshops to make sure that indigenous people not only understand the inter-American system but also start applying political pressure to their community and their government to respect and implement the decisions made by the inter-American system. It is important for us to use political pressure because the Commission and Court cannot. We have to do it; the human rights activists, indigenous people, and students need to wake up and make sure that this is done. It is very important, from our point of view, to start thinking about what we can do so that the inter-American system can work well in the future.

Finally, it is true that reparations, when effectively implemented, can be extremely useful. Oftentimes, they are the only remedy available to indigenous communities that have had their land and livelihood taken from them. However, it is critical to emphasize that the best remedy is always prevention. Once a people have been driven from their land, everything changes. Too often their cohesion is destroyed and their culture is lost. Once this has happened there is no remedy. No money and no land can repair it. You cannot pay for loss of culture. There can be no remedy for the loss of a people, even if the individuals go on living.

VI: COMPLIANCE WITH DECISIONS ON REPARATIONS: INTER-AMERICAN AND EUROPEAN HUMAN RIGHTS SYSTEMS

A. Santiago A. Canton¹³⁶

*“Reparations and Compliance with Reports and Judgments
in the Inter-American System”*

During the next few minutes, I will be talking about an issue extensively covered in many articles and books: reparations in the inter-American system. Hopefully, my intervention will generate questions and an open discussion on the subject.

First of all, when addressing the subject, we must remember to distinguish between the reparations issued in the Inter-American Court’s judgments and those issued in the Inter-American Commission’s friendly settlements and merits reports. We must also take into account that the inter-American system case law on reparations has evolved since the first cases decided by the Inter-American Commission and Court.

At first glance, we could envision the reparation of human rights violations through monetary compensation, administration of justice, and the adoption of symbolic measures relating to the acknowledgment of international responsibility.

In many cases, monetary compensation has been the easiest aspect to comply with by the governments concerned. Symbolic measures, for their part, are adopted with less consistency. Most instances of non-compliance are related to what, I believe, is the most critical aspect of reparations: the administration of justice pursuant to Articles 8 and 25 of the American Convention and the consequent strengthening of the rule of law in the member States of the Organization of American States (“OAS”).

In Chapter III of its Annual Reports, the Inter-American Commission on Human Rights (“IACHR”) makes public a chart with the status of compliance with the recommendations on reparations issued in individual cases.¹³⁷ This exercise, which started in the Annual Report for 2001, covers the reports on the merits issued from the year 2000. The assessment, made on the basis of the information provided by the parties, responds to three categories: full compliance, partial compliance, and pending compliance. Only one

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137. Inter-Am. C.H.R., Report No. 68/06, OEA/Ser.L/V/II.127, doc. 4 rev. 1 ¶ 53 tbl. (2006), available at <http://www.cidh.org/annualrep/2006eng/Chap.3i.htm>.

out of almost a hundred cases reported on this chart is in the category of full compliance with the recommendations issued by the Commission. On the other hand, sixty-nine cases have a record of partial compliance, usually consisting of the payment of monetary compensation, plus the adoption of symbolic measures, and a failure to achieve results in the area of administration of justice. The number of reports pending compliance is currently twenty-four. Many of the reports in this category have been recently adopted by the IACHR, and the authorities concerned have yet to implement measures towards compliance. The big picture, in terms of compliance with reparations, shows that it is highly deficient in terms of full compliance, and yet it is encouraging in terms of compliance with some aspects of the Commission's recommendations.

At the risk of oversimplifying the issue, I would outline the main problematic areas of reparations in the inter-American system as follows. There are two main obstacles to compliance with reparations: a lack of political will by certain governments and a lack of institutional mechanisms with which to comply. In some cases, even when there is political will to comply with the recommendations, many states appear to lack the institutional mechanisms to materialize the undertakings. For instance, in cases where the Commission's recommendations or the Court's judgments require the reopening of a judicial process already archived, such a measure is likely to confront strong opposition from not only political actors but also the local legal community that will seek to protect their own understanding of common concepts or principles such as *res judicata*. Even in those cases where the states involved show a clear intention to comply, they may lack the legal tools or institutional frameworks to ensure implementation.

