

# Legislative measures as guarantees of non-repetition: a reality in the Inter-American Court, and a possible solution for the European Court

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*A Camilo Mejía, un hermano de vida.*

*When a non-monetary remedy is explicitly or de facto directed to the “society as a whole,” it is an indication that the judge considered the immediate need to efficiently and effectively redress the violation and especially to prevent its recurrence.<sup>1</sup>*

## Introduction

According to Article 31 of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, “the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”<sup>2</sup>

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<sup>1</sup> Schonsteiner, Judith, “Dissuasive measures and the ‘society as a whole’: A working theory of reparations in the Inter-American Court of Human Rights,” in: *Academy on Human Rights and Humanitarian Law. Articles and essays analyzing reparations in International Human Rights Law*, American University International Law Review, Volume 23, No.1. Washington College of Law, Washington, D.C., 2007, pp. 127, 130-131.

<sup>2</sup> Draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), Article 31. It is important to mention that although not adopted by States in treaty form, the International Law Commission’s Draft Articles on Responsibility of States for

The right to a remedy and reparations forms one of the pillars of international human rights law.<sup>3</sup> All of the major international human rights instruments, starting with the Universal Declaration of Human Rights and later the International Covenant on Civil and Political Rights, the American Convention on Human Rights (“American Convention”), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”) guarantee the right to an “effective” remedy or recourse after a rights violation has occurred.<sup>4</sup> Reparations have taken different forms depending on the organ that grants them. For instance, while the reparations ordered by the Inter-American Court of Human Rights (“Inter-American Court”) represent “the most wide-reaching remedies afforded in international human rights law,”<sup>5</sup> the European Court of Human Rights (“European Court” or “ECHR”) has a very restrictive mandate and refers reparations to national systems.

This article focuses on legislative measures as guarantees of non-repetition. In particular, this article attempts to demonstrate how the European Court, through a broader interpretation of Article 41 of the European Convention, can adopt an expansive approach to reparations. With this expansive approach of ordering measures of non-repetition so as to avoid repetition of similar human rights violations by the same

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Internationally Wrongful Acts are an authoritative starting point in considering the modern law of reparations. Saul, Ben, “Compensation for unlawful death in International Law: A focus on the Inter-American Court of Human Rights,” in: *American University International Law Review*, Volume 19, No. 3. Washington College of Law, Washington, D.C., 2004, pp. 523, 536.

<sup>3</sup> Laplante, Lisa J., “Analyzing reparations in International Human Rights Law: The law of remedies and the clean hands doctrine: Exclusionary reparation policies in Peru’s political transition,” in: *American University International Law Review*, Volume 23, No.1. Washington College of Law, Washington, D.C., 2007, pp. 51, 55.

<sup>4</sup> Antkowiak, Thomas M., “Truth as right and remedy in International Human Rights experience,” *Michigan Journal of International Law*, Volume 23. University of Michigan, Ann Arbor, Michigan, 2002, pp. 977, 982.

<sup>5</sup> See Shelton, Dinah, “Reparations in the Inter-American System,” in: *The Inter-American System of Human Rights*, David J. Harris & Stephen Livingstone eds., 1998, pp. 151, 152. Quoted in Saul, Ben, “Compensation for unlawful death in International Law: A focus on the Inter-American Court of Human Rights”...

State, the Court might reduce the backlog of cases that it currently faces. It is important to point out that the examination of the Inter-American Court's approach to this kind of remedies is offered in the hope that its contributions in this area as well as its deficiencies, might be taken into account by the European Court to improve its own practice.

Part II examines reparations in the jurisprudence of the Inter-American Court. This part is divided in three subsections: generalities and jurisprudence development, legislative measures as non-repetition guarantees, and weaknesses and strengths of the Inter-American Court in this area. Considering that the jurisprudence developed by the Court on reparations has made and continues to make significant contributions to International Human Rights Law, the first subdivision briefly examines the Inter-American Court approach to reparations in three different periods. These periods follow the classification laid out by Thomas M. Antkowiak.<sup>6</sup> The second subcategory specifically addresses the Court's approach on legislative measures as guarantees of non-repetition. For this part, in order to provide an accurate analysis of the Court's approach, the author reviewed all the Court's decisions where such measures were ordered as well as the order of State compliance with the Court's judgments. Finally, the third subsection discusses the contributions and deficiencies of the Court in the legislative measures ordered, taking into account its authority to monitor compliance with judgments and its lack of authority to implement its orders.

Part III addresses the European Court's approach to reparations looking particularly at its jurisprudence on this matter and the sources of the serious backlog that it currently faces, as well as possible ways in which it might effectively address this problem. This part advocates in for a broader approach to reparations, through an expansive interpretation of Article 41 of the European Convention.

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<sup>6</sup> Antkowiak, Thomas M., "Remedial approaches to human rights violations: The Inter-American Court of Human Rights and beyond," in: *Columbia Journal of Transnational Law*, Volume 46. New York, 2008, pp. 351.

Part IV concludes that one way for the Court to cope with its current and projected caseload, is by adopting a more expansive approach towards reparations. This approach will allow the Court to both remedy existing violations and prevent new violations from occurring.

## **1. Reparations in the Inter-American Court of Human Rights**

### **a. Generalities and development of the Court's jurisprudence**

The legal basis for the Inter-American Court's competence to order reparations is Article 63 (1) of the Convention,<sup>7</sup> which provides that:

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

The Court has repeatedly held that this provision “embodies an accepted tenet that is a fundamental principle of contemporary International Law on the responsibility of the State.”<sup>8</sup> In this respect, this Tribunal has also accepted that international law regulates the obligation to make reparations in all its aspects: scope, nature, forms, and determination of beneficiaries, and that the respondent State may not invoke provisions of domestic law in order to modify or fail to comply with this obligation.<sup>9</sup>

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<sup>7</sup> Organization of American States, American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978.

<sup>8</sup> I/A Court H.R., Case of the Ituango massacres v. Colombia. Preliminary objection, merits, reparations and costs. Judgment of July 1, 2006 Series C No. 148, para. 346; Case of Ximenes-Lopes v. Brazil. Merits, reparations and costs. Judgment of July 4, 2006. Series C No. 149, para 209; Case of Goiburú et al. v. Paraguay. Merits, reparations and costs. Judgment of September 22, 2006. Series C No. 153, para 141, and Case of La Cantuta v. Peru. Merits, reparations and costs. Judgment of November 29, 2006. Series C No. 162; para. 200.

<sup>9</sup> I/A Court H.R., Case of Castillo-Páez v. Peru. Reparations and costs. Judgment of November 27, 1998. Series C No. 43, para. 49; Case of Suárez-Rosero v. Ecuador.

Article 63 (1) of the American Convention has given the Court discretion to broadly interpret the term “reparations” which has made this Tribunal’s jurisprudence the most comprehensive legal regime on reparations for human rights violations.<sup>10</sup> Indeed, taking into account the three kinds of remedies victims are entitled to –access to justice, reparation for harm suffered, and access to factual information concerning the violations–<sup>11</sup> and the basic forms of reparations –restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition–<sup>12</sup> both set out in the *Basic principles and guidelines on the right to a remedy and reparation for victims of violations of International Human Rights and Humanitarian Law*, Professor Cassel states that “although it does not always label them as such, the Inter-American Court awards all three kinds of remedies and all four basic forms of reparation [...] suggested in the *Basic principles*.”<sup>13</sup>

During its 30 years of existence, the Inter-American Court has significantly expanded the scope and nature of the reparations it orders. In fact, Thomas M. Antkowiak states that it is possible to

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Reparations and costs. Judgment of January 20, 1999. Series C No. 44, para. 42; Case of Blake v. Guatemala. Reparations and costs. Judgment of January 22, 1999. Series C No. 48, para. 32, and Case of the “Street Children” (Villagrán-Morales et al.) v. Guatemala. Reparations and costs. Judgment of May 26, 2001. Series C No. 77, para. 61.

<sup>10</sup> Grossman, Claudio, “Introduction,” in: *Conference: Reparations in the Inter-American System: A comparative approach*, American University Law Review, Volume 56. Washington, D.C., 2007, pp. 1375, 1377.

<sup>11</sup> Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of International Human Rights Law and serious violations of International Humanitarian Law, adopted and proclaimed by UN General Assembly resolution 60/147 of 16 December 2005, UN Doc. A/RES/60/147. Final Report of the Special Rapporteur, M. Cherif Bassiouni, “The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms,” UN Doc E/CN.4/2000/62, 18 January 2000. Annex, Basic principles and guidelines on the right to a remedy and reparation for victims of violations of International Human Rights and Humanitarian Law (hereafter ‘Basic Principles’), para. 11.

<sup>12</sup> *Ibidem*, para. 21.

<sup>13</sup> Cassel, Douglass, “The expanding scope and impact of reparations awarded by the Inter-American Court of Human Rights,” in: *Hastings International and Comparative Law Review*, Volume 27. California, 2004, p. 157.

identify three stages of evolution in the Inter-American Court's dealing with reparations: a) the early reparations jurisprudence (1988-1998), b) developments in 1998, and c) contemporary era (2001 to present).<sup>14</sup>

i. Early reparations jurisprudence (1988-1998)

Considering that during this period, almost all of the cases brought before the Court dealt with forced disappearances and extra-judicial killings, the reparations ordered by the Court, apart from compensation for patrimonial and non patrimonial damages, included the State obligation to locate, identify, and return the remains of a victim to his or her family, as well as the obligations to investigate, identify, and punish the responsible. The case *Aloeboetoe v. Suriname* was an exception to this Court's general approach. In this case, the Court ordered the State "to reopen [a] school [...] and staff it with [...] personnel [...], and to make the medical dispensary already in place in that locality operational [...]."<sup>15</sup>

ii. Developments in 1998

The Tribunal's composition changed in the late 1990's, and a new receptivity to equitable remedies emerged. A broader perspective is immediately evident in the decision in *Garrido v. Argentina*, a case of forced disappearances, which considers several restitutionary measures and medical rehabilitation as potential means for redress.<sup>16</sup> However, it is important to point out that in other forced disappearance cases, such as *Castillo-Paez v. Peru* and *Blake v. Guatemala*, the Court did not fully adhere to the approach stated in *Garrido v. Argentina*.<sup>17</sup>

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<sup>14</sup> Antkowiak, Thomas M., "Remedial approaches to human rights violations: The Inter-American Court of Human Rights and beyond"..., p. 366.

