Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines

*By Theo van Boven**

A. *Introduction*

1. *The Victims' Perspective*

In this essay the perspective of the victim is a central point of orientation. It is obvious that in the human rights discourse the victims' perspective cannot be seen in isolation from the perspective of various organs of society. Thus, governments may be guided by claims of sovereignty; peoples pursue their aspirations in terms of self-determination and development; religions entertain value systems; political and social institutions look for a normative basis in order to attain their objectives. The perspectives of these various actors may be human rights related but often differ depending on status and power positions. They have to a greater or lesser extent the means at their disposal to promote and defend their interests. However, victims often find themselves in vulnerable situations of neglect and abandonment and are in need of the care, the interest and active recognition of the human rights promotion and protection systems. The position of victims, at least the most destitute among them, was aptly characterised by a former Director-General of UNESCO in a publication marking the 20th anniversary of the Universal Declaration of Human Rights:

> The groans and cries to be heard in these pages are never uttered by the most wretched victims. These, throughout the ages, have been mute. Whenever human rights are completely trampled underfoot, silence and immobility prevail, leaving no trace in history; for history records only the words and deeds of those who are capable, to however slight degree, of ruling their own lives, or at least trying to do so. There have been – there still are – multitudes of men, women and children

* Honorary Professor of International Law, University of Maastricht, The Netherlands. The text of this paper is based on a series of lectures delivered by the author at the 37th annual study session of the International Institute of Human Rights (Strasbourg, July 2006).

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 19–40.

> who, as a result of poverty, terror or lies, have been made to forget their inherent dignity, or to give up the efforts to secure recognition of that dignity by others. They are silent. The lot of the victim who complains and is heard is already a better one.[1]

If victims are at all in a position to speak, they often express themselves in similar terms. Consequently, one may learn more about the essence and the universality of human rights from the voices of victims than from the views of secular or religious leaders. Concepts of human rights are better translated from the perspective of victims than from demands of the powerful.

Without defining in this introductory paragraph the notion of victim and the right of victims to a remedy – these issues will be dealt with later – it is apparent that victims of systematic breaches of the law and of flagrant deprivation of rights find themselves in many different settings and situations, armed conflicts: situations of violence including domestic violence, as objects of crime and terror, or stricken by the misery of poverty and deprivation. As human beings entitled to enjoy the basic human rights and freedoms enshrined in the Universal Declaration of Human Rights and other international human rights instruments, victims are, more often than not, experiencing the gap between entitlements and realities. Domestic legal and social orders disclose *legal* shortcomings such as inadequate laws, restrictions in legal scope and content, impediments in getting access to justice and restrictive attitudes of courts; *political* obstacles in the sense of unwillingness of the authorities and the society to recognise that wrongs were committed; *economic* setbacks as a result of shortage or unjust distribution of resources; and *under-empowerment* of victims themselves because of lack of knowledge and capacity to present and pursue their claims.[2] All these factors are compounded by the vulnerability of categories or groups of victimised persons, notably women, children, members of specific racial, ethnic or religious groups, the mentally and physically disabled and many others.

2. *Evolutions in International Law*

In traditional international law, States were the major subjects and insofar as wrongful acts were committed and remedies instituted, this was a matter of inter-State relations and inter-State responsibility. The leading opinion in this regard was set out in the often-cited judgment of the Permanent Court of International

[1] René Maheu, in: Preface to *Birthright of Man*, an anthology of texts or human rights prepared under the direction of Jeanne Hersch, UNESCO, 1968.

[2] See further, Theo van Boven, Special Rapporteur, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms* (final report), UN Doc. E/CN.4/Sub.2/1993/8, chapter VI (National Law and Practice).

Justice in the *Chorzow Factory* case: "It is a principle of international law that the breach of an engagement involves an obligation to make a reparation in an adequate form".[3] For long, when internationally protected human rights were not yet proclaimed, wrongs committed by a State against its own nationals were regarded as essentially a domestic matter and wrongs committed by a State against nationals of another State may only give rise to claims by the other State as asserting its own rights and not the rights of individual persons or groups of persons. It was only since World War II with the recognition that human rights were no more a matter of exclusive domestic jurisdiction and that victims of human rights violations had a right to pursue their claims for redress and reparation before national justice mechanisms and, eventually, before international fora, that remedies in international human rights law progressively developed as a requirement to obtain justice. As the result of an international normative process the legal basis for a right to a remedy and reparation became firmly anchored in the elaborate corpus of international human rights instruments, now widely ratified by States. Further, in a fair amount of case law developed by international (quasi-) judicial bodies, including the European and Inter-American Courts of Human Rights, the meaning and significance of access to effective remedies at national and international levels was given concrete shape.

This chapter will deal with developments towards the recognition of the right to an effective remedy as laid down in international instruments, with emphasis on the normative content of this right. Special attention will be given to the United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted in their final form by the UN General Assembly in 2005[4] and marking a milestone in the lengthy process towards the framing of victim-orientated policies and practices. While the gap between entitlements and realities still persists in the light of the requirements of remedial justice, the Basic Principles and Guidelines coincide with an increasing awareness of the prevalence of victims' rights. This tendency is illustrated by the granting of standing to victims to participate in their own right in proceedings before the International Criminal Court and by the prominent attention given to victims of past and contemporary practices of racism and racial discrimination in the documents adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, September 2001).

[3] Permanent Court of International Justice, Ser. A, No. 9 at 21 (1927).

[4] United Nations General Assembly resolution 60/147, 16 December 2005.

B. *The Right to a Remedy and Reparation in International Instruments*

1. *Effective Remedies; Various Dimensions*

The basic right to effective remedies has a dual meaning.[5] It has a *procedural* and a *substantive* dimension. The *procedural* dimension is subsumed in the duty to provide "effective domestic remedies" by means of unhindered and equal access to justice. The right to an effective remedy is laid down in numerous international instruments widely accepted by States; the Universal Declaration of Human Rights (article 8), the International Covenant on Civil and Political Rights (article 2), the International Convention on the Elimination of All Forms of Racial Discrimination (article 6), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 14), the Convention on the Rights of the Child (article 39), the International Convention for the Protection of All Persons from Enforced Disappearance (article 24), as well as in regional human rights treaties: the African Charter on Human and Peoples' Rights (article 7), the American Convention on Human Rights (article 25), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 13). Also relevant are instruments of international humanitarian law: the Hague Convention of 1907 concerning the Laws and Customs of War on Land (article 3), the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I, article 91) and the Rome Statute of the International Criminal Court (article 68 and 75).

The notion of "effective remedies" is not spelled out in detail in these international instruments. However, international adjudicators, in particular when faced with complaints about gross violations of core rights such as the right to life and the prohibition of torture, increasingly and insistently underlined the obligation of States Parties to give concrete content to the notion of effective remedies, with emphasis on the requirement that remedies must be effective. Thus, while the European Court of Human Rights was for quite some time not very forthcoming in its interpretation of the effective remedy provision in article 13 of the European Convention, the Court evolved its position when dealing with complaints about gross violations of human rights relating to article 2 (the right to life) and article 3 (prohibition of torture or cruel, inhuman or degrading treatment or punishment). For instance, in a landmark case involving serious ill-treatment against a member of the Kurdish minority in South East Turkey while in police custody, the European Court gave particular weight to the prohibition of torture and the vulnerable position of torture victims and the

[5] See in particular Dinah Shelton, *Remedies in International Human Rights Law* (2nd edition), Oxford, 2005, 7 ff.

implications for article 13. Consequently the notion of an "effective remedy" entails, according to the European Court, an obligation to carry out a thorough and effective investigation of incidents of torture and, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including access for the complainant to the investigatory procedure.[6] The European Court followed the same reasoning in a case of alleged rape and ill-treatment of a female detainee and the failure of the authorities to conduct an effective investigation into the complaint of torture.[7]

The Inter-American Court of Human Rights adjudicated many cases involving *gross* violations of human rights, notably killings and disappearances. In this context the Court ruled that article 25 of the American Convention on the right to judicial protection and effective domestic recourse is "one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in terms of the Convention".[8]

The trend to give concrete content and to emphasise the crucial importance of "effective remedies" in any human rights protection system is not only apparent in the jurisprudence of regional human rights adjudicators, it is equally manifest in the case law developed by global human rights adjudicators, notably the Human Rights Committee. Analysis of case law pertaining to the right to life and the prohibition of torture (article 6 and 7 of the International Covenant on Civil and Political Rights) bears out that the Human Rights Committee expressed in numerous cases the view that States Parties are under an obligation to take such measures under article 2(3) of the Covenant as to investigate the facts, to take actions thereon as appropriate, to bring to justice persons found responsible and to extend to the victim(s) treatment in accordance with the provisions of the Covenant.[9] The essence of the procedural dimension of the right to an effective remedy and the corresponding duties of States to respect and to guarantee this right is also reflected in the Updated Set of principles for the protection and promotion of human rights through action to combat impunity,[10] endorsed by UN Commission on Human Rights resolution 2005/81. Principle 1 containing the General Principles of States to take Effective Action to Combat Impunity reads as follows:

[6] *Aksoy v. Turkey*, ECtHR, Judgment of 18 December 1996, Reports of Judgments and Decisions of the ECtHR, 1996-VI, para. 98.

[7] *Aydin v. Turkey*, ECtHR, Judgment of 25 September 1997, Reports of Judgments and Decisions of the ECtHR, 1997-VI, para. 103.

[8] *Castillo Paez v. Peru*, IACtHR, Judgment of 3 November 1997, 19 Human Rights Law Journal (1998), 219–229.

[9] See also in the study referred to in n. 2 above, para. 56 and Dinah Shelton, *supra.* n. 5, 184–186.

[10] See *Report of the independent expert to update the set of principles to combat impunity*, Diane Orentlicher, UN doc. E/CN.4/2005/102 and Add.1.

> Impunity arises from a failure by States to meet their obligations to *investigate* violations; to take appropriate measures in respect of *perpetrator*, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide *victims* with *effective remedies* and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to *know the truth* about violations; and to take other necessary steps to *prevent the recurrence* of violations (italics added).

In fact, in many situations where impunity is sanctioned by the law or where de facto impunity prevails, victims are effectively barred from seeking justice by having recourse to effective remedies. Where State authorities fail to investigate the facts and to establish criminal responsibility, it becomes very difficult for victims or their relatives to carry on effective legal proceedings aimed at obtaining just and adequate redress and reparation.

2. *Substantive Dimension*

The substantive dimension of the right to an effective remedy is essentially reflected in the general principle of law of wiping out the consequences of the wrong committed. In this respect, having regard to the obligation of States, it is appropriate to rely on the doctrine of State Responsibility elaborated by the International Law Commission in a set of articles which were commended in 2001 to the attention of Governments by the United Nations General Assembly.[11] The ILC Articles indicate that there is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State (article 2). For present purposes, in connection with the substantive dimension of the right to an effective remedy, the ILC Articles provide useful guidance, in particular in the description of the obligation to cease the wrongful act and offer appropriate assurances of non-repetition (article 30) and the obligation to make full reparation for the injury caused by the internationally wrongful act (article 31). Further, the Articles spell out the different forms of reparation to be afforded either singly or in combination as restitution, compensation and satisfaction (articles 34–37). Later in this paper, when more detailed attention will be paid to the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, the various forms of reparation will be further discussed. At this stage it should be noted that, while the Basic Principles and Guidelines list guarantees of non-repetition

[11] UN General Assembly resolution 56/83, Annex, *Responsibility of States for Internationally Wrongful Acts*.

under the forms of reparation for harm suffered, the ILC Articles consider the obligation of cessation and assuring non-repetition as a separate and distinct legal consequence of the internationally wrongful act.[12] Equally, the updated principles to combat impunity[13] treat separately guarantees of non-recurrence of violations which may include reform of State institutions, the repeal of laws that contribute to or authorise violations of human rights and civilian control of military and security forces and intelligence services, from the right to reparation (principles 35–38, and 31–34).