It must be said that a majority of governments involved in cases before the Commission and the Court have expressed the political will to comply with the reparations owed to the victims. While political will is important—and, needless to say, very welcome by the organs of the system—the truth is that it is even more important that states undertake to comply with reports and judgments precisely when there is a lack of political will. If we want to have an inter-American system for human rights that works, we need to ensure compliance with reports and judgments regardless of political will. The achievement of this goal depends on the establishment of local institutional mechanisms that ensure compliance with the undertakings of the state at the international level.

This is an area of international law, and the inter-American system in particular, that requires development. Apart from Colombia and Peru—which have adopted some legislation to effect compliance with certain aspects of international judgments and reports in individual cases—there are no other examples of institutional mechanisms designed to comply with reparations granted in the inter-American system.

Today, the Commission's recommendations on individual cases are complied with only when there is a combination of political will and a search for creative ways to comply even if the measures adopted are not technically permitted under domestic law. In practice, this creativity has sometimes put government officials in danger of being prosecuted for implementing certain agreements or measures. This is definitely an area that requires attention and development if we want to strengthen the inter-American system.

There are some important and positive developments that deserve to be highlighted. For instance, the cases in which the Supreme Court of Argentina followed precedents established by the organs of the inter-American system as authority to base its own decisions in cases regarding the laws that protected those accused of participating in the disappearance and killing of thousands of victims during the dictatorship from prosecution. Specifically, in its decision in the *Simón Case*,¹³⁸ the Supreme Court of Argentina implemented the Commission's recommendations and followed the jurisprudence of the Court in the *Barrios Altos Case*.¹³⁹ The importance of this decision must be underscored, since the issuance of amnesty laws preventing prosecution of individuals responsible for massive killings has affected several states in the region and weakens their rule of law and democratic systems. In this regard, in their decisions adopted in 1992 and 2002 respectively, the Commission and the Court clearly stated that amnesty laws violate the American Convention on Human Rights. Thanks to these pronouncements, local courts are now able to support the authority of their own decisions on the basis of international law. Hopefully, they will contribute to the resolution of an issue that affects many countries and people all over the region.

Lastly, in terms of follow-up, the Commission monitors compliance with its reports through hearings and, as explained above, in the

138. Corte Suprema de Justicia [CSJN], 14/7/2001, "Simón, Julio Héctor y otros s/ Privación Ilegítima de La Libertad, etc./ recurso de hecho," Jurisprudencia Argentina [J.A.] (2001-III-240) (Arg.).

139. Case of Barrios Altos v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 87 (Nov. 30, 2001).

pertinent section of Chapter III of its Annual Report. The General Assembly of the OAS also follows up on compliance at a political level. Over the last decade, the General Assembly seemed to have lost momentum and strength to perform this task. In the past, the General Assembly devoted time to the consideration of the Inter-American Commission's reports and to the subsequent comments that frequently engaged the foreign ministers of the hemisphere in one of the most important debates of the Assembly. During the last decade, the Commission's President has been granted only a few minutes to present the report. Secretary General Jose Miguel Insulza has introduced positive changes in this regard, and during the last Assembly, the foreign ministers of the OAS member states discussed the Commission's report for two hours. Unfortunately, follow-up on compliance with recommendations in individual cases was not among the topics discussed.

*B. Ingrid Nifosi Sutton*¹⁴⁰

Today I will talk about the implementation of the judgments of the European Court of Human Rights. I will do that by addressing two main issues: the scope of states' obligation under the 1950 European Convention on Human Rights to comply with the Court's judgments and the monitoring system of the execution of these decisions, a mechanism that has been set under the auspices of the Committee of Ministers of the Council of Europe.