<sup>15</sup> Case of *Aloeboetoe et al. v. Suriname*. Reparations and costs. Judgment of September 10, 1993. Series C No. 15, para. 116.5.

<sup>16</sup> Antkowiak, Thomas M., "Remedial approaches to human rights violations: The Inter-American Court of Human Rights and beyond"..., p. 366.

<sup>17</sup> *Ibidem*, p. 371.

The most illustrative case of this period is *Loayza Tamayo v. Peru*, where the Tribunal, in addition to ordering restitutionary measures,<sup>18</sup> also introduced the important concept of “life plan” or *proyecto de vida*<sup>19</sup> different from the notions of special damages and loss of earnings, and indirect or consequential damages.

### iii. Contemporary era (2001 to present)

According to Thomas M. Antkowiak, the Tribunal’s current approach to reparations was almost fully developed during 2001, year in which the Court granted a diversity of remedies directed to individual victims, communities, and society at large.<sup>20</sup> It is very clear that since 2001, the Inter-American Court has been more disposed to grant reparations directed to both the individual and social dimensions, including in orders such as satisfaction and guarantees of non-repetition.

This author classifies the non-monetary remedies awarded by the Court in three categories: 1) victim-centered remedies, 2) remedies directed at discrete communities, and 3) remedies directed to society as a whole.

#### 1. *Victim-centered remedies*

##### a) *Restitutionary measures*

In this regard, the Inter-American Court has held that the reparation of the damage flowing from a breach of an international obligation

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<sup>18</sup> In this respect, the Tribunal required the State: “to re-instate [...] Loayza-Tamayo in the teaching service in public institutions, “to guarantee to her full retirement benefits, and to ensure that no adverse decision delivered in proceedings against [her] in the civil courts has any legal effect whatever.” I/A Court H.R., Case of *Loayza-Tamayo v. Peru*. Reparations and costs. Judgment of November 27, 1998. Series C No. 42, para. 192 (1) (2) (3).

<sup>19</sup> This concept “deals with the full self-actualisation of the person concerned and takes account of her calling in life, her particular circumstances, her potentialities, and her ambitions, thus permitting her to set for herself, in a reasonable manner, specific goals, and to attain those goals.” *Ibidem*, para. 147.

<sup>20</sup> Antkowiak, Thomas M., “Remedial approaches to human rights violations: The Inter-American Court of Human Rights and beyond”..., p. 372.

calls for, if practicable, full restitution.<sup>21</sup> However, in many cases, it is not possible to award this kind of remedy. In cases where restitution is feasible and appropriate, the Court has ordered the State to take restitutionary measures such as the restituting of employees in their positions or reversal of criminal convictions.<sup>22</sup> In this respect, the most illustrative case was *Baena-Ricardo v. Panama*, in which the Court decided that “the State must reinstate the 270 workers in their positions, and should this not be possible, [...] it must provide employment alternatives where the conditions [...] that they had at the time that they were dismissed are respected.”<sup>23</sup>

b) *Rehabilitation measures*

The Tribunal has ordered States to provide educational, medical or similar services, or scholarships to victims and their relatives.<sup>24</sup>

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<sup>21</sup> I/A Court H.R., Case of Baldeón-García v. Peru. Merits, reparations and costs. Judgment of April 06, 2006. Series C No. 147, para. 176; Case of Goiburú et al. v. Paraguay, *supra* note 8, para. 142, and Case of Almonacid-Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs. Judgment of September 26, 2006. Series C No. 154, para. 136.

<sup>22</sup> I/A Court H.R., Case of Loayza-Tamayo v. Peru, *supra* note 18, paras. 192.1, 192.2 and 192.3; Case of Suárez-Rosero v. Ecuador. *supra* note 9, para. 113.1; Case of Castillo-Petruzzi et al. v. Peru. Merits, reparations and costs. Judgment of May 30, 1999. Series C No. 52, para. 226.13; Case of Baena-Ricardo et al. v. Panama. Merits, reparations and costs. Judgment of February 2, 2001. Series C No. 72, para. 214.7; Case of Ivcher-Bronstein v. Peru. Reparations and costs. Judgment February 6, 2001. Series C No. 74, para. 191.8; Case of Cantoral-Benavides v. Peru. Reparations and costs. Judgment of December 3, 2001. Series C No. 88, paras. 99.4 and 99.5; Case of Cantos v. Argentina. Merits, reparations and costs. Judgment of November 28, 2002. Series C No. 97, para. 77.1; Case of Herrera-Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of July 2, 2004. Series C No. 107, para. 207.4; Case of De la Cruz-Flores v. Peru. Merits, reparations and costs. Judgment of November 18, 2004. Series C No. 115, paras. 188.6 and 188.8; Case of Lori Berenson-Mejía v. Peru. Merits, reparations and costs. Judgment of November 25, 2004. Series C No. 119, para. 248.5, and Case of Acevedo-Jaramillo et al. v. Peru. Preliminary objections, merits, reparations and costs. Judgment of February 07, 2006. Series C No. 144, para. 330.6.

<sup>23</sup> Case of Baena-Ricardo et al. v. *supra* note 22, para. 214.7.

<sup>24</sup> I/A Court H.R., Case of Loayza-Tamayo v. Peru, *supra* note 18, para. 129; Case of Blake v. Guatemala. Reparations and costs, *supra* note 9; Case of Cantoral-Benavides v. Peru, *supra* note 22, para. 50; Case of Bulacio v. Argentina. Merits, reparations and costs. Judgment of September 18, 2003. Series C No. 100, para.



*c) Recognition of responsibility and apologies*

This remedy was introduced in 2001, when in *Cantoral Benavides v Peru*, the Tribunal ordered that the State make a public apology and admission of responsibility. In every case after that, the Inter-American Court has ordered the State to publicly acknowledge responsibility for human rights violations.<sup>25</sup>

*d) Memorials and commemorations*

In 2001, the Court also commenced a practice of requiring States to take measures in order to preserve the victim's memory, such as to name a street or plaza, place a plaque containing the victims' names, erect monuments or bust, establish a scholarship in the name of a victim, or even designate a day dedicated to the children who have disappeared.<sup>26</sup>

*2. Remedies directed to society as a whole*

*a) Training and educational programs for State officials*

In this respect, the Court has ordered States to include national training and educational programs in different matters for military,

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100; Case of Molina-Theissen v. Guatemala. Reparations and costs. Judgment of July 3, 2004. Series C No. 108, para. 71; Case of the 19 Tradesmen v. Colombia. Merits, reparations and costs. Judgment of July 5, 2004. Series C No. 109, para. 295.9; Case of the Gómez-Paquiyaury Brothers v. Peru. Merits, reparations and costs. Judgment of July 8, 2004. Series C No. 110, para. 253.13; Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary objections, merits, reparations and costs. Judgment of September 2, 2004. Series C No. 112, paras. 340.12, 340.13; Case of De la Cruz-Flores v. Peru, *supra* note 22, paras. 188.5, 188.7; Case of the Plan de Sánchez Massacre v. Guatemala. Reparations and costs. Judgment of November 19, 2004. Series C No. 116, para. 125.7; Case of Lori Berenson-Mejía v. Peru, *supra* note 22, para. 248.5, and Case of Acevedo-Jaramillo et al. v. Peru. Preliminary objections *supra* note 22, para. 330.6.

<sup>25</sup> Antkowiak, Thomas M., "Remedial approaches to human rights violations: The Inter-American Court of Human Rights and beyond"..., p. 380.

<sup>26</sup> I/A Court H.R., Case of the Gómez-Paquiyaury Brothers v. Peru, *supra* note 24, para. 253.12; Case of Serrano-Cruz Sisters v. El Salvador. Merits, reparations and costs. Judgment of March 1, 2005. Series C No. 120, para. 218. 10; Case of Huilca-Tecse v. Peru. Merits, reparations and costs. Judgment of March 3, 2005. Series C No. 121, para. 124. f); Case of Servellón-García et al. v. Honduras. Merits, reparations and costs. Judgment of September 21, 2006. Series C No. 152, para. 214. 11, and Case of Goiburú et al. v. Paraguay, *supra* note 8, para. 192.10.

police, administrative, and judicial personnel.<sup>1</sup> This remedial scheme first appeared in *Caracazo v. Venezuela*.<sup>2</sup>

*b) Reform legislation*<sup>3</sup>

*3. Remedies directed at discrete communities*

Thomas M. Antkowiak mentions that the Court has increasingly ordered measures for the benefit of discrete communities.<sup>4</sup> In the same vein, Tara Melish states that “in addition to legislative and policy changes, the Court has also ordered the implementation of specific housing and ‘development’ programs, in affected communities, particularly where the harm caused was ‘extremely’ grave and of ‘collective character’.”<sup>5</sup>

<sup>1</sup> I/A Court H.R., Case of *Bámaca-Velásquez v. Guatemala*. Reparations and costs. Judgment of February 22, 2002. Series C No. 91, paras. 83 and 106.4; Case of the *Caracazo v. Venezuela*. Reparations and costs. Judgment of August 29, 2002. Series C No. 95, para. 143.4 (b); Case of *Juan Humberto Sánchez v. Honduras*. Preliminary objection, merits, reparations and costs. Judgment of June 7, 2003. Series C No. 99, para. 201.12; Case of the “*Juvenile Reeducation Institute*” v. *Paraguay*, *supra* note 24, para. 340.11; Case of *Carpio-Nicolle et al. v. Guatemala*. Merits, Reparations and Costs. Judgment of November 22, 2004. Series C No. 117, paras. 135 and 155.3; Case of *Lori Berenson-Mejía v. Peru*, *supra* note 22, and Case of *López-Álvarez v. Honduras*. Merits, Reparations and Costs. Judgment of February 01, 2006. Series C No. 141, para. 210.

<sup>2</sup> Antkowiak, Thomas M., “Remedial approaches to human rights violations: The Inter-American Court of Human Rights and beyond”..., p. 385.

<sup>3</sup> These remedies will be discussed in the following section, Legislative measures as non-repetition guarantees.