The obligation of States to afford reparation is also stressed by the Human Rights Committee in its General Comment 31 interpreting the meaning and significance of article 2 of the International Covenant on Civil and Political Rights.[14] Marking the importance of the effective remedy provision in article 2(3) of the Covenant, the Committee stated that "without reparation to individuals whose Covenant rights have been violated, the obligation to provide effective remedy, which is central to the efficacy of article 2(3), is not discharged." The Committee further noted that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

C. *The Law of State Responsibility as a Legal Basis for the Right to Remedy and Reparation*

In the foregoing section of this chapter the ILC Articles on State Responsibility were referred to as setting out legal consequences in terms of obligations of a State to stop wrongs attributable to that State and to repair the harm done to injured parties. It is true that, as argued by those who are critical of relying on the Law of State Responsibility as a basis for the right to a remedy and reparation in cases of human rights violations,[15] that the ILC Articles were drawn up with inter-State relations in mind. Does this mean that in so far as States violate the human rights of individual persons or groups, causing serious harm to their life, integrity and dignity, the Law of State Responsibility would not apply? It is

[12] See also, Dinah Shelton, *supra*. n. 5 at 149, who correctly states that cessation is not part of reparation but part of the general obligation to conform to the norms of international law.

[13] See n. 10 above.

[14] Human Rights Committee, General Comment 31 adopted 29 March 2004; (UN doc. HRI/GEN/1/Rev, 8 233–238). See in particular paras. 15–17.

[15] See statement by Germany at the 61st session of the UN Commission on Human Rights in an explanation of vote concerning the Basic Principles and Guidelines on the Right to a Remedy and Reparation, 19 April 2005.

submitted here that construction of the concept of State Responsibility to the inter-State context only, ignores the historic evolution since World War II of human rights becoming an integral and dynamic part of international law as evidenced by numerous widely ratified international instruments for the promotion and protection of human rights. It also ignores that the duty of affording remedies for governmental misconduct is so widely acknowledged that the right to an effective remedy of violations of human rights may be regarded as forming part of customary international law.[16]

The evolution in the traditional State Responsibility concept in the light of the emergence of human rights as a matter of international concern and the proclamation of human rights at universal, regional and national levels since the adoption of the United Nations Charter in 1945, was aptly set out in the Report of the International Commission of Inquiry on Darfur, chaired by Antonio Cassese, to the UN Secretary-General pursuant to Security Council Resolution 1564.[17] In suggesting the establishment of a Compensation Commission on behalf of the victims of war crimes and crimes against humanity, in particular the victims of rape, the Commission of Inquiry argued that the universal recognition and acceptance of the right to an effective remedy cannot but have a bearing on the interpretation of the international provisions on State Responsibility. The Commission stated that these provisions may now be construed as obligations assumed by States not only towards other States but also vis-à-vis the victims who suffered from war crimes and crimes against humanity.[18] In this context the Commission of Inquiry also quoted a former President of the International Criminal Tribunal for the Former Yugoslavia who stated in a letter of 12 October 2000 to the UN Secretary-General:

> The emergence of human rights under international law has altered the traditional State Responsibility concept, which focused on the State as the medium of compensation. The integration of human rights into State Responsibility has removed the procedural limitation that victims of war could seek compensation only through their own governments, and has extended the right to compensation to both nationals and aliens. There is a strong tendency towards providing compensation not only to States but also to individuals based on State Responsibility. Moreover, there is a clear trend in international law to recognise a right to compensation in the victim to recover from the individual who caused his or her injury.[19]

In all fairness, the authorities referred to above speak in terms of trends and tendencies as regards the duty of States to provide effective remedy and reparation to

[16] See Dinah Shelton, *supra.* n. 5, 28–29.
[17] UN doc. S/2005/60, 11 February 2005.
[18] *Id*, para. 597.
[19] UN doc. S/2000/1063, at p. 11, Annex para. 20.

victims as a legal consequence of the concept of state Responsibility. This is not yet a firm *acquis* but an emerging duty that finds a consistent basis in human rights instruments cited in the preceding section of this chapter. This emerging duty is also confirmed, as the Inter-national Commission of Inquiry acknowledged, in the UN *Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) and in the (draft and since then adopted) *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* (2005). It should be recognised, however, that as transpired from the German position referred to above, there appears not to be general consensus as to existence of a customary international law governing individual reparation claims.[20] It should also be noted that the Security Council, when acting upon the recommendations of the Darfur Inquiry Commission, did refer the situation of Darfur to the International Criminal Court for criminal investigation and action pursuant to article 13(b) of the ICC Statute but the Security Council did not act upon the recommendation to establish a Compensation Commission. This leaves, however, unaffected the right of victims in the Darfur situation to claim in appropriate cases reparations, including restitution, compensation and rehabilitation pursuant to article 75 of the ICC Statute.

D. *The Process Towards a Comprehensive International Instrument*[21]

1. *Background*

The years marking the end of the Cold War (late eighties and early nineties) opened up new potentials and new perspectives. Democratic structures were introduced or reintroduced in various continents, notably in Central and Eastern Europe and in Latin-America. In many countries institutions and mechanisms were established with the purpose to set out a process of truth and reconciliation, prominently also in South Africa. It was in the same period that the struggle against impunity and the call for reparative justice took shape. It was also in this climate that claims for criminal and reparative justice, having their origin in

[20] Note in particular Christian Tomuschat, "Darfur - Compensation for the Victims," 3 *Journal of International Criminal Justice* (2005), 579–589, where the author criticised the underlying arguments of the proposition of the Darfur Inquiry Commission to establish a Compensation Commission.
[21] This section is largely based on the text of a paper the present author wrote in preparation of a report published by the International Council on Human Rights Policy together with the International Commission of Jurists and the International Service for Human Rights, *Human Rights Standards: Learning from Experience*, Versoix, Geneva, 2006.

World War II, became more visible and vocal. The victim's perspective, often overlooked and ignored, was lifted up from the stalemate of the Cold War. Thus, civil society groups in East Asia, Australia and Europe demanded reparations for the comfort women (sex slaves of the Japanese Imperial Army) and for the victims of Japanese forced labour schemes. Their demands had for long received hardly any resonance. In the same climate the right to reparation for victims of brutal repression by Latin American dictatorships became a persistent claim.

It was against this background, stressing the importance of criminal and reparative justice as a condition for reconciliation and democracy, that the then UN Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted in 1989 the present author, as one of its members, with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms – with a view to exploring the possibility of developing some basic principles and guidelines in this respect.[22] The study had to take into account relevant existing international human rights norms on compensation and relevant decisions of international human rights bodies. The study and the draft principles and guidelines as they evolved demonstrated that the gaps in human rights protection were less legal than political and that a new instrument was not supposed to entail new international or domestic legal obligations but rather to identify mechanisms, modalities, procedures and methods for making existing legal obligations operational.

2. *Description of the Process and its Form and Nature*

The Special Rapporteur of the Sub-Commission included in his 1993 final report a set of proposed basic principles and guidelines which he drew up with the assistance of non-governmental experts from various continents, notably from countries that had been facing and living through gross violations of human rights.[23] On the basis of comments received and as a result of deliberations in a workshop, co-organised by the International Commission of Jurists and the Maastricht Centre for Human Rights, the Special Rapporteur made the draft basic principles subject to several revisions. The revised text reached the Commission on Human Rights in 1997.[24] From thereon the process moved from the expert and non-governmental sphere to the inter-governmental arena, with considerable involvement, though, of non-governmental and independent expertise but also with input of the views of governments. At the Commission level

[22] Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1989/13.
[23] UN doc. E/CN.4/Sub.2/1993/8, chapter IX.
[24] UN doc. E/CN.4/1997, Annex.

the process stretched over a considerable number of years, with repeated requests for comments but with little substantive discussion in the Commission itself. The process received, however, new impetus with the appointment of an Independent Expert of the Commission Mr. M. Cherif Bassiouni who, after consultations with governmental and non-Governmental experts, added new dimensions to the draft principles and guidelines in particular with reference to international humanitarian law.[25] The process was also advanced by the organization, on the basis of Commission resolutions, of a series of open-ended consultations under the leadership of the delegation of Chile (Chile being an early proponent of the draft principles and guidelines), with the assistance of the former Special Rapporteur of the UN Sub-Commission and the former Independent Expert of the Commission, and with the participation of governmental representatives and non-governmental experts. As a result, the draft principles underwent a series of revisions and clarifications with the aim of reaching consensus without reducing the text to the lowest common denominator level. This process under the Commission's authority and stretching over quite a number of years was important for political and psychological reasons. It signified the indispensable element of inter-governmental ownership and interest in the process, without however losing close links with essential quarters of civil society. The process was not following a pre-conceived plan. It was made up of an evolving pattern, entailing non-governmental expertise and, progressively, inter-governmental participation and input.

3. *Actors of the Process*

The initial actors were expert members of the Sub-Commission, joined by a number of active human rights NGOs, such as the International Commission of Jurists, Amnesty International, Redress Trust, and a good number of governmental representatives and experts. The political backing in the process came largely from a number of Latin American countries, with Chile in a leadership role, and to a lesser extent from West European countries. In the consultative process organised under the authority of the Commission on Human Rights, delegates acted not so much as members of regional groups but rather individually. As a result, the discussions had an open character and were not fixed in advance. They reflected by and large the willingness to reach acceptable solutions.

4. *Other Influencing Factors*

The process – and this is a common feature of many projects on the UN human rights agenda – was in competition with many other items and sub-items of an

[25] UN doc. E/CN.4/2000/62.

overloaded agenda. As a result the Commission on Human Rights and even its Sub-Commission provided little substantive guidance and feedback. The human rights policy bodies were mainly involved in taking procedural decisions so as to advance the process (with moderate speed). In this connection it must be noted that the subject matter of redress and reparation enjoyed broad sympathy – the procedural resolutions of the Commission received wide sponsorship – but by and large the political interest was not strong among the membership of the United Nations. This limited political interest may also reflect the reticence of many States to accept and implement domestically the consequences of victim-oriented policies of reparative justice.

In the course of the proceedings relating to the substance, a number of politico-legal issues came up that complicated the process and that were difficult to solve by way of consensus. One such issue was whether the document under preparation should only deal with *gross* violations of international human rights law or with *all* violations of human rights. Further, disagreement arose as to whether the basic principles and guidelines should only focus on violations of human rights law or, in addition, deal with serious violations of international humanitarian law. Another issue was whether the basic principles and guidelines should extend, in addition to violations committed by States, to violations committed by non-state actors and further deal with the duty of the latter to provide compensation. An issue giving rise to much debate was the question whether the notion of victims applies to individual human beings or also to collectivities.

During the process, in the years 2000 and 2001, there was glimmering at the background, in the political process leading to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa (31 August – 8 September 2001), a highly politicised issue that deeply divided States and that was relevant to the substance of the basic principles and guidelines. It related to the duty to repair historical wrongs connected with practices of slavery and colonialism.[26] If this issue would have been introduced in the standard-setting process, it could have substantially complicated the process. This did not happen. Apparently no delegation wished to pursue such a hazardous course. At the same time, and understandably so, the process lingered in those years with minimal speed in order to avoid disruptive influences. In later years the road towards the adoption of the basic principles

[26] See on this issue paras. 98–106 of the Declaration adopted by the Durban Conference, in particular para. 100 which reads: "We acknowledge and profoundly regret the untold suffering and evils inflicted on millions of men, women and children as a result of slavery, the slave trade, the transatlantic slave trade, apartheid, genocide and past tragedies. We further note that some States have taken the initiative to apologise and have paid reparation, where appropriate, for grave and massive violations committed." UN doc. A/CONF. 189/12.

and guidelines was paved by a series of open-ended consultations held under the authority of the UN Commission of Human Rights, which culminated in their endorsement by consensus of the UN General Assembly.[27]

5. *Implementation*

It is worth noting that the draft basic principles and guidelines as they were emerging over the years had already a certain influence on national law and practice, on international jurisprudence and on other standard-setting activities. One could consider these developments as implementation "*avant la lettre*." Thus, several Latin American countries, in drawing up legislation on reparation for victims, have taken the draft principles and guidelines into account. The Inter-American Court on Human Rights referred in its jurisprudence several times to the draft principles and guidelines. Last but not least, the Statute of the International Criminal Court, notably article 75 dealing with reparation to victims, bears in its intent and wording, the imprint of the basic principles and guidelines. Since the Basic Principles and Guidelines are adopted by the UN General Assembly, their implementation is crucial for the advancement of reparative justice. Therefore, the General Assembly recommended that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of the executive bodies of Government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general.[28]

E. *The Nature, Scope and Content of the Basic Principles and Guidelines*[29]

For the purpose of the present chapter it is not envisaged to review in detail all the provisions of the Basic Principles and Guidelines. The focus will be on a number of general issues relating to the nature and the scope of the document as well as to its structure and substantive content.