Let me begin with the first issue. States' obligation to comply with judgments of the European Court of Human Rights is proscribed by Article 46 of the 1950 European Convention on Human Rights.¹⁴¹ Paragraph 1 states that "[t]he High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties."¹⁴² The Court has specified the significance and the practical application of this wording. It has made it clear that a judgment finding a violation of the 1950 European Convention creates an

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141. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222, as amended by Protocol No. 11, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/05.htm>.

142. *Id.* art. 46.

obligation on the state to bring the violation to an end and to restore, to the extent that is possible, the situation that existed before the violation. As commentators have noted, if *restitutio in integrum* is possible, then it is for the states to carry it out because the Court does not have the power to award reparations. Such a limitation of the Court's authority is set forth in Article 41 of the 1950 European Convention, providing that the Court can afford just satisfaction when remedies at the domestic level only allow for partial reparation. In addition to that, even when *restitutio in integrum* is not possible, states have the option to choose measures to abide by the Court's judgments. They may choose the remedial measure they deem more appropriate, provided that they are in accordance with the conclusions the Court reaches in its decisions.

State practice highlights three kinds of remedial measures governments take to adhere to Strasbourg final judgments: the award of financial compensation, which usually covers pecuniary and non-pecuniary damages together with legal costs and expenses; individual measures; and general measures. General measures aim at preventing the violation from occurring again—in a sense they can be seen as a guarantee of non-repetition. Individual measures, on the other hand, are specifically tailored to the violation the individual has been subjected to and aim, to the extent that is possible, to rectify the wrong that has been done to the individual. States' obligation to adopt general or individual measures has been summarized in the judgment *Scozzari & Giunta v. Italy*.¹⁴³ Basically, the Court said that

a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in [its] domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.¹⁴⁴

An exhaustive list of individual and general measures can be found on the website of the Committee of Ministers.¹⁴⁵ I will mention some by way of example. Individual measures include: speeding up or concluding pending proceedings; restatement of the applicant in his/her rights; official statements by the government (for instance,, on the applicant's innocence); measures concerning restitution of, or

143. App. Nos. 39221/98 & 41963/98 (2000).

144. *Id.* ¶ 249.

145. Council of Europe, Execution of the Judgments of the European Court of Human Rights, http://www.coe.int/T/E/Human_rights/execution/ (last visited June 17, 2007).

access to property or use thereof; and the reopening of domestic proceedings. General measures may include the amendment of parliamentary legislation, undertaking of executive action in the form of regulations or circulars, changes of jurisprudence, practical measures such as the recruitment of judges, and the construction of prisons.

The discretion states enjoy in complying with the European Court's judgments vis-à-vis reparations and remedial action is, however, not unlimited. It is subject to the supervision of the Committee of Ministers of the Council of Europe, which under paragraph 2 of Article 46 of the 1950 European Convention has the authority and the competence to monitor compliance with the Court's judgments. The Committee has set up a very effective procedure based on the systematic solicitation of information to carry out such function. The procedure unfolds as follows: once delivered, the final judgments of the Court are transmitted to the Committee of Ministers. Upon their receipt, the Committee writes to the states concerned asking to provide information as to the measures they have adopted to comply with the judgments. Once states send the information required, the Committee analyzes it carefully. If it concludes that governments have done whatever was necessary to abide by the decisions of the Court, it adopts a resolution where it says that its supervisory function has been satisfied.

Sometimes states do not promptly take remedial measures. The Committee can use several tools to foster compliance with the Court's decisions. First, it continues to request that the state provide information and take action. Second, it may adopt interim resolutions describing all the interim measures governments have taken while endeavoring to comply with the Court's judgments. Third, it may set a calendar imposing a deadline within which remedial measures must be adopted. Very seldom has the Committee exerted political or diplomatic leverage to pressure states to comply with the Court's judgments. This is because, as noted by many commentators, the practice under the 1950 European Convention shows that in an overwhelming majority of cases states do report on the remedial measures they take and tend to honor judgments of financial compensation when the Court requests them to do so.