<sup>4</sup> I/A Court H.R., Case of *Aloboetoe et al. v. Suriname*, *supra* note 15; Case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, reparations and costs. Judgment of August 31, 2001. Series C No. 79; Case of the *Plan de Sánchez Massacre v. Guatemala*, *supra* note 24; Case of the *Moiwana Community v. Suriname*. Preliminary objections, merits, reparations and costs. Judgment of June 15, 2005. Series C No. 124; Case of the *Yakye Axa Indigenous Community v. Paraguay*. Merits, reparations and costs. Judgment of June 17, 2005. Series C No. 125; Case of the *Mapiripán Massacre v. Colombia*. Merits, reparations and costs. Judgment of September 15, 2005. Series C No. 134; Case of the *Pueblo Bello Massacre v. Colombia*. Merits, reparations and costs. Judgment of January 31, 2006. Series C No. 140; Case of the *Sawhoyamaya Indigenous Community v. Paraguay*. Merits, reparations and costs. Judgment of March 29, 2006. Series C No. 146, and Case of the *19 Tradesmen v. Colombia*. Merits, reparations and costs. Judgment of July 5, 2004. Series C No. 109, para. 295.7.

<sup>5</sup> Melish, Tara J., “The Inter-American Court of Human Rights,” in: M. Langford, ed., *Human Rights jurisprudence*. Cambridge University Press, 2008, p. 403.

### **b. Legislative measures as guarantees of non-repetition in the Inter-American Court**

One of the most important developments in the jurisprudence of the Inter-American Court is the ordering of guarantees of non-repetition,<sup>6</sup> which aim to have a broader social impact and prevent repetition of the same type of violations.

The Inter-American Court explicitly recognized in *Trujillo-Oroza v. Bolivia* that guarantees of non-repetition are granted based on the general State obligation to respect, protect, and fulfill Article 1(1) of the American Convention.<sup>7</sup>

According to Judith Schonsteiner, guarantees of non-repetition frequently take the form of legislative measures which “identify and attempt to remedy a structural wrong that the court has recognized in its examination of a case.”<sup>8</sup>

Regarding these specific measures, Professor Cassel states that “the Court’s authority to order legislative reform is supported by article 2 of the Convention which requires States to take such legislative or other measures as may be necessary to implement the Convention.”<sup>9</sup>

A review of the entire jurisprudence of the Inter-American Court on reparations as of the time of this writing, shows that in 37 cases the Court has ordered the State to amend, annul or adopt new domestic

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<sup>6</sup> Quintana, Francisco, “Reparations: A comparative perspective,” in: *Conference: Reparations in the Inter-American System: A comparative approach*, American University Law Review, Volume 56. Washington, D.C., 2007, pp. 1388.

<sup>7</sup> Schonsteiner, Judith, “Dissuasive measures and the ‘society as a whole’: A working theory of reparations in the Inter-American Court of Human Rights”..., p. 147.

<sup>8</sup> *Ibidem*, p. 149.

<sup>9</sup> In this regard, Professor Cassel also states that “the Court in some cases has ordered legislative reform as a measure of reparation even where, on the merits, it found no violation of article 2. In such cases it nonetheless relies in part on the substantive obligations of States under article 2, as well as on their general obligations under article 1.1 [...], and under customary international law to modify their domestic laws to meet treaty commitments. However, the Court orders legislative reform only where the legislation at issue was in fact applied in the victim’s case.” Cassel, Douglass, “The expanding scope and impact of reparations awarded by the Inter-American Court of Human Rights”...

laws after finding the existing laws incompatible with the American Convention. Domestic legislations that have been affected are those dealing with: children's rights,<sup>10</sup> conditions of detention,<sup>11</sup> corporal punishments,<sup>12</sup> death penalty,<sup>13</sup> extrajudicial executions,<sup>14</sup> forced disappearances,<sup>15</sup> freedom of expression,<sup>16</sup> judicial independence,<sup>17</sup>

<sup>10</sup> I/A Court H.R., Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala, *supra* note 9; Case of "Juvenile Reeducation Institute" v. Paraguay, *supra* note 24, para 340.11, and Case of Vargas-Areco v. Paraguay. Merits, reparations and costs. Judgment of September 26, 2006. Series C No. 155, para. 176.14.

<sup>11</sup> I/A Court H.R., Case of Caesar v. Trinidad and Tobago. Merits, reparations and costs. Judgment of March 11, 2005. Series C No. 123, para. 143.5.

<sup>12</sup> I/A Court H.R., Case of Caesar v. Trinidad y Tobago. *supra* note 39, paras. 143. 3-4.

<sup>13</sup> I/A Court H.R., Case of Fermín Ramírez v. Guatemala, *supra* note 40. para. 138.10; Case of Raxcacó-Reyes v. Guatemala. Merits, reparations and costs. Judgment of September 15, 2005. Series C No. 133, para. 145.6-145.7; Case of Boyce et al. v. Barbados. Preliminary objections, merits, reparations and costs. Judgment of November 20, 2007. Series C No. 169, para.138.7-138.8, and Case of Dacosta Cadogan v. Barbados. Preliminary objections, merits, reparations and costs. Judgment of September 24, 2009. Series C No. 204, para. 104.

<sup>14</sup> I/A Court H.R., Case of Barrios-Altos v. Perú. Reparations and costs. Judgment of November 30, 2001. Series C No. 87, para. 50.5(b).

<sup>15</sup> I/A Court H.R., Case of Trujillo-Oroza v. Bolivia. Merits, reparations. Judgment of February 27, 2002. Series C No. 92, paras. 98, 141.2; Case of Bámaca-Velásquez v. Guatemala. Reparations and costs. Judgment of February 22, 2002. Series C No. 91, para. 106.4; I/A Court H.R., Case of Molina-Theissen v. Guatemala., *supra* note 24, para. 106.7-106.8; Case of Gómez-Palomino v. Perú. Merits, reparations and costs. Judgment of November 22, 2005. Series C No. 136, para. 162.12; Case of Blanco-Romero et al v. Venezuela. Merits, Reparations and costs. Judgment of November 28, 2005. Series C No. 138, paras. 125.9-10; Case of Goiburú et al. v. Paraguay, *supra* note 8, para. 192.12; Case of Heliodoro-Portugal v. Panama. Preliminary objections, merits, reparations and costs. Judgment of August 12, 2008. Series C No. 186, para. 275. 16, and Case of Anzualdo Castro v. Perú. Preliminary objections, merits, reparations and costs. Judgment of September 22, 2009. Series C No. 202, para. 191.

<sup>16</sup> I/A Court H.R., Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations and costs. Judgment of February 5, 2001. Series C No. 73, para. 103.4; Case of Palamara-Iribarne v. Chile. Merits, reparations and costs. Judgment of November 22, 2005. Series C No. 135, para. 269.13; Case of Claude-Reyes et al. v. Chile. Merits, reparations and costs. Judgment of September 19, 2006. Series C No. 151, para. 174.7, and Case of Kimel v. Argentina. Merits, reparations and costs. Judgment of May 2, 2008 Series C No. 177, para. 140. 1.

<sup>17</sup> I/A Court H.R., Case of Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary objections, merits, reparations and costs.

juvenile detention,<sup>18</sup> indigenous land and property titles,<sup>19</sup> kidnapping or abduction,<sup>20</sup> military jurisdiction,<sup>21</sup> obligation to investigate, prosecute and punish,<sup>22</sup> political rights,<sup>23</sup> principle of legality,<sup>24</sup> procedures for acquiring nationality,<sup>25</sup> registers of detainees<sup>26</sup> regulation of the recourse of habeas corpus,<sup>27</sup> right of judicial

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Judgment of August 5, 2008. Series C No. 182, para. 267.19; Case of Yvon Neptune v. Haiti. Merits, reparations and costs. Judgment of May 6, 2008. Series C No. 180, para. 192.7, and Case of Reverón Trujillo v. Venezuela. Preliminary objections, merits, reparations and costs. Judgment of June 30, 2009. Series C No. 197, para. 193.

<sup>18</sup> I/A Court H.R., Case of Bulacio v. Argentina. Merits, reparations and costs. Judgment of September 18, 2003. Series C No.100, para. 162.5.

<sup>19</sup> I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 30, para. 173.3, Case of the Moiwana Community v. Suriname. *supra* note 30, para. 233. 3; Case of the Indigenous Community Yakye Axa v. Paraguay. Merits, reparations and costs, *supra* note 30, para. 242. 10 and Case of the Saramaka People. v. Suriname. Preliminary objections, merits, reparations, and costs. Judgment of November 28, 2007. Series C No. 172, paras. 214.7, 214.8.

<sup>20</sup> I/A Court H.R., Case of Raxcacó-Reyes v. Guatemala, *supra* note 40. paras. 145.5.

<sup>21</sup> I/A Court H.R., Case of Palamara-Iribarne v. Chile. *supra* note 43, para. 269.14.

<sup>22</sup> I/A Court H.R., Case of Loayza-Tamayo v. Perú, *supra* note 18, paras. 103-07, 118.2; Case of Myrna Mack-Chang v. Guatemala. Merits, reparations and costs. Judgment of November 25, 2003. Series C No. 101, para. 301.6; Case of Carpio-Nicolle et al. v. Guatemala, *supra* note 27, and Case of Serrano-Cruz sisters v. El Salvador, *supra* note 26, para. 218. 6.

<sup>23</sup> I/A Court H.R., Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs. Judgment of June 23, 2005. Series C No. 127, paras. 275.9-11; Case of Castañeda-Gutman v. Mexico. Preliminary objections, merits, reparations, and costs. Judgment of August 6, 2008. Series C No. 184, para. 251.6.

<sup>24</sup> I/A Court H.R., Case of Fermín Ramírez v. Guatemala, *supra* note 40, para. 138.8.

<sup>25</sup> I/A Court H.R., Case of the Girls Yean and Bosico v. Dominican Republic. Preliminary objections, merits, reparations and costs. Judgment of September 8, 2005. Series C No. 130, para.206.8.

<sup>26</sup> I/A Court H.R., Case of the “Panel Blanca” (Paniagua-Morales et al.) v. Guatemala. Reparations and costs. Judgment of May 25, 2001. Series C No. 76, para. 229.4.