[27] UN General Assembly resolution 60/147, 16 December 2005.

[28] *Id*, oper. para. 2.

[29] The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law have been extensively commented upon by: REDRESS, *Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*, London, 2006, 1–42; Dinah Shelton, "The United Nations Principles and Guidelines on Reparations: Context and Contents," in *Out of the Ashes, Reparation for Victims of Gross and Systematic Human Rights Violations* (eds. K. De Feyter, S. Parmentier, M. Bossuyt and

1. *Normative value*

When the Basic Principles and Guidelines were adopted by the UN General Assembly a number of speakers pointed out that the document was not a legally binding document. Reference was made in this context to the seventh preambular paragraph to the effect that the Principles and Guidelines do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law. While the Basic Principles and Guidelines are therefore not intended to create new or additional obligations, they are meant to serve as a tool, a guiding instrument for States in devising and implementing victim-oriented policies and programmes. They also serve as guidance to victims themselves, collectively and individually, in support of claims to remedy and reparation. They may further be referred to or invoked by domestic and international adjudicators when faced with issues of victims' rights and reparations. In fact, the Inter-American Court of Human Rights and the International Criminal Court were already mindful of the Basic Principles and Guidelines as a source of reference before they received final approval by the UN General Assembly. It is worth recalling that the Basic Principles and Guidelines are the outcome of a lengthy process of consideration and review by non-governmental and governmental experts and that the significance of the document was considerably enhanced by its adoption by the UN General Assembly without a dissenting vote. Thus, good reasons can be advanced to consider the text as declaratory of legal standards in the area of victims' rights, in particular the right to a remedy and reparation.[30]

2. *Gross and Serious Violations*

A second aspect relating to the nature and scope of the Basic Principles and Guidelines is intrinsic in the terms *gross* violations and *serious* violations. These qualifying words have a restrictive effect on the scope of the Basic Principles and Guidelines and were the subject of much discussion as it was argued that all violations entail a duty to afford remedies and reparations. The initial study carried out under the mandate of the Sub-Commission on Prevention of Discrimination and Protection of Minorities referred to victims of "gross violations of human

P. Lemmens), Antwerpen-Oxford, 2005, 11–33; Marten Zwanenburg, "The Van Boven/Bassiouni Principles: An Appraisal," 24 Netherlands Quarterly of Human Rights, 2006, 641–686; International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: a Practitioners' Guide*, Geneva, December 2006 and Bogotá, Colombia, June 2007 (authors Cordula Droege and Frederico Andreu-Guzmán).

[30] See in this regard Marc Groenhuijsen and Rianne Letschert, "Reflections on the Development and Legal Status of Victims' Rights Instruments," in *Compilation of International Victims' Rights Instruments*, Tilburg/Nijmegen, 2006, 1–18.

rights and fundamental freedoms" and the Special Rapporteur who, in the absence of an agreed definition of the term "gross violations", was called upon to give further guidance on this issue relied on a number of relevant sources. In this connection he mentioned the draft Code of Crimes Against the Peace and Security of Mankind drawn up by the International Law Commission, common Article 3 of the Geneva Conventions of 12 August 1949 and the Third Statement of the Foreign Relations Law of the United States (section 702). He also noted that the word "gross" qualifies the term "violations" and indicates the serious character of the violations but that the term "gross" is also related to the type of human rights that is being violated.[31] Against this background the Special Rapporteur in his first set of proposed basic principles and guidelines included the following text as general principle 1:

> Under international law, the violation of any human right gives rise to a right of reparation for the victim. Particular attention must be paid to gross violations of human rights and fundamental freedoms, which include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture or cruel, inhuman or degrading treatment or punishment; enforced disappearances; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.[32]

While over the years diverging views persisted whether or not the Basic Principles and Guidelines should be restricted to "gross violations", with the evolving opinion that the document should also explicitly cover serious violations of international humanitarian law, the view prevailed that the focus of the Basic Principles and Guidelines should be on the worst violations. The authors had in mind the violations of international humanitarian law constituting international crimes under the Rome Statute of the International Criminal Court. On this premise a number of provisions were included in the Basic Principles and Guidelines spelling out legal consequences that are contingent, according to the present state of international law, to international crimes. Such provisions affirm the duty of States to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish (article 4). They also include the duty to make appropriate provisions for universal jurisdiction (article 5) as well as references to the non-applicability of statutes of limitation (articles 6–7).

It remains true, however, that the terms "gross violations" and "serious violations" are not formally defined in international law. It must nonetheless be understood that in customary international law "gross violations" include the types of violations that affect in qualitative and quantitative terms the core rights

[31] Final report of the Special Rapporteur, *supra* note 2, UN doc. E/CN.4/Sub.2/1993/8, paras. 8–13.

[32] *Id*, para. 137.

of human beings, notably the right to life and the right to physical and moral integrity of the human person. It may generally be assumed that the non-exhaustive list of gross violations cited in the above mentioned General Principle 1 of the first version of the Basic Principles and Guidelines falls in this category. But also deliberate, systematic and large-scale violations of economic and social rights may amount to gross violations of human rights and serious violations of international humanitarian law.[33] It should further be noted that the concept of "serious violations" is to be distinguished from "grave breaches" in international humanitarian law. The latter term refers to atrocious acts defined in international humanitarian law but only in relation to international armed conflicts (Third and Fourth Geneva Conventions of August 12, 1949, and the 1977 Protocol I additional to the Geneva Conventions). The term "serious violations" stands for severe violations that constitute crimes under international law, irrespective of the national or international context in which these violations are committed.[34] The acts and elements of these crimes are reflected in the Rome Statute of the International Criminal Court under the headings of genocide, crimes against humanity and war crimes (ICC Statute, articles 6, 7 and 8).

As pointed out, in various stages of the development of the Basic Principles and Guidelines reservations were expressed regarding the limitation to "gross violations" and "serious violations" with the argument that as a general rule all violations of human rights and international humanitarian law entail State Responsibility and corresponding legal consequences. This was generally acknowledged but did not preclude opting for a narrower approach: "gross" and "serious" violations. However, in order to rule out any misunderstanding on the matter, the following phrase was included in article 26 on non-derogation: "– it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of *all* violations of international human rights law and international humanitarian law" (italics added).

3. *The Notion of Victims*

In situations which are characterised by systematic and gross human rights violations large numbers of human beings are affected. They are all entitled to reparative justice. Problems do arise, however, because of the tension between

[33] See in particular the statement by the UN High Commissioner on Human Rights, Louise Arbour, at the New York University School of Law on *Economic and Social Justice for Societies in Transition*, 25 October 2006. Note her following words: "In crises like the one we now witness in Darfur, the systematic burning of houses and villages, the forced displacement of the population and the starvation caused by the restrictions on the delivery of humanitarian assistance and destruction of food crops are deliberately used along other gross human rights violations – such as murder or rape – as instruments of war."

[34] See also REDRESS, Handbook, *supra*. n. 29, at 14.

the huge number of persons involved and the limited capacity to afford reparations. A firm principle is that of non-discrimination, emphasised in article 25 of the Basic Principles and Guidelines. But in order to devise and apply fair and just criteria for the rendering of reparative justice in terms of personal and material entitlements, it is crucial to define the notion of "victim." A great variety of views were expressed in the consultations and deliberations on this issue. Objections were raised to include collectivities in the definition. Reservations were also expressed against mentioning legal persons as possible victims. At the end of the day it was proposed and decided to base the notion of victims, as reflected in articles 8 and 9, on the terms used in the generally accepted Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power earlier adopted by the UN General Assembly.[35] Thus, for the purposes of the interpretation and application of the Basic Principles and Guidelines the following elements can be distinguished:[36]

- a person is a victim if he/she suffered physical or mental harm or economic oss as well as impairment of fundamental rights, regardless of whether a perpetrator is identified[37] or whether he/she has a particular relationship with the perpetrator;
- there are different types of harm or loss which can be inflicted through acts or omissions;
- there can be both direct victims as well as indirect victims such as immediate family members or dependents of the direct victim;
- persons can suffer harm individually or collectively.

It is noteworthy that the above description only mentions natural persons and not legal persons. This does not mean that legal persons cannot qualify as victims. In fact, in the context of international criminal law, notably the International Criminal Court, victims are defined in the Rules of Procedure and Evidence for the purpose of the Statute as (a) natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court, and (b) including organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or

[35] UN General Assembly resolution 40/34, 29 November 1985.

[36] These elements were aptly summarised in REDRESS, Handbook, *supra*. n. 29 at 15–16.

[37] There are situations where individual perpetrators are identified and such perpetrators can be held liable to provide reparations to victims. Note article 15 of the Basic Principles and Guidelines: "In cases where a person, a legal person, or other entity is found liable for reparations to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparations to the victim." In other situations perpetrators may not be identified. Whichever is the case, there remains an obligation on the part of the State to provide reparation to victims for acts or omissions which can be attributed to it, irrespective of whether a natural or legal person has been found liable.

charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.[38]

A huge problem faced by national authorities and, as the case may be an institution like the International Criminal Court, is the large number of people victimised by systematic and widespread violations of human rights and humanitarian law. The types of situations referred to the International Criminal Court – Uganda, the Democratic Republic of Congo and Darfur (Sudan) – all involve systematic and widespread attacks against civilian populations, affecting many thousands, if not hundreds of thousands of women, men and children. The reparative capacities of the Court and its Trust Fund for Victims will be complex as regards the demarcation of beneficiaries and the entitlements to and modalities of reparation. As a matter of fact such a complex issue was the subject matter of an early significant decision relating to the Situation in the Democratic Republic of Congo in a ruling by Pre-Trial Chamber I of the ICC on the applications from six victims asking the right to participate in the proceedings. The Prosecutor considered such participation premature before defendants had been identified and arrest warrants had been issued. In the opinion of the Prosecutor the admission of the applications from six victims could instigate many thousands of persons, in view of the massive scale of alleged criminality in the DRC and finding themselves in a similar situation as the six applicants, to claim the same right. In his view a distinction had to be made between a class of "situation victims" and a victim who had been personally affected by a "case" and the accused in such a case. In its decision the Pre-Trial Chamber analysed in detail the relevant provisions of the ICC Statute and Rules of Procedure and Evidence. It took also into account the UN *Basic Principles of Justice for Victims of Crime and Abuse of Power* and the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law* and decided, after assessing the specific circumstances of each victim, to grant the applications.[39] Consequently, in determining the category and the scope of victim's participation in ICC proceedings and victim's entitlement to reparation, the 1985 UN Basic Principles and the 2005 UN Basic Principles and Guidelines may provide useful guidance. Both instruments determine that a person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

[38] Rule 85 of the ICC Rules of Procedure and Evidence. See also Article 8(2)(b)(ix) and article 8(2)(e)(iv) of the ICC Statute on the war crime of attacking protected objects.

[39] *Situation in the Democratic Republic of Congo*, Decision of the Pre-Trial Chamber I on the Application of Participation in the Proceedings, No: ICC-01/04, 17 January 2006.