I would like to conclude my presentation by mentioning a new approach of the European Court of Human Rights towards reparations, a trend that may pose serious challenges to the supervisory function of the Committee of Ministers. In the past the

Court has limited itself to the adoption of declaratory judgments stating that violations had occurred and the award of financial compensation by way of just satisfaction. In some recent and exceptional cases beginning in 2004, the Court started to specifically request that states take special measures to comply with its judgments. Two important cases were mentioned this morning by Professor Nicola, namely *Assanidze v. Georgia*¹⁴⁶ and *Ilascu and Others v. Moldova and Russia*.¹⁴⁷ These cases concerned arbitrary detention amounting to a flagrant denial of justice and a continuing violation of Article 5 of the 1950 European Convention. In these cases the Court asked the states to immediately release the individuals that were subject to the violation of Article 5. Scholars have welcomed this approach, and it is desirable that the Court extends it to other violations of the European Convention, especially serious ones, such as disappearances. A more daring attitude towards reparations for disappearances, however, would entail stringent remedial measures addressing structural problems of domestic legal systems that may prove quite difficult for the Committee of Ministers to monitor. It remains to be seen if the Court and the Committee will be ready to take this challenge.

C. *Frank La Rue*¹⁴⁸

For the record, COPREDEH is the Presidential Commission of Human Rights in Guatemala. We have been talking about mechanisms for the implementation of the resolutions of the Inter-American Court. I would not say that COPREDEH per se is a mechanism because we fully rely on the political will of each branch of government in Guatemala. In Guatemala we have the Ombudsman, and we have a Commission on Human Rights in Congress. But there is also the Presidential Commission. This is very important. There has been a big debate on the duplicating of functions, which I absolutely reject, because each one has a totally different position. The Ombudsman is the most important institution because it is the defender of the people in terms of human rights and has the capacity to investigate all human rights violations.

The Human Rights Commission in Congress has only a legislative role and is the body that supervises the Ombudsman's work without violating its autonomy or independence. On the other hand, the

146. App. No. 71503/01 (Eur. Ct. H.R. Apr. 8, 2004).

147. App. No. 48787/99 (Eur. Ct. H.R. July 8, 2004).

148. Frank LaRue is President of the Presidential Commission of Human rights in Guatemala (COPREDEH).

Presidential Commission is formed by members of the cabinet: the Minister of the Interior, the Minister of Defense, the Minister of Foreign Affairs, the Secretary of Peace, and the Attorney General. I, as a representative of the President, preside over the Presidential Commission with the goal of coordinating public policies on human rights and working with the international bodies of human rights, including those of the inter-American system but also with the rapporteurs from the Inter-American Commission on Human Rights and the rapporteurs from the United Nations.

The Presidential Commission was a suggestion by the United Nations to Guatemala because of Guatemala's dark past and horrendous human rights record. Throughout the nineteen-eighties the UN had special rapporteurs for human rights in Guatemala, all of whom would visit the country, but there was no domestic counterpart in the executive branch to these international representatives. Foreign ministers would receive them diplomatically, but there was no working relationship. It was actually Dr. Christian Tomuschat, a German professor and the last rapporteur, who subsequently became the President of the Truth Commission, who insisted that the Presidential Commission be created so that he would have someone with whom to discuss his recommendations. As it turns out, the Presidential Commission has become a very important instrument because it is through this body that the Guatemalan state responds to the Convention¹⁴⁹ and Committee on the Rights of the Child, the UN Economic and Social Council, the UN Committee Against Torture, and other human rights oriented international agreements and bodies. At the same time, the Presidential Commission is the mechanism through which we get the recommendations of the Inter-American Commission rapporteurs and the reports of the Inter-American Commission and the Court. Our office is a coordinating body that makes sure that all state institutions comply with the pertinent laws, judgments, and recommendations. It also works on other issues, like precautionary measures from the Inter-American Commission and provisional measures from the Court, ensuring that security measures are taken. In any case, there is an institutional basis for the Presidential Commission, but because it is part of the executive branch and the Cabinet, it is always related to political will.