<sup>27</sup> I/A Court H.R., Case of Chaparro-Álvarez and Lapo-Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs. Judgment of November 21, 2007. Series C No. 170, para. 289.11.

appeal,<sup>28</sup> states of exceptions and suspension of guarantees,<sup>29</sup> terrorism,<sup>30</sup> use of force by State agents,<sup>31</sup> and use of information.<sup>32</sup>

This review reveals that, with the exception *Castillo Petruzzi v. Peru* and *Loayza Tamayo v. Peru*, the Court began to order this kind of measures starting in 2001. These legislative measures were granted with much more frequency from 2005 on. In 2005, the Court ordered nine States in ten cases<sup>33</sup> to adopt such measures as may be necessary to bring their legislation into compliance with the norms of the American Convention. It is interesting that until 2005, the Court's orders of reparations, with the exception of *Loayza Tamayo v. Peru* and "*The Last Temptation of Christ*" v. *Chile*, makes no reference to specific domestic legislations. This trend will reverse in 2005 and up to the present where we see the Court in its decision scrutinize

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<sup>28</sup> I/A Court H.R., I/A Court H.R., Case of Herrera-Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of July 2, 2004. Series C No. 107, para. 207.5.

<sup>29</sup> I/A Court H.R., Case of Zambrano-Vélez et al. v. Ecuador. Merits, reparations and costs. Judgment of July 4, 2007. Series C No. 166, para. 169.9.

<sup>30</sup> Case of Loayza-Tamayo v. Perú. Reparations and costs, *supra* note 18, para. 192.5; Case of Castillo-Petruzzi et al. v. Perú, *supra* note 22, para. 226.14, and Case of Lori Berenson-Mejía v. Perú, *supra* note 22, para. 248.1.

<sup>31</sup> I/A Court H.R., Case of Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela. Preliminary objection, merits, reparations and costs. Judgment of July 5, 2006. Series C No. 150, para. 160.9.

<sup>32</sup> I/A Court H.R., Case of Tristán Donoso v. Portugal. Preliminary objections, merits, reparations and costs. Judgment of January 27, 2009. Series C No. 193, para. 206.

<sup>33</sup> I/A Court H.R., Case of Caesar v. Trinidad y Tobago, *supra* note 39; Case of Raxcacó-Reyes v. Guatemala. *supra* note 40; Case of Gómez-Palomino v. Perú, *supra* note 42; Case of Palamara-Iribarne v. Chile, *supra* note 43; Case of the Mowjuna Community v. Suriname, *supra* note 30; Case of the Indigenous Community Yakye Axa v. Paraguay, *supra* note 30; Case of Serrano-Cruz sisters v. El Salvador. *supra* note 26; Case of Yatama v. Nicaragua. *supra* note 50; Fermín Ramírez v. Guatemala. *supra* note 40, and Case of the Girls Yean and Bosico v. Dominican Republic, *supra* note 52.

specific domestic legislation as national constitutions,<sup>34</sup> penal codes,<sup>35</sup> electoral acts<sup>36</sup> and national security laws.<sup>37</sup> It is also important to note that in four cases, the Court has ordered the State to modify its Constitution so that it could be brought into compliance with the American Convention.

On the other hand, according to a review of all the orders of monitoring compliance with judgments at the time of this writing, and of the 37 cases in which a legislative reform has been ordered, only five countries in seven cases<sup>38</sup> complied with the Court's orders.

It is also important to note that this number does not accurately reflect the level of compliance with the Court's orders, since the Court's authority to monitor compliance is still limited. For instance, the State might have amended a law in accordance with the Court's order but the Court has yet to issue an order of compliance in the case. A clear example is *Herrera Ulloa v. Costa Rica*, where the State had already enacted the Law 8.503 entitled "Relaxation of criminal cassation" in compliance with the Court's order that as adequate reparation, the State adjusts "its domestic legal system to the provisions of Article

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<sup>34</sup> I/A Court H.R., Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. *supra* note 43; Case of Caesar v. Trinidad y Tobago, *supra* note 39; Case of Boyce et al. v. Barbados, *supra* note 40, and Case of Dacosta Cadogan v. Barbados, *supra* note 40, para. 104.

<sup>35</sup> I/A Court H.R., Case of Fermín Ramírez v. Guatemala, *supra* note 40; Case of Raxcacó-Reyes v. Guatemala, *supra* note 40, and Case of Goiburú et al. v. Paraguay, *supra* note 8.

<sup>36</sup> I/A Court H.R., Case of Yatama v. Nicaragua, *supra* note 50.

<sup>37</sup> I/A Court H.R., Case of Zambrano-Vélez et al. v. Ecuador, *supra* note 56.

<sup>38</sup> I/A Court H.R., Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Monitoring compliance with judgment. Order of November 27, 2003, para 9.e; Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Monitoring compliance with judgment. Order of November 28, 2003; Trujillo-Oroza v. Bolivia. Monitoring compliance with judgment. Order of November 17, 2004, para. 8.b; Case of Barrios-Altos v. Perú. Monitoring compliance with judgment. Order of September 22, 2005, para. 9.b ; Case of Myrna Mack-Chang v. Guatemala. Monitoring compliance with judgment. Order of November 26, 2007, para. 27.10; Case of Claude-Reyes et al. v. Chile. Monitoring compliance with judgment. Order of November 26, 2007, para. 13, and Zambrano Vélez v. Ecuador. Monitoring compliance with judgment. Order of September 21, 2009, para. 49.



8 (2) (h) of the American Convention.”<sup>39</sup> Despite the second order of compliance with judgment<sup>40</sup> was issued after this enactment, the communications of the parties in which this order was based on, are previous to the enactment of this law.<sup>41</sup> Thus the Court decided to keep open the proceeding for monitoring compliance with this order.

**c. Weaknesses and strengths of the legislative measure orders and compliance with these orders**

There is a general consensus that the Inter-American Court’s decisions have played an important role in changing the culture and institutions in the Americas. The Court has gained general acceptance among American States, despite the fact that a small number of them—particularly, the Dominican Republic, Venezuela, Peru and Trinidad and Tobago—<sup>42</sup> have responded with hostility to its rulings.

The reparations ordered by the Court have contributed to the progressive development of remedies for victims of violations. A clear example of the Court’s impact on domestic legislation is *Barrios Altos v Peru*,<sup>43</sup> one of the cases where the Court ordered legislative reforms,

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<sup>39</sup> I/A Court H.R., Case of Herrera-Ulloa v. Costa Rica, *supra* note 22, para. 207.5.

<sup>40</sup> I/A Court H.R., Case of Herrera Ulloa v. Costa Rica. Monitoring compliance with judgment. Order of September 22, 2006.

<sup>41</sup> On January 30, 2006, the State submitted its report on compliance with the judgment. On February 28, 2006, the victim’s representatives submitted their comments on the State’s report. And, on March 22, 2006, the Inter-American Commission on Human Rights submitted its respective observations. *Ibidem*.

<sup>42</sup> This State revoked the jurisdiction of the Court when its system of capital punishment was challenged. Baluarte, David C., “Inter-American justice comes to the Dominican Republic: An island shakes as human rights and sovereignty clash,” in: Human Rights Brief, Volume 13. American University, Washington, D.C., 2006, pp. 25, 29.

<sup>43</sup> 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. “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.” Del Campo, Agustina, “Lawyering for



which have already been complied with by the State. In May 2006, the Colombian Constitutional Court –in response to the legal challenges posed by the international community with respect to the Justice and Peace Law<sup>44</sup> and in attempt to rectify gaps in the law– issued Decision C-370/2006,<sup>45</sup> which relied on the *Barrios Altos* case to make precisions on regarding the content of the right to truth, justice and reparation.<sup>46</sup> Likewise, Argentina relied on the same case to strike down its laws blocking prosecutions of human rights violators.<sup>47</sup>

It is nevertheless important to point out that there are serious obstacles to compliance with reparations ordered by the Court, such as lack of political will and/or lack of institutional mechanisms for compliance.<sup>48</sup> This is reflected in the fact that in 2007, the Court “ha[d]

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reparations: Inter-American perspective,” in: *Conference: Reparations in the Inter-American System: A comparative approach*, American University Law Review, Volume 56. Washington, D.C., 2007, pp. .

<sup>44</sup> Justice and Peace Law, Law 975 of July 22, 2005.

<sup>45</sup> Colombian Constitutional Court. Decision C-370/2006, (May 18 of 2006). This decision “ruled upon suits which alleged that Law 975 was unconstitutional, and declared that most of the articles of the Law were constitutional, ruled some articles unconstitutional, and conditioned the constitutionality of others.” I/A Court H.R., Case of the Rochela Massacre v. Colombia. Interpretation of the judgment of merits, reparations and costs. Judgment of January 28, 2008. Series C No. 175, para. 183.

<sup>46</sup> Colombian Constitutional Court. Decision C-370/2006, *supra* note 71, para. 3.1.2.1.3, 3.1.3.7., and 4.4.3.

<sup>47</sup> Corte Suprema de Justicia de la Nacion, “Simón, Julio Héctor y otros s/privación ilegítima de la libertad, etc.--causa N[degree] 17.768,” June 14, 2005, Argentina. Quoted in Cassel, Douglas, “The practice and procedure of the Inter-American Court of Human Rights,” in: *American Journal of International Law*, Volume 100. The American Society of International Law, Washington, D.C., 2007, pp. 503, 507.

<sup>48</sup> In this regard, Santiago Canton says that “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.” Santiago A. Canton, “Compliance with decisions on reparations: Inter-American and European Human Rights Systems,” in: *Conference: Reparations in the Inter-American System: A comparative approach*, American University Law Review, Volume 56. Washington, D.C., 2007, pp. 1455.

only ordered 11.57 percent of the total number of contentious cases closed.”<sup>49</sup>

There exists a dichotomy in the compliance with the Inter-American Court’s orders. While generally States continue to pose difficulties in complying with orders such as to investigate and prosecute perpetrators or to revise legislation,<sup>50</sup> there is consistent compliance with orders of monetary compensation or symbolic measures. In this respect, Judge Manuel Ventura observed before the Committee on Juridical and Political Affairs of the OAS “that compliance with decisions of the Inter-American Court of Human Rights was highly satisfactory, with 88% of financial or monetary reparations cases either settled or in the process of being settled, and similarly with reparations for material damages and satisfaction.”<sup>51</sup>

It must be noticed that governments commonly assert that they will comply or are in the process of complying with remedial orders granted by the Court, but however fail to take the necessary steps to bring their practices in line with the Court’s requirements. States would report taking steps towards a full investigation of a case or to prosecute some of the alleged perpetrators, but often do not move on to a full investigation or prosecution of all the people involved.<sup>52</sup>

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<sup>49</sup> Inter-American Commission on Human Rights, Summary of the Annual Report of the Inter-American Court of Human Rights for the 2007 Fiscal Year, presented to the OAS Committee on Juridical and Political Affairs, 9 (Apr. 3, 2008).