4. *Link with Impunity*

For many years work on combating impunity for perpetrators of human rights violations and reparation for victims followed parallel tracks in the UN Sub-Commission and Commission on Human Rights. As Special Rapporteur the present author concluded in his final report submitted in 1993:

> – that in a social and political climate where impunity prevails, the right to reparation for victims of gross violations of human rights and fundamental freedoms is likely to become illusory. It is hard to perceive that a system of justice that cares for the rights of victims can remain at the same time indifferent and inert towards gross misconduct of perpetrators.[40]

The process leading to a completion of two comprehensive instruments on reparation and on impunity ended in 2005 with the adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparation by the UN General Assembly and the endorsement of the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity by the UN Commission on Human Rights.[41] The Impunity Principles and the Remedy and Reparation Principles and Guidelines are largely complementary in setting out the principles and prescriptions of punitive and reparative justice. Principle 1 of the Impunity Principles succinctly describes the general obligations of States to take effective action to combat impunity with emphasis on the duty (i) to investigate violations, (ii) to meet out justice to perpetrators, (iii) to provide effective remedies and reparations to victims, (iv) to ensure the inalienable right to know the truth about violations, (v) to take steps to prevent recurrence of violations. The comprehensive document, consisting of a preamble, definitional explanations and 38 principles, is structured along the lines of three principal elements: the right to know, the right to justice and the right to reparation/guarantees of non-recurrence.

The Impunity Principles provide, from the perspective of the right to an effective remedy and reparation, additional insights and policy directives in conjunction with other justice measures, particularly in societies in transition. In dealing with reparation procedures (principle 32), they do not only highlight the right of all victims to have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings, but they also draw attention to setting up reparation programmes, based upon

[40] Final report of the Special Rapporteur, *supra.* n. 2, UN doc. E/CN.4/sub.2/1993/8, at para. 130.

[41] Commission on Human Rights resolution 2005/81; See Report of the independent expert to update the Set of Principles to Combat Impunity, Diane Orentlicher, UN doc. E/CN.4/2005/102 and Add. 1.

legislative or administrative measures, funded by national or international sources, addressed to individuals and to communities. The latter element implying that reparation should not only be secured through litigation and adjudication but first and foremost through the design and implementation of reparation programmes, is a valuable and realistic complement which remained somewhat under-exposed in the Basic Principles and Guidelines on the Right to a Remedy and Reparation. In two other aspects the Impunity Principles differ from, albeit do not contradict, the Basic Principles and Guidelines. They are not limited to "gross violations" ("any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries –" (principle 31)) and, as noted above, guarantees of non-recurrence of violations (principles 35–38) are not listed as a form of reparation but as a connected and separate category.

5. *Forms of Reparation in a Concluding Perspective*

Already in the early version of the Basic Principles and Guidelines proposed by the Special Rapporteur of the Sub-Commission, the following forms of reparation were identified and spelled out: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[42] It should be recalled that they were formulated with the (then draft) Articles on State Responsibility of the International Law Commission in mind, subject to the difference, however, that the ILC Articles list the obligation of cessation and non-repetition under "general principles" and forms of reparation under "reparation for injury".[43] In the process of the further elaboration and adoption of the Basic Principles and Guidelines the various forms of reparation were retained and refined and they now appear in section IX of the document (Reparation for harm suffered). The Basic Principles and Guidelines underline that victims are entitled to adequate, effective and prompt reparation which should be proportional to the gravity of the violations and the harm suffered.

The various forms of reparation and their scope and content may be summarised as follows:

- *Restitution* refers to measures which "restore the victim to the original situation before the gross violations of international human rights law and serious violations of international humanitarian law occurred" (Basic Principles and Guidelines, article 19). Examples of restitution include: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.
- *Compensation* "should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case" (Basic Principles and Guidelines, article 20). The damage giving rise to compensation may result from physical or mental harm; lost opportunities, including employment, education and social benefits; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
- *Rehabilitation* includes medical and psychological care, as well as legal and social services (Basic Principles and Guidelines, article 21).
- *Satisfaction* includes a broad range of measures, from those aiming at cessation of violations to truth seeking, the search for the disappeared, the recovery and the reburial of remains, public apologies, judicial and administrative sanctions, commemoration, human rights training (Basic Principles and Guidelines, article 22).
- *Guarantees of non-repetition* comprise broad structural measures of a policy nature such as institutional reforms aiming at civilian control over military and security forces, strengthening judicial independence, the protection of human rights defenders, the promotion of human rights standards in public service, law enforcement, the media, industry, and psychological and social services (Basic Principles and Guidelines, article 23).

Some concluding observations are called for in affording various forms of reparation. *First*, these forms and modalities are not mutually exclusive. In certain instances and with respect to certain individual victims or groups of victims more than one form of reparation may commend themselves in order to render justice. The Basic Principles and Guidelines are designed with a fair degree of flexibility in this regard. *Second*, while the legal and judicial approach to reparation characterises the Basic Principles and Guidelines, in reality non-judicial schemes and programmes offering redress and reparation do also contribute to reparative justice for the benefit of large numbers of victims. Such schemes and programmes should operate in coordination with other justice measures.[44] Both the judicial and the non-judicial approach should interrelate and interact in a complementary fashion. *Third*, though perceptions, notions and forms of reparation are mostly discussed and understood in monetary terms, the

[42] Final Report of the Special Rapporteur, *supra.* n. 2, UN doc. E/CN.4/Sub.2/1993/8, at para. 137.

[43] See General Assembly resolution 56/83, Annex, Responsibility of States for internationally wrongful acts, articles 28–39.

[44] See in particular Pablo de Greiff, "Reparations Efforts in International Perspective: What Compensation Contributes to the Achievement of Imperfect Justice," in *Repairing the Irreparable: Reparations and Reconstruction in South Africa*, Charles Villa-Vicencio and Erik Doxtader (eds.), Cape Town, 2004.

importance of non-monetary and symbolic forms of reparation, with the aim to render satisfaction to victims, must not be neglected. *Fourth*, in situations of gross violations of human rights law and serious violations of international humanitarian law, the numbers of victimised women, children and men tend to reach appalling proportions. For this reason, reparative policies are very complex in terms of demarcation of beneficiaries and entitlements to and modalities of reparation. Nevertheless, also in these circumstances and in order to meet the requirements of justice, policies and programmes of reparation must aim to be complete and inclusive in affording material and moral benefits to all who have suffered abuses.

sufficiently strong to induce state compliance. While regional human rights bodies, in particular the Inter-American and European courts are largely able to exert their authority, the UN human rights treaty bodies have been less successful in securing compliance with their recommendations.

There is no immediate prospect of a transformation of the present system of human rights bodies dealing with cases of mass violations, but a gradual change of practice can be expected in light of the increasing number of such cases being brought. What should be considered by all actors concerned is whether changes in governing procedures and in the working methods of human rights bodies can be made, responding specifically to cases of mass violations. This would be a welcome development that would recognise the importance of a system having the capacity to provide satisfactory answers to one of the most serious challenges faced by the international human rights order today.

The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations

*By Clara Sandoval-Villalba**

In the Americas region "there is an enormous unfinished business of justice for past crimes".[1] As a result of this unfinished business, also applicable to other regions in the world, victims continue to challenge domestic legal systems calling upon them to investigate, prosecute and punish the perpetrators of gross human rights violations and award them reparations for the harms suffered. This has been done to no avail: domestic systems have for the most part been unable or unwilling to respond to such situations as international law requires them to do. This deficit in domestic legal systems has forced regional human rights systems like the Inter-American Commission on Human Rights (IACommHR or Commission), the Inter-American Court of Human Rights (IACtHR or Court) and the European Court of Human Rights (ECtHR) to deal with increasing numbers of complaints of alleged gross human rights violations.

Of these regional systems, the Inter-American one has played a crucial role in dealing with these types of violations at several levels. For instance, the Commission has been instrumental in documenting systematic practices and patterns of gross human rights violations taking place within the Organisation of American States (OAS) region through reporting, *in situ* visits and individual complaints.[2] It has also helped establish regional standards to be able to respond more adequately to such violations, as is evidenced by the drafting and negotiation

* Lecturer and Co-Director of the LLM in International Human Rights Law at Essex University. (UK). I wish to thank Michael Duttwiler, Geoff Gilbert, Oscar Parra-Vera, Sir Nigel Rodley, Judith Schönsteiner and Theresa di Perna for their comments in relation to the topic of this article.

1 J. Mendez. "Lessons Learned" in Due Process of Law Foundation, *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America* (Washington, Due Process of Law Foundation, 2007), 191–202, at 191.

2 See, e.g., *The Status of Human Rights in Chile*, 25 October 1974; *The Situation of Human Rights in Argentina*, 11 April 1980; the III Report on *The Situation of Human Rights in Guatemala*, 3 October 1985; the II Report on *The Situation of Human Rights in Perú*, 2 June 2000 and

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 243–282.

of the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearance of Persons.[3] Equally, the Court has contributed to the development of international law with ground-breaking jurisprudence on the legal treatment of disappearances, arbitrary killings, torture, arbitrary detention and internal displacement. The Court has also developed what is considered to be the most coherent and solid approach to reparations for gross, widespread and systematic human rights violations in international law today.[4]

The IACtHR is mandated to receive and study alleged violations of rights incorporated within the American Convention on Human Rights (ACHR) or any other relevant regional treaties, if applicable.[5] The ECtHR is similarly mandated regarding violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its protocols where applicable.[6] As courts, they carry out this function by applying predetermined, general procedural and substantive rules for the purpose of facilitating the fair, independent and impartial administration of justice. However, when the issue of reparations arises, the regional legal frameworks do not envisage special procedures to repair gross, widespread and systematic human rights violations; they only provide for general provisions regulating this subject. Therefore, these courts face the difficult job of interpreting such provisions in a way that responds in an independent and impartial manner to the nature and consequences of gross human rights violations.

As the IACtHR has developed the most coherent and consistent approach to reparations for gross human rights violations, it is worth looking at some of its achievements. Due to the vastness and complexity of the subject matter, the author focuses on the concepts of 'victim' and 'injured party' as these two concepts are essential in analysing the reparations awards afforded for gross human rights violations. The meaning and interplay of both concepts have been established through years of the Court's jurisprudence that has not been the object of detailed analysis. Therefore, an analytical overview of the Court's understanding

the III Report on *The Human Rights Situation in Colombia*, 26 February 1999. See, also C. Medina. "The Role of Country Reports in the Inter-American System of Human Rights", in D. Harris and S. Livingstone. *The Inter-American System of Human Rights* (Oxford, Clarendon Press, 1998).

[3] OAS General Assembly, Inter-American Convention to Prevent and Punish Torture, 9 December 1985, and OAS General Assembly, Inter-American Convention on Forced Disappearance of Persons, 9 June 1994. See also, N, Rodley. *The Treatment of Prisoners under International Law* (Oxford University Press, 2nd edition).

[4] D. Shelton. *Remedies in International Human Rights Law* (Oxford University Press, 2005) 299.

[5] This function is established in art. 33 of the ACHR and art. 1 of the 1979 Statute of the Inter-American Court of Human Rights.

[6] Articles 19 and 34 of the ECHR.

of these concepts is long overdue and is required to make sense of its current approach and of the challenges ahead. The analysis takes into account critical moments that determined the transformation of these two concepts.

The chapter begins with an analysis of the scope of article 63.1 of the ACHR, as it establishes the regulating principles applicable to reparations under this treaty, and indicates that an 'injured party' is entitled to reparations. The following sections concentrate on the concept of 'injured party' while mapping this notion against the concept of 'victim' in four different periods. The consequences of the different approaches of the IACtHR to these concepts and to their relationship will be highlighted accordingly.

A. *The Legal Framework: Article 63.1 of the American Convention*

The ACHR created the IACtHR and established general principles to be applied to reparations for violations of its provisions. Article 63.1 states:

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that 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.[7]

Article 63.1 provides the IACtHR with less restrictive rules regarding reparations than those found within the ECHR. Indeed, it gives the IACtHR a primary and not a subsidiary role in the award of reparations and recognises different types of reparations measures. In contrast, the content of article 41 of the ECHR 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. (emphasis added)

[7] The initial draft of article 63.1 followed former article 50, now article 41, of the ECHR that is, as just seen, more restrictive in nature. In response to the draft, Guatemala presented a new proposal that was wider as it included that the injured party should receive reparations for the consequences produced resulting from violations of the ACHR and should also be guaranteed the enjoyment of any impaired rights and freedoms. This final view was adopted and the minutes of the Drafting Committee considered the 'text [to be] broader and more categorically in defence of the injured party than was the Draft'. OAS, *Report of the II Committee: Organs of Protection and General Provisions*, OEA/Ser.K/XVI/1.1.doc.71, 30 January 1970. See also, D. Shelton, *supra*, n. 4, 217; J. Pasqualucci. *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press, 2003) 234.