I have been a human rights activist all my life, and for the first time I am in a government position, a cabinet position in fact. I am very

149. Convention on the Rights of the Child, Nov. 20, 1989, 19 U.S.T. 6223, 1577 U.N.T.S. 3.

proud because I accepted this position under one condition, which we are now fulfilling, that human rights be taken seriously. In the past, the Presidential Commission was used as a public relations mechanism. It was used to defend the un-defendable or excuse the in-excusable. I said to President-elect Berger, who spoke to me before he took office, that I would only do it if public policies in human rights were taken seriously, and if we had a chance to propose new policies. Additionally, I would only accept the position if we could always speak the truth. As a member of the Cabinet, I would not hold my tongue, as all cabinet members should out of respect for the authority of the President, but I would speak up with somewhat more freedom. He agreed on both counts. He said, yes, human rights will be an issue, and you can propose as many policies as you wish, insist on the issues, and you will even be able to criticize my own policies.

President Berger took office on the fourteenth of January, 2004. On the 25th of February, which in Guatemala is the national day of commemoration for the victims of violence, President Berger re-launched the peace process in Guatemala. That is the date of the Truth Commission's report, and the feeling was that the Truth Commission's report encompassed all the victims—rural, urban, indigenous, non-indigenous, women, children, and elderly alike. The President began his speech by saying that he had chosen this day on purpose, to fully recognize state responsibility in past atrocities. This had never been done in Guatemala before. Obviously, this is an old issue in Chile with President Aylwin and in other countries of Latin America, but for Guatemala, it was a first. Guatemala still denied its past and still denied state responsibility in past atrocities, and now the State was accepting its role. The President also said this was to honor the memory of the victims and seek forgiveness from their relatives. This was the beginning of a program of reparations that the State wanted to establish. President Berger proposed a program to establish a fund of 300 million quetzales for thirteen years, which then could be extended. The reason for a thirteen year time period is because thirteen is the perfect number of the Mayan indigenous people of Guatemala.

Reparations were a key issue because we had instructions to go to the Inter-American Commission and go before the Court and fully accept state responsibility in all cases before these bodies. We accepted responsibility in all of these cases and recognized the events. These actions also established a different relationship for Guatemala as a state. Guatemala had been a widely criticized country—a country

that was hiding from human rights issues—but all of a sudden it was at the forefront of human rights policy. We instituted a policy of full recognition of the truth and the fairness of requests from all petitioners, especially the victims of human rights abuses.

Then we had some of the decisions of the Court, and we were faced with how to implement them. It has not been easy. I came from civil society, as a director of a human rights NGO that had handled cases in the inter-American system. It was still very strange for my colleagues to see a human rights activist, who had opposed the military governments, all of a sudden in a government position. There is still tremendous prejudice. At some public events that we had in rural areas, the facilitator would call me “el Señor Gobierno.”

We recognize responsibility in all cases, but let me give one example. Maybe the most important case is the case of *Plan de Sánchez*.¹⁵⁰ The case of *Plan de Sánchez* was the first massacre of the scorched earth policy of counter insurgency that went to the Court. There were, however, many other massacre cases. This was a massacre committed by the Guatemalan military with the support of the civilian patrols, against the Mayan community because it was a Mayan community. As a matter of fact, the massacre of Plan de Sánchez is part of the genocide case against General Rios Mont, presented in domestic courts in Guatemala. That case has not progressed because there is no political will in the justice system in Guatemala to make it move. It was important to get this case to the Court, and it took eleven years to do so.