<sup>50</sup> Cassel, Douglass, “The expanding scope and impact of reparations awarded by the Inter-American Court of Human Rights,”...

<sup>51</sup> Manuel Ventura Robles, Judge of the Inter-American Court of Human Rights, “Presentation on mechanisms to guarantee compliance by States with the decisions of the Court,” Committee On Juridical and Political Affairs (OAS), Work Plan of the Committee on Juridical and Political Affairs (CAJP) for the Presentation and Negotiation of Draft Resolutions to be Submitted to the Thirty-Ninth Regular Session of the General Assembly, CP/CAJP-2718/09 corr. 1 (31 March 2009).

<sup>52</sup> Cavallaro, James L. and Stephanie Erin Brewer, “Reevaluating regional human rights litigation in the Twenty-First Century: The case of the Inter-American Court,” in: American Journal of International Law, Volume 102. The American Society of International Law, Washington, D.C., 2008, pp. 768, 786-787.

Furthermore, States also frequently fail even to provide the Court with data necessary to determine if they are effectively complying with a judgment. That explains for example, that cases such as *Neira Alegría y otros v. Perú*, *Blake v. Guatemala*, *Loayza Tamayo v. Peru*, *Castillo Petruzzi v. Peru* and *Suárez Rosero v. Ecuador*, in which decisions were issued approximately ten years ago, are still pending compliance. What is even more discouraging is that in some situations, States do comply with Court's decisions, but the compliance measures do not really remediate the situation that caused the alleged human rights violations.

A clear example of this situation and as regards compliance with legislative measures as guarantees of non-repetition, is the case of *Herrera Ulloa v Costa Rica*. In this decision, the Inter-American Court held that “the right to appeal a judgment, recognized in the Convention, is not satisfied merely because there is a higher court than the one that tried and convicted the accused and to which the latter has or may have recourse.”<sup>53</sup> Likewise, the Court held that “regardless of the label given to the existing remedy to appeal a judgment, what matters is that the remedy guarantees a full review of the decision being challenged.”<sup>54</sup> Consequently, it ordered the State to “adjust its domestic legal system to conform to the provisions of Article 8(2)(h) of the American Convention on Human Rights, in relation to Article

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<sup>53</sup> I/A Court H.R., Case of Herrera-Ulloa v. Costa Rica, *supra* note 22, para. 207.5

<sup>54</sup> In this regard, the Judge of the Inter-American Court Sergio García Ramírez, stated that “in the judgment delivered in the Case of Castillo-Petruzzi, one Judge of the Court produced a Concurring Opinion in which he alluded to this matter (and others), although he did so in reference to a military court system that had failed to respect the right of appeal: ‘that the victim’s right to a court of second instance was not respected (because the courts that heard the case on review) did not function as tribunals that re-examine all the facts in a case, weigh the probative value of the evidence, compile any additional evidence necessary, produce, once again, a juridical assessment of the facts in question based on domestic laws and give the legal grounds for that assessment.’ (Concurring opinion of Judge Carlos Vicente de Roux Rengifo, in the Judgment on the Case of Castillo-Petruzzi et al., May 30, 1999).” Concurring Opinion of Judge Sergio Garcia Ramírez in the Judgment of The Inter-American Court of Human Rights in the Case of Hererera Ulloa v. Costa Rica, of July 2, 2004, para. 33.

2 thereof.”<sup>55</sup> On April 28, 2006, Costa Rica enacted the Law No. 8503 “Relaxation of Criminal Cassation,” mentioned above, in order to comply with the *Herrera Ulloa* decision. However, this legislative modification does not fulfill the requirements of the Court’s order. This assessment is supported in the Defendant Public Office “*Defensa Pública de Costa Rica*” *Amicus Curiae* brief to the Inter-American Court stating that “despite the inclusion in the draft of an article [449 *bis*] allowing the obtaining of proof, this measure does not satisfy the integral exam required by the Inter-American resolution. Rather, it takes up or reasserts the possibility of access to the principle of rational criticism, already available in the current legislation.”<sup>56</sup> Article 449 *bis* of the Draft of Law, alleged as not compatible with the Convention, is the same Article 449 *bis* under the Law No. 8503. Thus, it is possible to conclude that the remedy to appeal a judgment as regulated in the new national law, does not guarantee a full review of the decision being challenged, as held by the Court in the *Herrera Ulloa* decision.<sup>57</sup> Consequently, this law which was enacted to comply with a Court’s decision, ended up having a negative impact not just at the domestic level but also in the international arena, in particular on one of the organs of the Inter-American System. The scope of this repercussion will be clear in the near future.

The above example reflects not only a misunderstanding on the part of the State but also the limited authority of the Court in supervising compliance with its judgments. Accordingly, despite the fact that the Law 8503 was enacted three years ago, the Court has still not made a pronouncement in this regard.

It is also important to note that in some cases the lack of compliance with remedies granted by the Inter-American Court is not only attributable to the State but also to the Court’s orders itself, which in some occasions are not clear enough or are overly broad and so not easily understood by States. Even the Court’s response to a request for

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<sup>55</sup> I/A Court H.R., Case of *Herrera-Ulloa v. Costa Rica*, *supra* note 22, para. 207.5.

<sup>56</sup> *Defensa Pública de Costa Rica, Amicus Curiae*, *Caso Herrera Ulloa v. Costa Rica*, 9 (Feb. 2, 2005).

<sup>57</sup> I/A Court H.R., Case of *Herrera-Ulloa v. Costa Rica*, *supra* note 22, para. 207.5.

interpretation of judgment might still be ambiguous. An example is *Castro Castro v. Peru*, where the Center for Civil and Human Rights of the University of Notre Dame represented the victims. In this case, the Court not only ordered the State to comply with measures that were unclear,<sup>58</sup> but also did not appropriately consider the political context prevailing in Peru which resulted in Peru's government strong and overt opposition to the decision.<sup>59</sup>

In the international field, it may be considered that there are two essential steps to prevent future recurrence of human rights violations where there is a domestic law that does not comply with human rights treaties; these are: reparations ordered by the Court, and compliance by States. Even if the remedial orders granted are the most appropriate to deter future recurrence of violations, failure from the State to timely and effectively comply, render the reparations ordered ineffective. With respect to the Inter-American Court, it is clear that this Tribunal has significantly developed its jurisprudence in granting guarantees of non-repetition, but the general lack of compliance from States with orders to adopt legislative measures is evident. Indeed, only a small number of States have modified their domestic legislations in accordance with the Court's decisions.

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<sup>58</sup> I/A Court H.R., Case of the Miguel Castro-Castro Prison v. Peru. Interpretation of the judgment of merits, reparations and costs. Judgment of August 2, 2008 Series C No. 181.

<sup>59</sup> In this regard, Lisa J. Laplante says that "specifically, in Castro Castro Prison, the court ruled in favor of reparations for survivors and families of prisoners killed during a State-led massacre meant to quell an uprising of inmates detained on charges of, and in some cases convicted of, the crime of terrorism [...] The reaction to the court's decision in Castro Castro Prison has resulted in a national crisis, with some surprising and serious political developments that run contrary to the overall goal of the TRC to promote political transition and reconciliation. For instance, recently re-elected President Alan García reacted to the court's decision by saying it was 'indignant that a court would reach a conclusion that would harm Peru, a victim of the insanity of a terrorist sect.' Prime Minister Jorge del Castillo publicly declared that 'the judgment obligates us to pay terrorists with the money of Peruvians [...]'. As a reaction, the Peruvian Congress initiated criminal charges against former President Toledo for having accepted partial responsibility for the State's actions at Castro Castro Prison, claiming he had thus failed to defend national interests as required by the National Constitution." Laplante, Lisa J., "Analyzing reparations in International Human Rights Law: The law of remedies and the clean hands doctrine: Exclusionary reparation policies in Peru's political transition," ... pp. 86-87.

In this regard, it is necessary that the Inter-American Court and States take appropriate steps so that the adoption of legislative measures contributes substantially to avoid repetition of human rights violations derived from laws that are incompatible with the American Convention. It follows that the Court must make an analysis of the facts and clearly articulate its decisions so that remedial orders are clear and precised so as to be understood by States, as well as concrete enough to be verifiable during the monitoring of the compliance process. On their part, States must adopt measures to change their domestic laws in timely compliance with reparations measures ordered by the Court. Considering that the implementation of a legislative measure as guarantee of non-repetition is a serious and long process than for example, complying with reparation orders consisting in acknowledging responsibility or erecting monuments. It is necessary that during the process of execution of a remedial order, judges do not give effect to the domestic laws that have been declare incompatible with the American Convention.

## **2. European Court's approach towards reparations**

### **a. Generalities and development of the jurisprudence**

The European Court determines reparations through interpretation and application of Article 41 of the European Convention.<sup>60</sup> The ECHR's approach to reparations has typically been restrictive in comparison to the Inter-American Court's. Once the ECHR finds a violation under the Convention, it only awards declarative relief and exercise its remedial power by affording just satisfaction if a State is in violation of the Convention by partially or completely failing to comply with it.<sup>61</sup> This usually consists of material and moral compensation,

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<sup>60</sup> Article 41 of the European Convention provides that: "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party." Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (Nov. 4, 1950).

<sup>61</sup> Nicola, Fernanda, and Ingrid Nifosi-Sutton, "Assessing regional cooperation: New trends before the European Court of Human Rights and the European Court

together with legal costs and expenses. “[S]ubject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment.”<sup>62</sup>

The European Court’s mandate towards reparations, according to Dinah Shelton, “has gradually become more receptive to indicating non-monetary relief for applicants [...]”<sup>63</sup> In this regard, the Professor states that the first cases where restitution was indicated as the appropriate remedy were property cases in *Papamichalopoulos v. Greece* and *Brumarescu v. Romania* where the Court’s operative paragraphs established that each State “is to return the property to the applicant” and if not to pay compensation.<sup>64</sup>

In 2004, the Court took an unprecedented step with respect to remedies in the so-called “prisoner cases” *Assanidze v. Georgia*<sup>65</sup> and *Ilascu and Others v. Moldova and Russia*,<sup>66</sup> both concerning

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of Justice”, Human Rights Brief, Volume 15. American University, Washington, D.C., 2007, pp. 11, 13.