The IACtHR established the legal foundations for the interpretation of article 63.1 in *Velásquez Rodríguez v. Honduras*.[8] Based mainly on case law and advisory opinions of the International Court of Justice, the Court indicated that 'just compensation' is a general principle of international law[9] that applies to human rights, as reflected in the work of the ECtHR and the United Nations Human Rights Committee (HRC), adding that:

> Reparation of harm brought about by the violation of an international obligation consists in full restitution (restitutio in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.[10]

This decision clarified the applicable law under Article 63.1, establishing that reparations for human rights violations by the IACtHR are regulated by the ACHR and international law and not by domestic law, contrary to Honduras' claim at the time.[11] Since the landmark decision in 1989, the nature of awards under article 63.1 have been interpreted as compensatory and not punitive.[12] Equally, the article has been taken to consider, without distinction as to the kind of violations, that *any* human rights violation requires *restitutio in integrum* which includes different elements such as restoration of the *status quo ante* if possible, material damages, moral damages and non-satisfaction measures.[13]

In light of this interpretation, the IACtHR has consistently dismissed the wording of article 63.1 requiring that reparations should only be granted 'if appropriate'. Further, the Court did not see the need to address a major component of the provision, namely – the meaning of 'injured party.' Indeed, in *Velásquez Rodríguez* the Court identified the injured parties but did not lay down the principles that should be followed for their identification. Nevertheless, and as will be seen in the coming pages, it can be inferred from the treatment given by the Court to reparations in this case that any victim of violations of the ACHR is also an injured party. The topic, however, was not exhausted.

The IACtHR has maintained this interpretation of article 63.1 across its case law, but its application in specific cases has become more holistic as will be seen.[14] Additionally, as the complexity of the cases increased, the Court has been forced to address the meaning of the concepts of 'injured party' and 'victim' either by identifying them or by defining them. The following sections review these transformations.

[8] IACtHR, *Velásquez Rodríguez v. Honduras*, judgment on reparations, 21 July 1989.
[9] *Id*, para. 25.
[10] *Id*, para. 26.
[11] *Id*, paras. 28–31.
[12] *Id*, paras. 8, 9 and 38.
[13] *Id*, para. 26.
[14] See, for instance, the judgment of the IACtHR in the case of *Saramaka People v. Suriname*, judgment on preliminary objections, merits and reparations, 28 November, 2007, paras. 186–187.

B. *The Concept of 'Injured Party'*

Addressing the meaning of 'injured party' necessitates a precise conceptualisation of 'victim' as the latter is usually referred to as the person who has suffered damage resulting from a human rights violation and who is entitled to reparation as a result of a decision by a relevant court. These two terms are clearly interrelated; however, what is not entirely clear is whether the two concepts are equivalent. Understanding these concepts is especially problematic when the terms are raised in relation to gross human rights violations. This is due in part to the fact that while only a few individuals or a single person is initially a party to the proceedings, and considered to be a 'victim' by a relevant court, the universe of people affected by these violations could be infinite. Therefore, there is a growing need to properly identify those affected in order to give effect to their right to be repaired for the harm they have suffered, and/or to recognise their standing before a domestic or international body. Therefore, defining and distinguishing these concepts is essential to ensuring effective protection.

1. *The Concept of 'Victim' and 'Injured Party' under International Law*

International law lacks an adequate and consistent working definition of 'victim' of gross human rights violations. Its contribution to the clarification of this concept has been very slow although in recent years this has started to change. UN human rights treaties rarely refer to the word 'victim', never to the term 'injured party' and do not otherwise define who could be a victim.[15] For instance, the International Covenant on Civil and Political Rights only mentions the word victim once in article 9 (right to liberty and security of the person) but does not define it.[16] Yet, some steps have been taken to define this concept. *The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) contains one of the few available definitions of 'victim' but the Declaration is considered to be 'soft law', simply of declaratory value. It defines 'victims' as:

[15] To define who is a victim, it is necessary, for example, to be familiar with the understanding of the word by the Human Rights Committee and similar treaty monitoring bodies and by the regional courts. See, for instance, S, Davidson, "Procedure under the Optional Protocol" in A, Conte, S, Davidson, and R, Burschill. *Defining Civil and Political Rights* (UK, Ashgate, 2004) 17–32.
[16] United Nations General Assembly, International Covenant on Civil and Political Rights, resolution 2200A (XXI), 16 December 1966. Equally, the International Convention on the Elimination of all Forms of Racial Discrimination mentions the word victim only in article 14, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child do not mention the word at all while the Convention Against Torture and Other Ctuel, Inhuman and Degrading Treatment or Punishment enacted in 1984 and dealing with a gross human rights violation, mentions the word in articles 5, 14, 21 and 22.

> 1. .... persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
> 2. ... The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[17]

More recently, in December 2005, the United Nations' General Assembly adopted the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Basic Principles). These principles contain several references to victims and define them as:

> [the] persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

This definition follows the definition of the Declaration of Basic Principles of Justice of 1985 recognising that individuals other than the 'direct victim' of a violation can also be understood as victims. However, the definition contains two conditions to extend the status of 'victim' to others such as members of the immediate family and dependents. Indeed, the Basic Principles establish that 'where appropriate' and 'in accordance with domestic law' persons other than direct victims could be afforded the same treatment. These phrases imply that States are given the possibility to consider in which situations the extension of the concept of victim can take place, and confirms that in all situations, such a decision to extend the concept of victim would have to conform with domestic law. So, as a result, for instance, the domestic reparations programme of South Africa cannot be considered to be acting against the Basic Principles, when it only awarded reparations to relatives and dependents if the direct victim of a gross human rights violation had died.[18] South Africa did not consider it appropriate to give such status to the next of kin of direct victims who were alive.

[17] UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, res 40/34, 29 November 1985.

[18] B. Goldblatt, "Evaluating the Gender Content of Reparations: Lessons from South Africa" in R, Rubio-Marin, *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York, Social Science Research Council, 2006), 48–91.

Nevertheless, the problem is not limited to the human rights violations where the extension of the status of 'victim' to others, is permissible. The problem is also how domestic law defines 'immediate family' and 'dependents' for the purposes of reparations. A narrow definition of these terms would go against the basic idea that gross human rights violations produce a domino effect that goes beyond the nuclear family of a person.

The latest important development is the UN *Convention for the Protection of All Persons from Enforced Disappearance* (UNCPPED or the Convention) that was adopted in 2006 but at the time of writing had not yet come into force. This Convention mentions the word 'victim' several times and, more importantly, defines victim as "the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance".[19] This is a very broad definition of 'victim' as the only requisite condition for being treated as a 'victim,' other than for the disappeared person, is to have suffered harm 'as the direct result' of the disappearance.[20] The meaning of "direct result" is yet to be interpreted but could provide a ground breaking contribution to international law. For example, on a broad reading, 'victim' could be taken to include members of the extended family, of a community or an eye-witness of gross human rights violations.

Despite these developments, the meaning of the word 'victim' continues to be disputed terrain, but nonetheless one where the IACtHR is able to contribute by virtue of its solid approach to the topic. The steps taken by the IACtHR to define 'victim' and injured party' should be read in connection with existing gaps and developments present in international law, and its achievements should be measured by its ability to close these gaps.

2. *Preliminary Comments on the IACtHR's Interpretation of the Terms 'Injured Party' and 'Victim'*

As outlined above, article 63.1 of the ACHR refers to 'injured party' but it does not define the term. In principle, the article should apply once the Court has established that there has been a violation of the ACHR, or other applicable treaty. As such, this would imply that the term 'injured party' is synonymous with 'victim', as is the case under the ECHR.[21] Therefore, those who are recognised as victims in a judgment of the Court would be treated as injured parties for the purposes of reparations. This is, however, a very restrictive reading

[19] Art. 24 of the International Convention for the Protection of All Persons from Enforced Disappearance.

[20] S. McCrory, "The International Convention for the Protection of All Persons from Enforced Disappearance 7(3) *Human Rights Law Review* 545 (2007), at 557–228.

[21] As seen already, article 41 of the ECHR uses the words 'injured party' when dealing with just satisfaction. The practice of the Court since *De Wilde, Ooms and Versyp v. Belgium*, 18 June

that the IACtHR rejected since its reparation decision in *Velásquez Rodríguez* where it recognised the wife and children of the disappeared man as injured parties.[22] For the Court, the term 'injured party' would not only apply to victims but also to other persons considered to have suffered the effects of the violations even if they are not treated as victims by the Court on the merits of the case. Therefore, as Judge Cançado Trindade held, the concept of 'injured party' is a more ample concept than that of 'victim'.[23]

The Court's arrival at such an understanding of the term 'injured party' has not been easy as it has had to deal with both the legal gaps in relevant instruments, (such as the ACHR and its Rules of Procedure) and with factual challenges in difficult cases that will be discussed in the following sections. Despite these challenges, the concepts of 'injured party' and 'victim' have evolved holistically to try and cover all those persons who suffer harm as a result of gross human rights violations. The two concepts taken together go beyond the understanding of the term 'victim' within the Basic Principles. These two concepts offer a more complex understanding of those who suffer harm when gross human rights violations take place even if it is not as encompassing as the definition of victim within the UNCPPED. As previously noted, UNCPPED does not restrict the treatment of a person as a victim to only 'direct victims' or next of kin since any other person could claim 'victim' status so far as the person has suffered harm as a direct result of the disappearance. Nevertheless, recent developments in the jurisprudence of the Court suggest that it has been revisiting this intrinsic relationship and, what is worrying, is that by doing so it might be undoing what it has previously achieved.

a. *The Court and the Concepts of 'Injured Party' and 'Victim' (1980–1991)*

Besides the ACHR, the work of the IACtHR is regulated by its Statutes and Rules of Procedure (RP). The latter have been the object of fundamental reforms and to date contain the most important changes the IACtHR has made to strengthen the protection of human rights in the Americas.[24] This, however, has been the result of more than 25 years of experience and transformations.

1971, has been to consider that only the persons who are considered as victims in a particular case can receive reparations unless a person is awarded reparations but not as victim but as a heir or successor.

[22] *Velásquez Rodríguez, supra* n. 8, at paras. 50–52.

[23] Concurring opinion of Judge Cançado Trindade, *Interpretation of the judgment in the case of la Cantuta v. Perú*, 20 November 2007, para. 61.

[24] The RP of the Commission and the Court have been amended on different occasions. For the purposes of this article, only 4 of the amendments to the RP of the Court are addressed since they have been the most substantial amendments and have also contributed in one way or another to the topic of this article. Therefore, other smaller amendments are not analysed.

The ACHR does not mention the word 'victim' and does not define the words 'injured party'. This gap in the ACHR had to be resolved by the Court. The first Rules of Procedure (RPI) of the IACtHR were developed by the Court during its second session in 1980.[25] These rules were inspired by the regulations of the ECtHR and the International Court of Justice and did not define the term 'victim' or 'injured party'.[26] Equally, between the Court's 1989 decision in *Velásquez Rodríguez* and the coming into force of the New Rules of Procedure of the Court (RPII) in 1991, the IACtHR did not explicitly define the terms 'victim' or 'injured party', even though it had to determine who was to receive reparations for disappearances, the first gross and systematic human rights violation it had to deal with.

In the first cases decided by the Court, it used the term 'victim' to refer to those persons who suffered a direct violation of rights under the ACHR as happened to Manfredo Velásquez Rodríguez, the victim of a disappearance in the case against Honduras. The Court, however, did not give the same status to his next of kin even if they were awarded reparations.[27] Indeed, in the reparations decision, the Court awarded monetary reparations for loss of earnings caused to Manfredo, to his wife and 4 children as heirs.[28] The Court, nevertheless, awarded moral damages directly to all members of the family as it was proven that "they had symptoms of fright, anguish, depression and withdrawal, all because of the disappearance of the head of the family"[29] but not because the Court recognised them as victims. On the contrary, they were only treated as injured parties. Manfredo was not awarded moral damages and the judgment was considered by the Court as a satisfaction measure.[30] Other cases in this period were treated similarly.[31] In this first period, the Court distinguished between 'victim' and 'injured party'. However, the Court was of the view that for the purposes of reparations the concept of 'injured party' had two separate meanings: 1) as a genre to be applied to all those persons who receive reparations awarded by the IACtHR

[25] Article 60 of the ACHR mandates the IACtHR to draw up its own Statutes and Rules of Procedure.