When the decision was made, one of the issues for the Court was full recognition of the massacre by the State. Although the President had publicly recognized responsibility in all cases, and we had accepted responsibility in the name of the State in the hearing before the Court, we also had a public event in Guatemala. Vice President Stein told me that he would be the speaker in the name of the State.

The event was held on the anniversary of the massacre, the 18th of July, in the village of Plan de Sánchez. Plan de Sánchez is one of the most remote villages in Guatemala, not because of its distance from other villages but because of its location on a mountain peak in a remote district in Guatemala. The fact that the Vice President was willing to go there, even though it was a security risk, was important for the community. When he landed in his helicopter, the community of Plan de Sánchez asked him to go to the excavation of

150. Case of the Plan de Sánchez Massacre v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 116 (Nov. 19, 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_116_esp.pdf.

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the mass grave. Next to the grave is a chapel which the community used as a burial site in order to have a ceremonial burial place for the victims. The Vice President accepted the offer, walked the mountains, went to the excavation, and recognized the victims. In the chapel the community had painted the names of the 317 victims of the Plan de Sánchez massacre on the walls. The Vice President read every single name. It was a very moving event.

The Court also added a couple of unique elements to its judgment. The victims were from the Achí Mayan community. For seven years after the massacre they had been forbidden to speak their language, Achí, or to gather for their ceremonies. The Court ordered the state of Guatemala to publish the facts and the reparations sections of the Court decision in the local newspaper and another newspaper. We did. They also ordered us to translate those sections of the opinion into Achí and publish it in Achí. This was interesting and difficult because it is not easy to translate legal language into the Mayan language. As a matter of fact, we mentioned to the Court that translation of the judgment into Achí did not make a lot of sense because most people do not read Achí. The people speak it but do not read it. We have done the translation anyway as a way to preserve and respect the Mayan culture. Now, we are also making video and audio tapes of the judgment in Achí for the community.

Finally, we are paying monetary compensation to the victims. The Court ordered exactly the same amount for all 317 victims, totaling eight-million dollars. It is the biggest monetary award in Guatemalan history. Given the number of people killed and the atrocities that were committed, I personally believe it was a modest and reasonable decision.

Then, we had Hurricane Stan. We asked the community if we could pay the reparations in three installments, recognizing the interest paid by the central bank. The community accepted. We had the first payment and each subsequent payment in December of each year. We have been able to characterize the payments not as the State paying for something it did, but rather that the reparations represent the legal victory of a community that took eleven years to realize, if not in Guatemala, at least on an international level. The reparations include the financial payments, the recognition by the State, the historic monuments, and the preservation of the chapel, which is a part of the decision of the Court. Part of the reparations is also the legal victory of reaching justice at the end of this period—justice the victims never received in Guatemala.

D. David Baluarte¹⁵¹

It is a challenge to be the last speaker on the last panel, but I see enough friends in the audience to make me confident that I will hold your attention. As I go through my presentation in record time, I wanted to piggyback on what some of my friends from the Americas have been talking about, specifically, how politics will be an issue in trying to compel governments to comply with the decisions of the Commission and the Inter-American Court.

I wanted to take one case, in particular, that I feel to be pretty compelling, discuss it with you, and hash out a couple of strategies. A lot of people here have referred to the need to find ways to pressure governments politically, and I would like to share a couple of strategies that we have used, which you can hopefully adapt and apply to the work that you are doing. And if you have any suggestions at the end for me, I would be more than happy to hear them.

The case that I am going to talk to you about is *Yean y Bosico v. Dominican Republic*,¹⁵² an incredibly complicated case not just because of the law involved but because of the controversy surrounding it in the Dominican Republic. For those of you who do not know, Haiti and the Dominican Republic share an island and a very porous border. There is a history of conflict between these populations, which has been exacerbated because of the politically and economically disadvantaged situation in which Haiti finds itself right now. Haitian migrant workers go to the Dominican Republic to find a better life. In recent years, this situation has fueled the discourse of many Dominican politicians, particularly nationalists, as they have spun this migratory trend as an invasion from the other half of the island. We say there are about 500,000 Haitian migrants in the Dominican Republic right now, while the nationalists say this number surpasses a million. Whatever the number, there are individuals who suffer from a variety of discriminatory and abusive laws and government policies.