<sup>62</sup> Antkowiak , Thomas M., “Remedial approaches to human rights violations: The Inter-American Court of Human Rights and beyond,”..., p. 358. The Article 46 of the European Convention provides that: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.” European Convention, *supra* note 87.

<sup>63</sup> Shelton, Dinah, *Remedies in International Human Rights Law*. Oxford University Press, 2005, p. 282.

<sup>64</sup> *Ibidem*.

<sup>65</sup> In this case, “the applicant alleged, in particular, a violation of his right to liberty and security, arguing that the fact that he had remained in the custody of the authorities of the Ajarian Autonomous Republic, despite having received a presidential pardon in 1999 for a first offence and been acquitted of a second by the Supreme Court of Georgia in 2001 following his conviction by the Ajarian courts, constituted a violation of his rights guaranteed by Article 5 §§ 1, 3 and 4, Article 6 § 1, Article 10 § 1 and Article 13 of the Convention, and Article 2 of Protocol No. 4.” European Court, *Assanidze v. Georgia*, App. No. 71403/01 (2004). Judgment of April 8, 2004, para. 3.

<sup>66</sup> With respect to this case, “the applicants submitted that they had been convicted by a Transdniestrian court which was not competent for the purposes of Article 6 of the Convention, that they had not had a fair trial, contrary to the same provision,

arbitrary detentions. In these cases, the European Court rather than merely declaring a violation of Article 5 of the European Convention and awarding monetary compensation, took very specific remedial measures to respond to the particularities of the cases, ordering to the States to release the applicants from prison.

Specifically, in the case of *Assanidze v. Georgia*, despite the fact that the Court reiterated that “it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation [...]”,<sup>67</sup> it held that “by its very nature, the violation found [...] does not leave any real choice as to the measures required to remedy it.”<sup>68</sup> Consequently, it establishes that “in these conditions, having regard to the particular circumstances of the case and the urgent need to put an end to the violation of Article 5 § 1 and Article 6 § 1 of the Convention [...] the respondent State must secure the applicant’s release at the earliest possible date.”<sup>69</sup>

Interestingly, the President of the Court, Jean-Paul Costa, established in its partly concurring opinion, that “the Court has taken what to my mind represents a welcome and logical step forward [...] rather than deciding that Georgia must pay the applicant compensation if it fails to secure his release, it has ruled that the payment obligation

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and that following their trial they had been deprived of their possessions in breach of Article 1 of Protocol No. 1. They further contended that their detention in Transnistria was not lawful, in breach of Article 5, and that their conditions of detention contravened Articles 3 and 8 of the Convention. In addition, Mr. Ilaşcu alleged a violation of Article 2 of the Convention on account of the fact that he had been sentenced to death. The applicants argued that the Moldovan authorities were responsible under the Convention for the alleged infringements of the rights secured to them thereunder, since they had not taken any appropriate steps to put an end to them. They further asserted that the Russian Federation shared responsibility since the territory of Transnistria was and is under *de facto* Russian control on account of the Russian troops and military equipment stationed there and the support allegedly given to the separatist regime by the Russian Federation.” European Court, *Ilaşcu & others v. Moldova*, App. No. 48787/99 (2004). Judgment of July 8, 2004, para. 3.

<sup>67</sup> European Court, *Assanidze v. Georgia*, *supra* note 92, para. 202.

<sup>68</sup> *Ibidem*.

<sup>69</sup> *Ibidem*, para. 203.



is additional to and does not in any way lessen the obligation to secure his release.”<sup>70</sup>

In *Ilaşcu v. Moldova*, the ECHR came to a similar conclusion, holding that “any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolongation of the violation of Article 5 found [...] and a breach of the respondent States’ obligation under Article 46 § 1 of the Convention to abide by the Court’s judgment.”<sup>71</sup> As a result, the Court established that “the respondent States must take every measure to put an end to the arbitrary detention of the applicants still detained and to secure their immediate release.”<sup>72</sup>

In relation to both cases, Dinah Shelton says that “the European Court of Human Rights took a more active role, addressing the remedies in light of *restitutio in integrum* by bringing the States into compliance with their treaty obligations.”<sup>73</sup> This innovative approach has been welcomed by many scholars.<sup>74</sup>

## **b. Overloading of the Court**

### **i. Sources**

Considering the enlargement of the Council of Europe after 1990 –which had twenty-three members in 1990 and currently has forty-seven– as well as the subsequent incorporation into the European Convention of the countries of Central and Eastern Europe, this Tribunal began to receive a large number of applications. Nowadays “some of the new member States have a high case-count with three of them (Russian Federation, Romania and Ukraine) accounting for nearly half of the total number, rising to 56% if Turkey is included.”<sup>75</sup>

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<sup>70</sup> *Ibidem*, para. 9, Judge Costa, partly concurring opinion.

<sup>71</sup> European Court, *Ilaşcu & others v. Moldova*, *supra* note 93, para. 490.

<sup>72</sup> *Ibidem*.

<sup>73</sup> Nifosi-Sutton, Ingrid, “Compliance with decisions on reparations: Inter-American and European Human Rights systems,” in: *American University Law Review*, Volume 56. Washington, D.C., 2007, pp. 1459.

<sup>74</sup> *Ibidem*.

<sup>75</sup> Jean-Paul Costa, President of the European Court of Human Rights, “Speech given on the occasion of the opening of the judicial year,” (Jan. 25, 2008), in European Court of Human Rights, Annual Report 2008, January, 2009, p. 5.

In addition, the President of the European Court of Human Rights, Jean-Paul Costa, affirms that two further phenomena explain this overloading: lodging of inadmissible applications, which still need to be examined, and the large number of repetitive cases.<sup>76</sup>

According to the Court's statistics, the number of applications registered in Strasbourg in 1981 was 404. By 1997, this number had risen to 4750, and by 2004 the number of new cases lodged with the Court was 44100.<sup>77</sup> The Court had 97300 applications pending on 21 December 2008,<sup>78</sup> and this is projected to grow by around 20% per year, and so exceed a quarter of a million cases by 2010.<sup>79</sup> There is no doubt that the number of pending applications is threatening the credibility and effectiveness of the European Court.

## ii. Response

In response to this growing crisis, the European Court has made notable efforts to deal most effectively and productively with its current and projected caseload, debating and exploring possible methods of reform. For instance, the Court has worked to simplify the procedure for rejecting inadmissible cases, and has reformed its working methods more generally to achieve a remarkable increase in output.<sup>80</sup>

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<sup>76</sup> Specifically, the President of the ECHR, Costa, maintains that "two further phenomena, however, explain the overloading of the Court, which is the cause of regrettable delays. First, certain applicants, usually because of ignorance about the Convention and the role of the Court, lodge applications which have no prospect of success but which still need to be examined. Secondly, the Court has to deal with a large number of repetitive cases, admittedly well-founded, but which should be disposed of at national level once the relevant principles have become well-established in Strasbourg case-law. The States must bear responsibility for this second problem if they have failed to implement the necessary internal reforms or if reforms have been delayed." *Ibidem*, p. 9.

<sup>77</sup> Lord Woolf's Review of the Working Methods of the European Court of Human Rights, December, 2005, p. 7.

<sup>78</sup> European Court of Human Rights, *supra* note 87, p. 127.

<sup>79</sup> Lord Woolf's, *supra* note 104, p. 49.

<sup>80</sup> *Ibidem*, p. 10.

### 1. *Protocol 14 to the European Convention*

One of the most significant efforts to handle this caseload was the adoption in May, 2004, of the Protocol 14 to the European Court,<sup>81</sup> not yet into force,<sup>82</sup> which amends the control system of the Convention in order to improve the efficiency of the Court under the current demand.<sup>83</sup>

With respect to this Protocol, the president Jean-Paul Costa stated in 2007 that “the application of Protocol 14 will enable the Court to increase its productivity by at least 25%. Although it cannot suffice by itself, the Protocol is therefore indispensable.”<sup>84</sup> Likewise, Lord Woolf affirmed that this legal instrument is “far from being a fix-all solution. It treats the symptoms rather than the causes of the problem.”<sup>85</sup>

### 2. *“Pilot judgment” procedure*

Taking into account that many of these cases before the European Court were repetitive and derived from the same systemic flaws, the Committee of Ministers recommended the Court “to identify, in its judgments finding a violation of the Convention, what it considers to

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<sup>81</sup> Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report P 6, opened for signature May 13, 2004, Council Europ. T.S. 194.

<sup>82</sup> It has yet to come into force due to it requires universal ratification, and one member State (Russia) has not ratified it.

<sup>83</sup> In this regard, this Protocol has three main provisions. It allows for a single judge, assisted by a non-judicial rapporteur, to reject cases where they are clearly inadmissible from the outset. This replaces the current system where inadmissibility is decided by committees of three judges, and will increase judicial capacity. Protocol 14 also provides for committees of three judges to give judgments in repetitive cases where the case law of the Court is already well-established (on length of proceedings cases, for example). Repetitive cases are currently heard by chambers of seven judges, so this measure will also serve to increase efficiency and judicial capacity. Thirdly, Protocol 14 introduces a new admissibility criterion concerning cases where the applicant has not suffered a “significant disadvantage”, provided that the case has already been duly considered by a domestic tribunal, and provided that there are no general human rights reasons why the application should be examined on its merits. Lord Woolf’s, *supra* note 104, p. 12.

<sup>84</sup> Jean-Paul Costa, President of the European Court of Human Rights, “Speech given on the occasion of the opening of the judicial year,”... p. 2 .