[26] IACtHR, *Annual Report to the General Assembly*, 1980, 27.

[27] IACtHR, *Velásquez Rodríguez v. Honduras*, judgment on the merits, 29 July 1988, paras. 2, 119. The dissenting opinion of Judge Piza Escalante in this judgment appears to include the next of kin of Manfredo in the concept of 'injured party'.

[28] Nevertheless, it should be recalled that in the judgment on the Merits, the Court clearly indicated to Honduras that under the ACHR it had and has the obligation to investigate, prosecute and punish the perpetrators of disappearances and to disclose all available information to the next of kin of the disappeared person. In the judgment on reparations, the Court referred to the judgment on the merits to stress that Honduras had and has such an obligation. *Velásquez Rodríguez, supra* n. 8, paras. 45–49 and 32–34.

[29] *Id*, para. 51.

[30] *Id*, paras. 6–9.

[31] IACtHR, *Godínez Cruz v. Honduras*, judgment on reparations, 20 January 1989.

(Manfredo, the disappeared person, and his family); and 2) those persons who, even if not considered to be victims by the Court in the judgment on the merits, are still awarded reparations (the family of Manfredo as heirs and for moral damages).[32]

b. *The Court and the Concepts of 'Injured Party' and 'Victim' (1991–1997)*

The IACtHR began to use its contentious jurisdiction in 1983 when the IACommHR submitted to it the case of *Velásquez Rodríguez*. This case and subsequent ones made clear to the Court that it had to adapt its RP to the nature of the cases it was facing because a prompt response from the Court was needed. As a result, the RPI were amended in 1990 and entered into force in 1991 (RPII). They incorporated, for the first time, in article "2.0" the term 'victim', meaning the person whose rights under the ACHR have allegedly been violated. These rules made another important amendment. They included a new paragraph 2 to article 22 related to the representation of the Commission before the IACtHR, which indicated that if within the delegates of the Commission are some of the lawyers of the alleged victim or the next of kin, the Court should be informed. This article makes sense if its content is read in connection with article 44 of the RPII that, for the first time, recognised some *standi* before the Court to the persons mentioned in article 22.2. This article stated that the Court could invite the persons mentioned in article 22.2 of the Rules to present pleadings in relation to the application of article 63.1 of the ACHR (reparations).[33]

These changes were important for reparations for gross human rights violations as confirmed by the case-law of the years 1991 to 1996. Indeed, in *Aloeboetoe v. Suriname*, the fourth case known by the Court concerning the arbitrary killing of 7 Maroons by military personnel in December 1987, the Court faced complex questions related to reparations and evidence. Indeed, the IACommHR requested the payment of moral damages to the Saramaka tribe[34]-collective reparations-, the application of Saramaka's traditional concept of family for the award of reparations and the award of reparations to dependents.

[32] The IACtHR awards reparations for moral and material damages of a deceased person to his or her heirs. It could be discussed whether such awards are made because the Court considers the heirs as injured parties or just because inheritance law should apply. For the purposes of this chapter, it is maintained that the Court awards such reparations to the heirs as it considers that they are injured parties. Indeed, they have lost a close member of the nuclear family who, in many cases, was the breadwinner, so such harm has detrimental consequences for them, an issue that inheritance law recognises.

[33] IACtHR, *Annual Report to the General Assembly*, 1991, 17.

[34] IACtHR, *Aloeboetoe v. Suriname*, judgment on reparations, 10 September 1993, para. 81. See, also, C. Martin and F. Roth, "Suriname Faces Past Human Rights Violations" in 1(1) *Human Rights Brief* 1994.

For the award of reparations, the Court distinguished between the victims of the case -the 7 persons who died- and injured parties which are the heirs of the deceased and/or persons who not being victims of violations of the ACHR can claim reparations as they suffered damages. In this latter concept, the Court identified two possible claims for reparations: a) the one made by the next of kin of the victim, not as successors, for moral and pecuniary damages and b) dependents. The Court awarded reparations to a) but not to b) as in relation to the latter there was insufficient evidence to prove that the conditions established by the Court were met. For a dependent to be awarded reparations the Court required:

> First, the payment sought must be based on payments actually made by the victim to the claimant, regardless of whether or not they constituted a legal obligation to pay support. Such payments cannot be simply a series of sporadic contributions; they must be regular, periodic payments either in cash, in kind, or in services. What is important here is the effectiveness and regularity of the contributions.
>
> Second, the nature of the relationship between the victim and the claimant should be such that it provides some basis for the assumption that the payments would have continued had the victim not been killed.
>
> Lastly, the claimant must have experienced a financial need that was periodically met by the contributions made by the victim. This does not necessarily mean that the person should be indigent, but only that it be somebody for whom the payment represented a benefit that, had it not been for the victim's attitude, it would not have been able to obtain on his or her own.[35]

Although the Court rejected the request to award reparations to dependents, the same Court made use of an important presumption to identify some of them as injured parties. The issue concerned the status of five of the parents of the deceased who were not successors and whom the Commission claimed to be dependents for the award of moral damages. Indeed, the Court indicated that "it can be presumed that the parents have suffered morally as a result of the cruel death of their offspring, for it is essentially human for all persons to feel pain at the torment of their child".[36] Therefore, the Court's use of this presumption *juris tantum* evolved as a mechanism for the identification of injured parties even if only to award them moral damages. This means that besides any working definition of the concepts of 'victim' and 'injured party', issues of evidence might be of transcendental importance for their identification.

The Commission equally requested the Court to consider the Saramaka tribe as an injured party and to award it moral damages as it considered that the killings were racially motivated, that the community was a family and as such it

[35] *Id*, paras. 67–73.

[36] *Id*, para. 76.

suffered harm and that they had autonomy over their territory. The Court rejected all three claims. In relation to the second and most important claim, the Court considered that people always belong to 'intermediate' communities, therefore, reparations were not justified on this basis. Further, the Court considered that in this case there was no direct damage.[37]

The Commission also requested the Court to identify the successors of the victims taking into account the concept of family for the Saramaka's. Their system is matrilineal and accepts polygamy. The Court accepted the request but emphasised that respect for a particular culture can only take place if it does not violate the ACHR or important principles such as non-discrimination of women in which case the latter would prevail.[38] The acceptance of such a concept had clear consequences for the identification of the next of kin of the deceased and their heirs.

Further, this is the first decision taken by the Court where it awarded an additional measure of satisfaction to the judgment itself. The Court ordered Suriname to re-open the school of Gujaba making it, as well as the medical dispensary of the school, fully operational.[39] This last measure should be noted because while the Court did not consider the 'community' as an injured party, (therefore it was not entitled to reparations on that basis), the order to Suriname to re-open the school and make the medical dispensary operational in-and-of-itself constituted a form of reparations for the community. The Court's order not only can be considered to be reparations to the children of the deceased, but also to the children of the community as a whole. Therefore, the Court implicitly awarded reparations to the community, an approach to be defined in later cases as will be seen in the coming pages.[40]

Finally, it is important to highlight a procedural landmark that contributed to a better treatment of reparations in this case. The Court carried out a fact-finding visit to Suriname, which allowed it to be proactive in the identification of the injured parties and the quantification of the damages. The Court sent Ana Maria Reina, Deputy Secretary of the Court, to the country to gather information about the economic situation of the State and to visit the village of Gujaba in order to gather more data that would enable the Court to award reparations. The Court used the information gathered to award reparations in the case.[41] This important fact-finding tool appears not to have been used by the Court in other cases. It is clearly time-consuming and expensive but certainly is

[37] *Id*, para. 83.
[38] *Id*, paras. 59–62.
[39] *Id*, paras. 96.
[40] Shelton, *Remedies in International Human Rights Law*, *supra* n. 4, 286.
[41] *Aloeboetoe*, *supra* n. 34, para. 40.

an option that the Court should consider for cases where features such as the following ones are present:[42]

a) there are multiple victims, next of kin or duly accredited representatives and the Court requires that a common intervener be appointed to represent them before all proceedings before the Court according to article 23 of the RPIV of the IACtHR;[43]
b) the Commission was unable to present a complete list of victims before the Court and there are clear indications from the facts of the case that there are other potential victims to be determined;
c) the victims in the case were in such a vulnerable situation that they did not have access to registration systems or to State institutions so as to be able to register their identity or their property; and
d) the victims in the case belong to a community with different cultural traditions.

During this period another important case was decided by the Court: *El Amparo v. Venezuela*.[44] In this case, members of the Venezuelan military and the police opened fire against 16 fishermen who were about to leave their boat in the Arauca river. Fourteen of the fishermen were killed and two were left with permanent injuries.

The Commission appointed two of the lawyers of the victims as assistants, (Ligia Bolivar and Walter Márquez), before the IACtHR during the reparations stage as was envisaged in the 1996 RPII. During the proceedings on reparations, the Court faced many problems as the Commission and its assistants (the lawyers or the victims) were presenting different evidence and arguments. This forced the Court to ask questions directly to the assistants/legal representatives of the next of kin and not to the Commission or the State.[45] This was not however

[42] Article 45 of the RPIV of the Court could be used to justify such action. The article states that "The Court may, at any stage of the proceedings: "1. Obtain, on is own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant. 2. Request the parties to provide any evidence within their reach or any explanation or statement that, in its opinion, may be useful. 3. Request any entity, office, organ or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point. The documents may not be published without the authorisation of the Court. 4. Commission one or more of its members to hold hearings, including preliminary hearings, either at the seat of the Court or elsewhere, for the purpose of gathering evidence".
[43] Article 23 establishes that: "...When there are several alleged victims, next of kin or duly accredited representatives, they shall designate a common intervener who shall be the only person authorised to present pleadings, motions and evidence during the proceedings, including the public hearings..."
[44] IACtHR, *El Amparo v. Venezuela*, judgment on reparations, 14 September 1996.
[45] IACtHR, *El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI* (Costa Rica, BID, USAID, OEA and IACtHR, 2001, Vol. II), 23.

the only situation where victims, their next of kin or their legal representatives were involved with the reparations stage of the proceedings, but certainly it made patent to the Court that victims' participation was essential to deal with reparations adequately:[46] victims, their next of kin and/or their duly accredited representative are in a better position to both explain and if necessary, to prove the harm they have suffered to the Court.

Although some preliminary concepts were in the making, the Court continued to experience in this period a lack of a regulating principle to identify the injured parties of the case. At the same time, the lack of such a principle was also beneficial as it gave the Court a certain flexibility to deal with each case on its own merits. At the end of this period it was clear that the proper administration of justice in cases of gross human rights violations required the direct participation of victims, their next of kin or their duly accredited representatives, an area where the Inter-American system needed multiple changes as individuals do not have *standi* before the IACtHR, and where according to article 61 of the ACHR only the Commission or States parties to the Convention may submit cases to the Court.[47]

c. *The Court and the Concepts of 'Injured Party' and 'Victim' (1997–2001)*

In 1996, it became apparent that there was a need to give better access to justice to victims, their next of kin or their duly accredited representatives before the Court after the reparations decision in *El Amparo* coupled with important changes in the European System. Then, Protocol 11 to the ECHR was opened for signature. It restructured the enforcement machinery of the ECHR to give better access to justice for victims and to deal in a more efficient way with the caseload. The combination of these two events led the IACtHR to once again reform its RPII.

The most important change of the new RPIII, which entered into force in 1997, was the incorporation in article 23 of the autonomous right of victims, their next of kin or their legal representative to present pleadings, motions and evidence before the Court at the reparations stage.[48] Although article 23 intended to resolve the difficulties of the RPII by granting full *standi* to the victims, their next of kin or their duly accredited representative before the Court at the reparations stage, the concept of victim remained the same as that of the RPII.[49] This amendment of the RP cannot be underestimated as it led to better reparations

[46] J. Mendez and J. Vivanco. "Disappearances and the Inter-American Court: Reflections on a Litigation Experience" 13 *Hamline Law Review* 1990, 566.