The *Yean y Bosico* case attempts to address what is widely considered the most problematic of these discriminatory laws and practices: the system of birth registration in the Dominican Republic. Under the Dominican Constitution, all people born in the Dominican Republic are Dominican, with a few subtle exceptions; one of them is for

151. David Baluarte is an attorney at the Center for Justice and International Law (CEJIL).

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

children born to people who are “in transit.”¹⁵³ In 2004, the Dominican legislature passed a law in which it reinterpreted this constitutional precept and squeezed a wide range of migratory statuses into the “in transit” exception, which resulted in their children being stateless, a problem rampant throughout the Dominican Republic. This situation of statelessness—where people have absolutely no way to exercise their civil, political, economic, social, and cultural rights because they are not recognized by the State—is a situation that certain powerful sectors in the Dominican Republic have an interest in maintaining in as much as the Dominican economy relies on undocumented labor, and that labor comes almost exclusively from Haiti.

So what did we try to do in this case? Well, we took the case of two Dominican girls of Haitian descent. The girls had tried to get birth certificates, but the government denied their request, citing a variety of reasons including their strange last names. After exhausting all domestic remedies, we brought the case to the Inter-American Commission on Human Rights. We litigated through the system, and while I am not going to spend too much time on procedure, I would just like to note that the Dominican government gave the two girls their birth certificates when it became clear that the Commission was going to submit the case to the jurisdiction of the Inter-American Court. I mention this so as not to minimize the significance of friendly settlement negotiations that happen during the litigation of a case in as much as one can achieve important reparations through these processes. This was definitely one of those cases. The girls can now attend school, and they live as citizens within the Dominican Republic and enjoy a broad range of rights that they were once denied.

As many people have mentioned today, we distinguish between specific and general remedies. While we were able to attain birth certificates for these two girls, the issue of non-repetition still had to be addressed. Twenty-five percent of the Dominican population is not registered, meaning that about a quarter of the population does not exercise a laundry list of fundamental rights. This is a situation we felt compelled to confront on a more structural level. We litigated the case up to the Court, which ultimately ordered what I think are pretty standard reparations in the inter-American system. The Inter-American Court ordered the Dominican government to publish the

153. CONSTITUTION OF THE DOMINICAN REPUBLIC art. 11 (2002), *available at* <http://www.georgetown.edu/pdba/Constitutions/DomRep/domrep02.html>.

facts section of the sentence, to ask for public forgiveness, and to pay the girls a sum of money. Further, it ordered the Dominican government to make structural reforms to the civil registry to eliminate discrimination by establishing a simple and effective system to guarantee that everyone who is born in the Dominican Republic gets Dominican citizenship.

The Dominican government was outraged, absolutely outraged. This was something that no one in our community was completely prepared for. There was uniform and hostile rejection of the sentence from all branches of the Dominican government. From the executive, we had public statements the day after the sentence came out from the Vice President, the President of the Civil Registry, and the foreign minister, saying that this was a travesty. They said that the Inter-American Court had not properly considered the evidence and that this was part of an international conspiracy to ruin the good name of the Dominican Republic on the international stage. From the legislature, there was a Senate resolution uniformly rejecting findings of the Inter-American Court. From the judiciary, two months after the Inter-American Court decision, the Supreme Court of Justice decided a constitutional challenge to the 2004 immigration law, ceding the right to interpret the Constitution to the legislature, thereby upholding an interpretation that directly contradicted the holding of the Inter-American Court. Essentially, that was the situation that we were dealing with in the Dominican Republic. There wasn't going to be any compliance any time soon, not if we just let the Court's decision sit on paper.