<sup>85</sup> Lord Woolf’s, *supra* note 104, p. 49

be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.”<sup>86</sup>

Consequently, the Court responded with the “pilot judgment” procedure, which is “th[e] kind of adjudicative approach by the Court to systemic or structural problems in the national legal order,”<sup>87</sup> designed to both encourage the State in question to rectify the problem at national level, and to save the Court from considering all those cases that raised the same issue.<sup>88</sup>

The ECHR has applied the pilot judgment procedure in 2004 and 2008, subsequently in *Broniowski v. Poland* and *Hutten-Czapska v. Poland*.<sup>89</sup> In both cases the Court considered that the “violation [to the right to property] had originated in a systemic problem connected with the malfunctioning of domestic legislation.”<sup>90</sup> In the first case, Poland had failed to set up an effective mechanism to implement the “right to credit” of Bug River claimants.<sup>91</sup> Thus, the Court “directed that the [...] State should, through appropriate legal measures and administrative practices, secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, in accordance with the principles

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<sup>86</sup> Committee of Ministers, Res. (2004) 3, Resolution on judgments revealing an underlying systemic problem, May. 12, 2004.

<sup>87</sup> European Court, *Broniowski v. Poland*. App. No. 31443/96. Judgment of September 28, 2005, para. 34.

<sup>88</sup> Lord Woolf’s, *supra* note 104, p. 39. By its part, the European Court has held that “the pilot judgment procedure is primarily designed to assist the [...] States in fulfilling their role in the Convention system by resolving such problems at national level, thereby securing to the persons concerned the Convention rights and freedoms as required by Article 1 of the Convention, offering to them more rapid redress and, at the same time, easing the burden on the Court which would otherwise have to take to judgment large numbers of applications similar in substance.” European Court, *Broniowski v. Poland*, *supra* note 113, para. 35.

<sup>89</sup> Eur. Ct. H. R., *Hutten-Czapska v. Poland*, Application no. 35014/97. Judgment April 28, 2008.

<sup>90</sup> Eur. Ct. H. R., *Broniowski v. Poland*, *supra* note 114, para. 3, and *Hutten-Czapska v. Poland*, *supra* note 116, para. 3.

<sup>91</sup> *Ibidem*.

of protection of property rights [...].”<sup>92</sup> In the *Hutten-Czapska* case, Poland “had imposed [...] restrictions on landlords’ rights [and] it had not [...] provide[d] for any procedure or mechanism enabling landlords to recover losses incurred in connection with property maintenance.”<sup>93</sup> As response, the Court established that Poland “must, through appropriate legal and/or other measures, secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords and the general interest of the community.”<sup>94</sup>

In both cases, “the Court held that the question of the application of Article 41 was not ready for decision in so far as the applicant’s claim for pecuniary damage was concerned and reserved the said question, inviting the Government and the applicant [...] to notify the Court of any agreement that they might reach.”<sup>95</sup> In this context, two friendly settlements were reached after the delivery of the judgment on the merits. In the Court’s view, those had “demonstrated an active commitment to take measures aimed at resolving the systemic problem identified in the principal.”<sup>96</sup> Therefore, the Court decided to strike the cases out of its list.

### **c. Reassessment of the European Court of Human Rights practice concerning reparations**

As previously mentioned, this paper attempts to demonstrate that the term “just satisfaction” established in Article 41 of the European Convention, may be interpreted in a broader manner. With an expansive interpretation of this term, the Court would be able to award non-monetary reparations, among them, legislative measures. If this Tribunal takes an expansive approach in this regard, and its decisions are effectively complied with by States, this would contribute to reduce the serious backlog that it faces. In the same way, the Court would be

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<sup>92</sup> Ibidem.

<sup>93</sup> European Court, *Hutten-Czapska v. Poland*, *supra* note 116, para. 3.

<sup>94</sup> Ibidem.

<sup>95</sup> European Court, *Broniowski v. Poland*, *supra* note 114, para. 3, and *Hutten-Czapska v. Poland*, *supra* note 116, para. 3.

<sup>96</sup> European Court, *Broniowski v. Poland*, *supra* note 114, para. 42, and *Hutten-Czapska v. Poland*, *supra* note 116, para. 43.

able to remedy other existing violations and prevent new violations from occurring.

A reassessment of the European Court's practice concerning the interpretation of the term "just satisfaction," is supported by the following arguments:

i. Basic principles of interpretation of treaties

The basic principle of interpretation of treaties is found in Article 31 of the Vienna Convention of the Law of Treaties<sup>97</sup> ("Vienna Convention"). Under this provision, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>98</sup> In this particular case, it may be established that the legal meaning of "just satisfaction" results ambiguous and difficult to its understanding. Indeed, in its jurisprudence, the European Court has not explained what it understands by "just satisfaction", what this term requires precisely. Not even in the cases already discussed, where the Court took an extensive approach towards reparations, does it go into further details about "just satisfaction."

In cases where the legal analysis of a term leaves the meaning ambiguous or obscure, according to Article 32 of the Vienna Convention, recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. Taking into account these supplementary means of interpretation, it is important to analyze the following aspects:

First, according to Dinah Shelton, the drafters of the European Convention made clear their concern with affording adequate remedies to victims of human rights violations.<sup>99</sup> To support this argument,

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<sup>97</sup> Vienna Convention on the Law of Treaties, entered into force on 27 January 1980, United Nations. Treaty Series, vol. 1155.

<sup>98</sup> Ibidem, Article 31.

<sup>99</sup> See Council of Europe, Report of the Control System of the European Convention on Human Rights, h (92) 14, Dec. 1992, p. 4. Quoted in Shelton, Dinah, *Remedies in International Human Rights Law...* p. 190.

the Professor quotes the *Message to Europeans adopted at the final plenary session*, in which the Congress delegates expressed the following: “We desire a Court of Justice with adequate sanctions for the implementation of this Charter.”<sup>100</sup>

Secondly, the language of Article 41 of the European Convention was derived from treaty provisions on the enforcement of arbitral awards in inter-State proceedings, including Article 32 of the 1928 General Act on Arbitration<sup>101</sup> and Article 10 of the German-Swiss Treaty on Arbitration and Conciliation.<sup>102</sup> In this respect, Dinah Shelton states that:

The term ‘satisfaction’ used in arbitral treaties and in the European Convention draws upon international practice in regard to State responsibility for injury to aliens [which] ranged from wrongful death to property losses, while the indirect harm to the State of nationality generally affected its honour and dignity. The State usually claimed pecuniary and non-pecuniary reparations for the injury to the aliens, and non-monetary satisfaction to remedy its own moral injury. Satisfaction could require punishment of the guilty and assurances as to future conduct, monetary awards, or declaration of the wrong, especially when coupled with an apology from the offending State.

Consequently, the author affirms that “many such non-monetary remedies afforded under the heading of satisfaction in inter-State proceedings may be appropriately applied in the human rights context, especially apologies, guarantees of non-repetition and/or punishment of wrongdoers.”<sup>103</sup>

It is worth mentioning that “the drafting history of the European Convention says only that the Court has no power to annul directly

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<sup>100</sup>Ibidem.

<sup>101</sup>This Article provides that: “If, in a judicial sentence or arbitral award is declared that a judgment, or a measure enjoined by a court of law or other authority of one of the parties to the dispute, is wholly or in part contrary to international law, and if the constitutional law of that party does not permit or only partially permits the consequences of the judgment or measure in question to be annulled, the parties agree that the judicial sentence or arbitral award shall grant the injured party equitable satisfaction.” Shelton, Dinah, *Remedies in International Human Rights Law...* p. 191.

<sup>102</sup>Ibidem.

<sup>103</sup>Ibidem, p. 197.

a national act.”<sup>104</sup> However, this Court’s inability “does not limit its power to hold that the appropriate remedy for a violation is for the State to amend or nullify measures that violate the Convention.”<sup>105</sup>

Likewise, it is important to underscore that the Tribunal’s interpretation of the term “just satisfaction” has been criticized as far too narrow.<sup>106</sup> Furthermore, Dinah Shelton states that the term “satisfaction” in international practice has never been restricted to monetary compensation.”<sup>107</sup>

On the other hand, it is important to point out that the interpretation of a provision must be in accordance with the object and purpose of the treaty.<sup>108</sup> In this regard, the application of the term “just satisfaction” must be consistent with the object and purpose of the European Convention that is “the maintenance and further realization of human rights and fundamental freedoms.”<sup>109</sup> Accordingly, it is important that the Court supports this approach in its own jurisprudence, specifically regarding the case *Karner v. Austria*, where the Court held that “although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.”<sup>110</sup>

In sum, considering the preparatory work of the treaty, the international practice in this regard, as well as the object and purpose of the European Convention, there is no evidence that the drafters or signatories, considered that the term “just satisfaction” is restricted to monetary compensation.

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<sup>104</sup>Ibidem, pp. 280-281.

<sup>105</sup>Ibidem, p. 189.

<sup>106</sup>Antkowiak, Thomas M., “Remedial approaches to human rights violations: The Inter-American Court of Human Rights and beyond,”... p. 409.

<sup>107</sup>Shelton, Dinah, *Remedies in International Human Rights Law...* p. 280.

<sup>108</sup>Vienna Convention, *supra* note 124, Article 31.

<sup>109</sup>European Convention, *supra* note 87, Preamble.

<sup>110</sup>European Court, *Karner v. Austria*, Application no. 40016/98). Judgment of July 24, 2003.



It follows that in cases that deal with violations derived from an incompatible law with the European Convention, the Court might order the State, depending on the circumstances of the particular case, to modify, nullify or adopt legislative measures to comply with the obligation enshrined in Article 1 which means, to secure the rights and freedoms guaranteed by the treaty.

ii. Innovative approaches

1. *Development in the ECHR's reparations jurisprudence*

Considering the development in the reparation's jurisprudence discussed in section 2.a, in particular in the *Assanidze* and *Ilascu* cases, it may be asserted that these decisions demonstrate the willingness and readiness of the European Court to extend its approach in awarding non-monetary remedies.

It is necessary that the Court does not abandon the innovative approach demonstrated in making reparations, and that the Court extends its approach to guarantees of non-repetition, which will be totally appropriate to the actual circumstances of the European Court.

2. *"Pilot judgment" procedure*

It is important to acknowledge that the "pilot judgment" procedure might be an important development in dealing with the backlog the European Court faces. However it is too soon to appreciate it. Marie-Louise Bemelmans-Videc, Member of the Parliamentary Assembly, affirms that "the definition and criteria for this procedure have yet to be defined."<sup>111</sup> Even, the President of the European Court indicated last year that "[they] are also thinking about ways to develop the pilot-judgment procedure."<sup>112</sup>

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<sup>111</sup> Bemelmans-Videc, Marie-Louise, "Comments on the Wise Persons' Report from the perspective of the Parliamentary Assembly of the Council of Europe," in: *Future developments of the European Court of Human Rights in the light of the Wise Persons' Report*. Colloquy organised by the San Marino chairmanship of the Committee of Ministers of the Council of Europe, March, 2007, p. 49.