[47] Article 61 reads: "1. Only the States Parties and the Commission shall have the right to submit a case to the Court. 2. In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed".

[48] IACtHR, *Annual Report to the General Assembly*, 1996, 202.

[49] *Id.*

pleadings before the Court. However, it introduced new challenges for the Court as is evidenced by the case law of the period 1997–2001.

During this period, the Court began to understand that violation(s) of the ACHR could encompass other victims beyond the direct victim of the violation. The Court's understanding of this important issue developed first in cases related to disappearances and then later in cases regarding arbitrary killings, resulting in part from the assistance provided by the Commission and by the participation of victims and their next of kin at the reparations stage. This extension of the concept of 'victim' to others, usually next of kin, had an impact in reparations awards as now some members of the family of a victim of gross human rights violations would receive reparation as victims and not only as injured parties.

The Court first recognised such a situation in disappearance cases.[50] In *Blake v. Guatemala*,[51] two American journalists were disappeared in 1985. The Court considered that the disappearance of Blake "generate(d) suffering and anguish (to his parents), in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate". The Court added that "such suffering was increased by the fact that the mortal remains of Mr. Blake were burned in order to destroy any traces of the crime". All of these constituted a violation of article 5 of the ACHR (right to human treatment).[52] The relatives of Mr. Blake were also considered as autonomous victims of violations of article 8 of the ACHR (right to fair trial) as there was undue delay in the administration of justice in the case of their son and it is a right of the next of kin of victims of disappearance to be able to get an effective investigation, prosecution and punishment of the material and intellectual perpetrators of the crime, together with compensation for the harm suffered.[53]

In relation to arbitrary killings, the first time the Court considered persons other than the persons deprived of their life as victims of rights under the ACHR was in the case of the *Street Children v. Guatemala*.[54] In this case five street children (three of them below 18 years of age) were killed and subjected to

[50] The first case where the Court found that the next of kin of a disappeared person could also be autonomous victims of the ACHR was *Castillo Páez v. Perú*, where the Court considered the next of kin to be victims of violations of their right to judicial guarantees (article 25 of the ACHR). See, judgment, 3 November 1997, paras. 80–84. Nevertheless, the first case where the Court made a more holistic reading of the ACHR in relation to other victims than the direct victim is the case of *Blake* as it found the next of kin to be victims of the right to human treatment (article 5 of the ACHR).

[51] IACtHR, *Blake v. Guatemala*, judgment on the merits, 24 January 1998.

[52] *Id*, paras. 114–116.

[53] *Id*, para. 97.

[54] IACtHR, *Street Children v. Guatemala*, judgment on the merits, 19 November 1999. See, also, I. Zarifis. "Guatemala: Children's Rights Case Wins Judgment at Inter-American Court of Human Rights", in 9(1) *Human Rights Brief* (2001).

inhuman treatment by State authorities. The mothers of all the children and one grandmother were considered to be autonomous victims of violations of article 5 (right to humane treatment). First, the authorities never took the necessary measures to identify the victims or to inform their next of kin of their deaths; consequently, they were unable to bury them according to their traditions. Second, the authorities mistreated the bodies of the children and third, they failed to properly investigate the crimes and to punish those responsible.[55] They and the siblings of the children were also found to be victims of violations of article 8 and 25 (right to fair trial and judicial guarantees) as Guatemala did not carry out an effective investigation, and the children, as well as their next of kin, were prevented from using effective remedies to resolve the situation.[56]

The recognition as victims of rights under the ACHR of persons that were previously treated as injured parties by the Court for the purposes of reparations meant that they had access to better monetary reparations for both pecuniary and non-pecuniary damages but especially for the latter. The following examples illustrate this: In the case of *El Amparo*, the following were the awards in 1996 to the direct victims and to the injured parties:

El Amparo v. Venezuela (1996)

	Pecuniary damages[57] (loss of income)	Moral damages[58]
To each of the families of the deceased[59]	Average USD 23,843 (as successors)	USD 20,000 (on their own right)
To each of the two victims who survived	USD 4,566 (for the two years they were unfit to work)	USD 20,000 to each one of the survivors

In the *Street Children* case, where the mothers and one grandmother of the children were considered to be victims in their own right in 2001, the following awards were granted:[60]

[55] *Id*, paras. 173–177.
[56] *Id*, paras. 199–238.
[57] *El Amparo*, *supra* n. 44, paras. 29–30.
[58] *Id*, para. 37.
[59] Each family received the award and the Court indicated the manner in which it should be distributed. The Court ordered that one third of the pecuniary damage be given to the wife or companion of the deceased and two thirds to the children. In relation to moral damages, the Court ordered that one half be given to the children, one quarter to the wife/companion and one quarter to the parents. *Ibid*, paras. 41–42.
[60] This table only illustrates the awards given to the mothers and grand mother of the children as victims of violations of the right to human treatment, fair trial and juridical guarantees but not the awards given to the siblings who were only considered as victims of the right to fair trial and juridical guarantees.

Street Children v. Guatemala (2001)

	Pecuniary damage[61]		Moral damages[62]	
Direct victims	Expenses (for mothers in their own right)	Loss of income (as successors)	For the direct victims as successors	For the mothers and grandmother as victims
Anstraun Aman Villagrán Morales	USD 150.00 USD 4,000.00	USD 28,136.00	USD 23,000.00	USD 26,000.00
Henry Giovanni Contreras	USD 400.00 USD 2,500.00	USD 28,095.00	USD 27,000.00	USD 26,000.00
Julio Roberto Caal Sandoval	USD 400.00 USD 2.500.00	USD 28,348.00	USD 30,000.00	USD 26,000.00 for the Mother US$ 26,000.00 for the Grand Mother
Federico Clemente Figueroa Túnchez	USD 2,500.00	USD 28,004.00	USD 27,000.00	USD 26,000.00
Jovito Josué Juárez Cifuentes		USD 28,181.00	USD 30,000.00	USD 26,000.00

A comparison of the awards in these two cases allows one to conclude that there is a drastic difference in the amount of financial and other reparations measures awarded between someone that is recognised as a 'victim' by the Court and someone that is only recognised as an 'injured party'. One can also compare the award of moral damages to the families of the deceased in the case of *El Amparo* with the mothers and grandmother of the youngsters in the *Street Children* case. In the latter case each one of them received USD 26,000 while in *El Amparo* all family members collectively received USD 20,000.[63]

[61] *Street Children*, *supra* n. 54, paras. 78–82.
[62] *Id*, paras. 88–93.
[63] Certainly, the Court takes into account other variables than the one under discussion here when awarding reparations. It is argued, however, that the consideration of a person as victim (as opposed to injured party) is a determinant factor to award greater monetary reparations.

It should be noted that the cases determined during this period maintained the distinction between 'victim' and 'injured party'. However, the scope of 'victim' was expanded to include 'indirect victims' in cases of disappearances and arbitrary killings. The broadened scope of who may be classified as a 'victim' is justified since these violations in-and-of themselves produce severe pain in the next of kin and others. Additionally, subsequent events following such violations may also adversely affect the next of kin. For example, a lack of adequate response by the State in relation to the investigation, prosecution and punishment of the perpetrators can cause further pain and suffering to the next of kin. Nevertheless, the Court continued to award reparations to persons as injured parties even if they were not victims as decided by the Court in the merits of the cases. The case of *Loayza Tamayo v. Perú* illustrates this approach. In this case, Maria Helena Loayza was arbitrarily detained and subjected to inhuman treatment for more than four years in Perú. The Court considered that she was the only victim in the case but awarded reparations to her children, parents and siblings as injured parties as shown in the table below.

Therefore, during this period the Court applied two different approaches in relation to reparations for gross human rights violations. First, in relation to disappearances and arbitrary killings, where the Court considered as victims some

Loayza Tamayo v. Perú (1998)

Victim and injured parties	Reparations for pecuniary damages[64]	Reparations for non-pecuniary damages[65]
Maria Helena Loayza (direct victim)	USD 48,690	USD 50,000
Gissele (daugther)	USD 5,000 (medical expenses)	USD 10,000
Paul Abelardo (son)	USD 5,000 (medical expenses)	USD 10,000
Julio Loayza and Adelina Tamayo (father and mother)	USD 500 (transport expenses)	USD 10,000 (to each parent)
Siblings of Maria Helena		USD 3,000 (to each sibling)

Nevertheless, this factor should be read in conjunction with other factors that the Court takes into account such as the equity principle and the particular circumstances of each case. The Court has not always been consistent when awarding reparations. Nevertheless, it is possible to say that the recognition of a person as victim provides her with better chances to be awarded more and better reparations. On the inconsistencies of the Court when awarding reparations, see R. Uprimny and M. P. Saffon "*Las Masacres de Ituango Colombia: Una Sentencia de Desarrollo Incremental*", 3 *CEJIL* (2007) 46–56, at 54–56.

[64] IACtHR, *Loayza Tamayo v. Perú*, judgment on reparations, 27 November 1998, paras, 129–133.

[65] *Id*, paras. 138–143.

of the next of kin of the direct victim as a result of violations of the right to humane treatment, to a fair trial and/or to judicial guarantees.[66] In such cases it did not recognise other injured parties for the purposes of reparations. The second approach was in relation to violations where the direct victim was subjected to arbitrary detention and to inhuman treatment. Under the second approach, the Court only considered those persons subjected to arbitrary arrest and detention and/or inhuman treatment as victims. Nonetheless, it recognised their next of kin as injured parties for the purposes of reparations as in *Loayza Tamayo*.[67]

However, the Court used presumptions to grant the status of 'injured party' to some of the next of kin of direct victims of gross human rights violations prior to the Court's extension of the concept of 'victim'. For instance, it continued to apply the presumption established in *Garrido and Baigorria v. Argentina*, according to which the torment of a child produces intense suffering in the parents of the deceased or disappeared person. More importantly, the Court also extended the presumption to others such as children and siblings of direct victims of gross human rights violations who were arbitrarily detained and subjected to inhuman treatment. In *Loayza Tamayo*, the Court considered that it had " ... established that grievous violations were committed against the victim and must presume that they had an impact on her children, who were kept apart from her and were aware of and shared her suffering".[68] It added that "the same considerations apply to the victim's siblings, who as members of a close family could not have been indifferent to Ms. Loayza-Tamayo's terrible suffering, a presumption not disproved by the State".[69] It is important to note that the Court first extended the presumption to children and siblings in cases not related to disappearances and arbitrary killings. Indeed, up until the case of *Paniagua Morales v. Guatemala* was decided in May 2001, the Court was ready to award moral damages to the siblings of the deceased or disappeared person if "credible or convincing evidence demonstrating an affective relationship with the disappeared person that goes beyond simple consanguinity"[70] was presented to the Court. This applied in cases like *Castillo Páez v. Perú*, where the Court presumed the moral damages of the parents but not those of the sister of Mr. Castillo. Nevertheless, the moral damage of the latter was duly proved and she was awarded reparations.[71]

[66] See for instance, IACtHR, *Garrido and Baigorria v. Argentina*, judgment on the merits, 2 February 1996 and judgment on reparations, 27 August 1998; *Durand and Ugarte v. Perú*, judgment on the merits, 16 August 2000 and judgment on reparations, 3 December 2001.

[67] See also IACtHR, *Suarez Rosero v. Ecuador*, judgment on the merits and reparations, 20 January 1999. The only exception to this approach is *Castillo Petruzzi v. Perú*, where only those detained were awarded reparations. See, judgment on the merits and reparations, 30 May 1999.

[68] *Loayza Tamayo*, *supra* n. 64, para. 140.

[69] *Id*, para. 143.

[70] *Garrido and Baigorria*, reparations, *supra* n. 66, para. 64.

[71] IACtHR, *Castillo Páez v. Perú*, judgment on reparations, 27 November 1998, paras. 88–90.