This is the moment where compliance with the decisions of international tribunals becomes about creative advocacy. What are some different ways that you can use different points of leverage to try and make a government do what it really does not want to? I'm going to talk about three strategies that we used. One of them is appealing to international organizations that have ongoing projects within that country. Another is petitioning national governments that have active bilateral relations with that country. The last is working with specific sectors that have power, either inside or outside the country, which are sensitive to your plight and can apply pressure on your behalf.

We identified international lending institutions like the World Bank that had a project it was developing in the Dominican Republic on registration. We also approached UNICEF, the OAS, and the Inter-American Development Bank, which had established a joint-initiative to promote universal registration. They were all concerned

about the low levels of registration in the Dominican Republic and the Americas in general and the limited enjoyment of fundamental human rights that resulted. We had a number of meetings with those different institutions. They are political institutions, so they were stand-offish and reluctant to engage the Dominican government about the systematic discrimination experienced by the children of Haitian migrants in that country, but it was one point of leverage. These projects involve multi-million and billion dollar loans for technical assistance to deal with different aspects of governance. Once countries have acquired those loan obligations, advocates can work with those international institutions to incorporate the language of human rights into their dealings with the government, thereby creating a point of leverage.

In our efforts to identify governments with bilateral relations with the Dominican Republic, we started talking with the United States. The U.S. government has a big interest in CAFTA DR, our newest regional free trade agreement. At the same time, the United States has been under fire about enforcement of labor rights within the context of these free trade agreements, so there was a hook for us: the idea of raising the issue of Haitian migrants' rights in discussions about the enforcement of labor provisions. Also, it just so happens that the State Department is really interested in statelessness—for the first time it is including separate sections on statelessness in its human rights reports. Through a variety of almost coincidental events, people in the State Department began paying more attention. I'm looking over at Marselha Gonçalves from the RFK memorial because one of those events was that Sonia Pierre, our co-petitioner in the *Yean y Bosico* case, won the RFK Memorial Human Rights Award. People on the Hill got even more interested in Sonia's work when she received that award. The U.S. Ambassador to the Dominican Republic came out hard against the government. All of the sudden there was a congressional delegation in the Dominican Republic going to the *bateyes* to meet with Haitian migrant workers to better understand their situation. Needless to say, this was on the front page of every Dominican newspaper. Suddenly people were wondering whether CAFTA DR was really going to be implemented and whether they needed to take a closer look at the labor provisions.

Finally, we set our sights on the Dominican population in the United States as a possible ally. There are nine-million Dominicans living in the Dominican Republic and a million living here in the United States. The Dominican President has said publicly that the country survives thanks to the remittances sent by Dominicans in

other countries. So we started to talk to that population about their common experience as migrants, about their families that have suffered from mandatory deportation here in the United States and were separated as a result, and about the importance of their children acquiring U.S. citizenship by being born here. Indeed, they have the very real experience of being treated as the other and have been marginalized by arbitrary, and often times discriminatory, migration policies. We have been working to get them to understand that this is exactly what is going on in the Dominican Republic and to empathize with immigrants in their home country. Many of these people are Dominican citizens—they vote, they send thousands of dollars back to the island every year, and they have a say. At the end of the month I am participating in a conference I helped to organize in Santo Domingo where we will be comparing and contrasting experiences of deportations from the United States and expulsions from the Dominican Republic with local organizations that work on these issues with the hope of working towards a common understanding to garner broader support.

Those are three strategies. I would love to hear other strategies from anyone in the audience if you have any more ideas. I'm heading down there at the end of the month, and we are going to be picking up the checks that the Inter-American Court ordered the government to pay to the two girls. While this is one important step in remedying the human rights abuses they suffered, the real challenge we face is non-repetition, so we need to keep on leveraging.