<sup>112</sup> Jean-Paul Costa, President of the European Court of Human Rights, "Speech given on the occasion of the opening of the judicial year,"... p. 2.

Marie-Louise Bemelmans-Videc also states that the weakness of the pilot procedure legal basis has already been pointed out by Judge Zagrebelsky, by recalling that this procedure, although approved by the Committee of Ministers, “is not yet reflected in the text of the Convention.”<sup>113</sup>

On the other hand, it may be asserted that this procedure is neither fair nor legitimate in the sense that it is not clear how a friendly settlement between the applicant under a pilot judgment and the government, can address the rights of other alleged victims regarding same violations against the same country, but who are not before the Court.

The Court decided to make use of the “pilot judgment” procedure as an effort to reduce the backlog. The adoption of this procedure demonstrates the readiness of the Court to take innovative solutions. Contrary to the pilot judgment procedure, which has no legal basis under the European Convention nor a clear criteria, the expansive reparations approach is not only in accordance with the general principles of interpretation of treaties but also more likely to be successful. The “pilot judgment” procedure is also an example of how the Court is prepared to look beyond the exact terms of the Convention in its search for additional solutions to deal with the backlog.

### iii. Different framework

The specific set of factors that characterized the European system through the early 1990s, has changed dramatically during this time. The European Court no longer exercise jurisdiction over

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<sup>113</sup> In *Hutten-Czapska v. Poland* (judgment of 19 June 2006), the Judge Zagrebelsky stated on the one hand that the arguments set out by the Committee of Ministers in Resolution Res (2004) 3 and Recommendation Rec (2004) 6 of 12 May 2004, which are addressed to governments, “are undoubtedly of much importance and must be taken into account by the European Court of Human Rights with a view to ensuring that the reasons given in its judgments are as clear as possible.” On the other hand, he disputed that the “fact that the proposals to which the European Court of Human Rights refers in paragraph 233 of the judgment were not included in the recent Protocol No. 14 amending the European Convention on Human Rights” cannot be overlooked. Quoted in Bemelmans-Videc, Marie-Louise, “Comments on the Wise Persons’ Report from the perspective of the Parliamentary Assembly of the Council of Europe”...

a relatively homogeneous group of Western European countries whose democracies are already well established or whose model of governmental compliance is the primary point of reference for how regional courts influence State practice. Nowadays, “the statistics of the Council of Europe’s Committee of Ministers reveal that the majority of the European Court’s judgments awaiting compliance supervision by the Committee (excluding the large family of similar cases involving delays in civil and criminal proceedings in Italy) now involve Eastern European member States and Turkey.”<sup>114</sup>

On the other hand, regarding the adoption of legislative measures, it is important to acknowledge the effect that the European Convention and the Court judgments especially had on Western countries.<sup>115</sup> However, considering the change in circumstances briefly narrated, it is crucial that the European Court takes a different approach in its judgments, assuming the responsibility to grant reparations, and therefore, providing a clearer guidance to States on how to comply with their obligations.

#### iv. The Inter-American Court as a model

Despite the differences between the Inter-American Court and the European Court –such as the standards of review, type of cases and, level of political stability– as well as the specific differences regarding reparations –for instance, the language of the reparations provision, the approach and the scope– the substantial purpose and aim of both

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<sup>114</sup> Cavallaro, James L. and Stephanie Erin Brewer, “Reevaluating regional human rights litigation in the Twenty-First Century: The case of the Inter-American Court”..., p. 774.

<sup>115</sup> In this regard, Dinah Shelton states that “Austria, for example, has modified its Code of Criminal Procedure; Belgium has amended its Penal Code; its laws on vagrancy and its Civil Code; Germany has modified its Code of Criminal Procedure regarding pre-trial detention, given legal recognition to transsexuals, and taken action to expedite criminal and civil proceedings. The Netherlands has modified its Code of Military Justice and the law on detention of mental patients; Ireland created a system of legal aid; Sweden introduced rules on expropriations and legislation on building permits; Switzerland amended its Military Penal Code and completely reviewed its judicial organization and criminal procedure applicable to the army; France has strengthened the protection for privacy of telephone communications.” Shelton, Dinah, *Remedies in International Human Rights Law...* p. 202.

regional courts is the same: the protection and assurance of the human rights situation in their respective continent.

As mentioned before, the Inter-American Court is “the most comprehensive legal regime on reparations,” for this reason it may be very useful that the European Court uses it as a framework for reflection and comparison, when analyzing possible measures that it could adopt in its own approach to reparations. Considering the difficulties facing the European Court, that we have previously discussed, it might take into account the flexibility and creativity of the inter-American reparations approach which can help it find an effective solution to reducing future human rights violations and decrease its backlog. It is also important that the European Court takes note of the deficiencies of its counterpart so as to avoid repeating them in its own practice.

### **Conclusions**

It is evident that the consequences of violations suffered by victims cannot always be adequately remedied by payment of just satisfaction. From the analysis in the previous section, it may be concluded that the Court, through a broader interpretation of Article 41, can move beyond its current limited approach to reparations. The Court must rely on a more appropriate interpretation of Article 41 to provide victims a range of remedies.

In this regard, it is important that the Court grants legislative measures as guarantees of non-repetition when a violation of the rights of the victims is based on, caused by, or related to domestic legislation. In these cases, the Court must order the State to remove such deficiencies by bringing domestic legislation in conformity with international standards. Taking into account the margin of appreciation, the State can itself take specific steps to comply with the remedy granted.

If the Court adopts such an approach to reparations and adopts legislative measures as guarantees of non-repetition, one positive implication will be the reduction of the probability that other similarly

situated individuals will be victim of the same human rights violations because of the same domestic laws. In sum, preventing recurrence cannot be achieved without including societal measures in the larger reparation measures ordered.

Considering the European current context, it is highly likely that the Court will continue to receive a large number of petitions from similarly situated individuals. Urgent action is thus needed to enable the Court to deal with this large number of pending applications. There is no doubt, that the positive implications of a wider approach to reparations mentioned below will reduce the number of incoming application and the backlog that the European Court currently faces. This new approach would ensure, in a certain manner, the efficacy and long-term viability of the procedures of the European Convention's. It is important to underscore that this proposal is not the only solution to reduce the serious backlog, but taken together with others, it provides the Court with some real assistance in dealing with its workload, and especially, in enhancing the protection of human rights at the domestic level and improving the human rights situation in the European Continent in general. Of course, States are also expected to take appropriate measures to implement the Court's judgments.

It is important to recognize, however, that a new and broader approach towards reparations might pose practical and serious problems during the execution phase. For instance, States such as Russia or Turkey might be reluctant to address structural problems in their domestic legal systems and object to an invasive approach by the European Court. However, possible negative State reaction to resolutions and judgments of the European Court must not be an impediment to adopting a better approach in the reparations ordered by the Court. It is also important to explore, in cooperation with other European Organs, ways of encouraging the State to comply with judgments of the European Court.

If the Court adopts the proposed approach, it will likely get the support of other European Organs given the concern they have shown and their recommendation to the Court in this respect. For instance, a

resolution of the Committee of Ministers urged the Court “to identify [...] what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments,”<sup>116</sup> and also the recommendation by the European Parliamentary Assembly to the Court in the sense “to ensure that its judgments are clear [...] so that governments have a firmer grasp of what is expected of them and are not tempted to use any inconsistencies as an excuse for failing to execute.”<sup>117</sup>

This proposal for a reassessment of the European Court’s approach to reparations focuses on guarantees of non-repetition. However, in actuality, the general approach would also include victim-specific measures of restitution, rehabilitation and satisfaction.

With a new approach towards its orders for reparations, the European Court will not only reduce its backlog, but will also contribute substantially to achieve the goal of the European Convention: “the maintenance and further realisation of human rights and fundamental freedoms.”

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<sup>116</sup> Committee of Ministers, Res(2004)3, *supra* note 113.

<sup>117</sup> European Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Execution of Judgments of the European Court of Human Rights Report, Doc. No. 8808, Jul, 12, 2000, para. 86.

# **O papel do sujeito perante os sistemas de proteção dos direitos humanos: a construção de uma esfera pública por meio do acesso universal como instrumento na luta contra violação dos direitos humanos**

*André Pires Gontijo\**

## **Introdução**

A comparação jurídica pode ser colocada como instrumento necessário para se alcançar o aperfeiçoamento do estudo do Direito, em especial dos direitos humanos. Nesse aspecto, esta pesquisa busca averiguar qual o papel do sujeito na seara internacional, em especial na perspectiva de acesso aos sistemas de proteção, por meio do direito de peticionamento individual. Isto é, a pergunta que se faz como escopo dessa pesquisa é: qual o papel do sujeito perante os sistemas de proteção dos direitos humanos?

Por essa razão, esta pesquisa circunscreve-se no âmbito do direito constitucional e internacional, e tem como objetivo geral a (re)discussão do papel do sujeito perante os sistemas de proteção dos direitos humanos, mediante uma comparação de procedimentos de acesso deste sujeito entre os sistemas internacionais de proteção dos direitos humanos, seja no âmbito do sistema das Nações Unidas, seja no contexto dos sistemas regionais (europeu e interamericano) de proteção.

Como objetivos específicos, pretende-se confeccionar uma revisão bibliográfica sobre a controvérsia teórica que envolve o direito de peticionamento individual, descrever a previsão normativa do acesso do sujeito perante o sistema ONU de proteção, analisar os sistemas

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\* Bacharel em Direito (2006) e Mestre em Direito das Relações Internacionais (2009) pelo Centro Universitário de Brasília (UniCEUB), pesquisador do Núcleo de Estudos Constitucionais (NEC), do grupo de estudos “Peter Häberle” (IDP) e do grupo de pesquisa Internacionalização dos Direitos (UniCEUB/Collège de France), Professor Universitário e Servidor Público do Superior Tribunal de Justiça, lotado no Gabinete da Ministra Maria Thereza de Assis Moura (STJ). Aluno do Programa de Doutorado em Direito do Centro Universitário de Brasília (UniCEUB).