When the Court extended the concept of victim to include some of the next of kin, the use of the presumptions mentioned above lost importance at the reparations stage. However, they continued to be relevant for those cases of arbitrary detention and inhuman treatment, such as *Loayza Tamayo*, where the Court only recognised the existence of direct victims.

d. *The Court and the Concepts of 'Injured Party' and 'Victim' (2001–2007)*

Another substantial reform of the Rules of Procedure took place in 2000 (RPIV). This reform produced one of the most important changes in the life of the Inter-American system as for the first time, it recognised *locus standi in judicio* to the victim, the next of kin or their duly accredited representative.[72] Prior to RPIV, the parties before the Court were limited to the Commission and the State while the victim; his/her next of kin; or the duly accredited representative played only a minor role in the proceedings. Subsequently to the reforms entering into force in June 2001, the latter became real parties in the litigation before the Court as established by article 23 of the RPIV.[73]

Importantly, article 2 of the RPIV was also amended extending the definition of 'next of kin' to include 'the immediate family, that is, the direct ascendants and descendants, siblings, spouses or permanent companions, or those determined by the Court, if applicable.' Such a concept was required not only for the purposes of article 23 of the RPIV – who could have standing before the Court – once the Commission submits a case, but also for reparations as the Court faced disputes in relation to who could be considered member of the family and as injured party.[74] The new Rules also included a new definition of 'victim' but kept the old concept to define an 'alleged victim.' As such, article 2.30 defines an alleged victim as "the person whose rights under the Convention are alleged to have been violated" and article 2.31 defines a victim as "the person whose rights have been violated, according to a judgment pronounced by the Court." Note, however, that the Court continued without defining the term "injured party".

The newly introduced concept of 'next of kin' is broad in nature as it allows the Court to consider persons other than the traditional members of the nuclear family; an approach that the Court was already applying as was highlighted when the case of *Aloeboetoe* was analysed.[75] This flexible concept applies to both the identification of victims and of injured parties that are not considered victims in the judgment of the Court.[76] Therefore, the Court does not interpret the concept in a restrictive manner when identifying the victims of violations of rights under the ACHR. Indeed, in the *Street Children* case, as seen earlier, one of the grandmothers of the children was treated as a mother due to her close relationship with one of the children and, therefore considered as a victim.[77] Equally, in the case of *Myrna Mack v. Guatemala*, Ronald Chang, a cousin of the deceased, was considered as a victim by the Court as he was raised from his childhood by the Mack family and developed very close ties with Myrna.[78] Further, the concept is especially meaningful when the Court has to deal with claims of victims that belong to different cultures or traditions as the Court can be sensitive to their understanding of family.[79] Finally, the concept equates the spouse of a victim with the permanent companion avoiding in this manner any discriminatory treatment in relation to the latter.[80]

The major developments which took place between 1997–2001, coupled with the subsequent jurisprudence during 2001–2007, have been particularly important in solidifying the meaning of 'victim' and 'injured party.' During this period the Court continued to widen its understanding of victims of gross human rights violations by extending the concept to the next of kin of a direct victim who is still alive after a period of arbitrary detention and inhuman treatment. In *Tibi v. Ecuador*, the Court considered that the arbitrary detention and torture of Mr. Tibi also breached

[72] A good article on these procedural changes is the one by V. Gómez. "The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: New Rules and Recent Cases" 1 *Human Rights Law Review* 3 (2001).

[73] Article 23 states: "Participation of the Alleged Victims: 1. When the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit their pleadings, motions and evidence, autonomously, throughout the proceedings. 2. When there are several alleged victims, next of kin or duly accredited representatives, they shall designate a common intervener who shall be the only person authorized to present pleadings, motions and evidence during the proceedings, including the public hearings. 3. In case of disagreement, the Court shall make the appropriate ruling". See also article 2.23 of the RPIV. This is not the same as full *standi* before the Court as the Commission has still the power to decide whether or not to send a case to the Court and only when the case has been sent to the Court, the victims gain *standi*. See also article 44 of the Rules of Procedure of the Inter-American Commission on Human Rights.

[74] This took place, for instance, in the case of *Loayza Tamayo*, where the latter rejected any claim to pay compensation to the next of kin of Maria Helena, the direct victim of the case. Reparations decision, *supra* n. 64, paras. 88–92.

[75] *Supra* n. 34 p. 14.

[76] The Court has considered as injured party for the purposes of reparations other persons not part of the nuclear family such as step children (*Mapiripán v. Colombia*, para 259a), sisters in law (*Paniagua Morales v. Guatemala*, para. 109), cousins (*19 Merchants v. Colombia*, patas. 244–264g) and nieces (*Las Palmeras v. Colombia*, para. 61).

[77] *Street Children*, *supra* n. 54, paras 80–85.

[78] IACtHR, *Myrna Mack v. Guatemala*, judgment on the merits and reparations, 25 November 2003, paras. 242–244.

[79] The Court has always shown sensitivity towards other conceptions of family in its case law as already mentioned in the case of *Aloeboetoe*.

[80] The equal treatment of spouses and companions by the Court has also been present across its case law. See, e.g., *Juan Humberto Sánchez v. Honduras*, para. 164 and *La Rochela v. Colombia*, para, 268. See also *Pueblo Bello v. Colombia*, judgment on the merits and reparations, 31 January 2006 and *Gómez Palomino v. Perú*, judgment on the merits and reparations, *22* November 2005.

the right to human treatment of his wife and children, treating his next of kin, for the first time, as victims of violations of the ACHR.[81] This approach has also been applied in more recent cases such as *De la Cruz Flores v. Perú* where inhuman treatment – not torture – was found to have taken place.[82] As shown before, such a treatment gives the next of kin, as victims, access to greater reparations. One may compare, for example, the cases of *Loayza Tamayo*[83] and *De la Cruz Flores*. In the latter case, the awards for moral damages were more substantial than the former.

The expansion of the concept of victim in cases of gross human rights violations should be seen as a step forward in the acknowledgment of the effects of these violations on other persons than the direct victims. As a consequence, the Court will now treat most people as victims and not only as injured parties even if the latter concept continues to exist in the jurisprudence of the Court. In fact, in *Bámaca Velásquez v. Guatemala*, the Court awarded reparations to the direct and indirect victims of the case: the disappeared man, his wife, his father and two

Loayza Tamayo v. Perú (1998)

Victim and injured parties	Reparations for pecuniary damages	Reparations for non-pecuniary damages
Maria Helena Loayza (direct victim)	USD 48,690	USD 50,000
Gissele (daugther)	USD 5,000 (medical expenses)	USD 10,000
Paul Abelardo (son)	USD 5,000 (medical expenses)	USD 10,000
Julio Loayza and Adelina Tamayo (father and mother)	USD 500 (transport expenses)	USD 10,000 (to each parent)
Siblings		USD 3,000 (to each sibling)

[81] IACtHR, *Tibi v. Ecuador*, judgment on the merits and reparations, 7 September 2004, paras. 139–163. Although the violations that took place in this case, such as arbitrary detention and torture, could be considered gross, they did not take place as part of a general practice of arbitrary detention and torture in Ecuador. Nevertheless, it is possible to infer that if the Court treated as victims the next of kin of Mr. Tibi despite the absence of a general practice, such treatment is to be also expected in cases where there is a general practice in the country of arbitrary detention and inhuman treatment.

[82] IACtHR, *De la Cruz Flores v. Perú*, judgment on the merits and reparations, 18 November 2004, para. 162.

[83] Maria Helena Loayza was subjected to arbitrary detention and inhuman treatment in Peru during Fujimori's fight against the Shining Path.

De La Cruz Flores v. Perú (2004)

Victims	Next of kin Reparations for pecuniary damages[84]	Reparations for non-pecuniary damages[85]
Mrs. De La Cruz Flores (direct victim)	Loss of income USD 39,050	USD 80,000
Widow of de la Cruz (mother)	USD 5,000 for expenses	USD 40,000
Ana Teresa (daughter)		USD 30,000
Danilo (son)		USD 30,000
Alcira Isabel de la Cruz (sister)	USD 5,000 for expenses	USD 30,000
Other siblings		USD 15,000 each

of his siblings,[86] and to Alberta Velásquez, another sister, as an injured party (but not a victim in the case). Alberta had a very close relationship with Mr. Bámaca during his childhood and her existence was unknown to the Commission until very late in the proceedings of the case.[87] This case shows that the Court maintains the concepts of victim and injured party despite the recent expansion of the former concept.[88]

So far, it has been shown that in the past the Court treated those who suffered the consequences of gross human rights violations as 'injured parties' and 'victims' but that the latter category was mostly applied to few persons in each case. This tendency by the Court has been reversed. The Court now treats the majority of persons who suffer the consequences of gross human rights violations as victims using the category of 'injured party' in exceptional cases as in *Bámaca*. Despite the importance that such a shift represents, the Court keeps the concept of injured party as distinct from that of victim as it provides the

[84] Loayza Tamayo, *supra* n. 64, paras. 151–154.

[85] *Id*, paras. 159–163.

[86] *Bámaca Velásquez v. Guatemala*, judgment on the merits, 25 November 2000, paras. 145g, 159–166; judgment on reparations, paras. 30–36.

[87] *Id*, judgment on reparations, para. 36. The Court considered Alberta as an injured party taking into account that the direct victim of the case and his next of kin belong to the Mam community, that they are not very good at communicating their feelings and that Alberta lived in a different place than her brother.

[88] See also the case of *Palamara Iribarne v. Chile*, judgment on the merits and reparations, 22 November 2005, para. 237, where the Court also recognised the wife of Mr. Palamara, the victim in the case, as an injured party (but not as a victim). Although this case is not related to gross human rights violations, it is important to note the treatment given by the Court to the next of kin of victims in other cases. Such treatment also reiterates the point made in relation to *Bámaca*.

Court with a legal tool to protect persons who experience suffering as a result of gross human rights violations but who are not considered by the Court as victims. This is particularly important as the standard and burden of proof applied by the Court in relation to who can claim to be a victim of gross human rights violations under the ACHR are very rigid as later case law suggests, and in light of current reforms of the system sought by OAS member States.[89]

The second development of this period that deserves attention is the recognition the Court gives to potentially unknown/unidentified victims. In cases of gross human rights violations such as massacres or massive disappearances, where it is difficult to individually establish each of the possible victims, the Court has adopted a flexible approach that allows it to provide unknown victims with reparations and also to repair the harm produced to communities.

In *Massacre of Plan de Sánchez v. Guatemala*, the Court knew of a case where approximately 268 members of the indigenous community Achi were killed by military personnel in 1982. Although the surviving victims were under permanent threat, the State never carried out effective investigations, prosecutions and punishment of the perpetrators, instigators and accessories of the crimes. Several reasons explain the difficulties of establishing the victims in the case. For instance, more than fourteen years passed between the time the facts of the case began to take place and the time when the petition was filed with the Commission. Additionally, most of the surviving victims had fled from the area of the massacre out of fear for their personal safety and intimidation while others were only visiting the area from neighbouring towns on the day of the massacre because it was market day.

The Court considered in its decision on the merits that the victims of the violations of the right to humane treatment, right to fair trial, right to privacy, freedom of conscience and religion, freedom of expression, freedom of association, right to property, right to equality and right to judicial protection of the ACHR are the persons listed by the Commission in its application "and those that may subsequently be identified, since the complexities and difficulties faced in identifying them lead to the presumption that there may be victims yet to be identified".[90]

[89] See for example the remarks by the Delegation of Colombia in the last Permanent Council Special Meeting, 4 April 2008. Colombia presented a preliminary study made by Brazil, Panama, El Salvador, Chile, Perú and Mexico with diverse proposals, including 1) The need to individualise the victims in both the proceedings before the Commission and the Court as lack of such identification breaches the right to defence of the State; 2) Reparations by the Court should take into account 3 key issues: the subsidiary nature of reparations, the aspirations of the victim to obtain fair reparation and the amount of monetary compensation that should be awarded. If such proposals were to materialise, the Court would not have other choice than to go back to its concept of 'injured party' as that would be the only open door to recognise the harm suffered by all those who were not individualised in due time before the Court. See: www.oas.org/OASpage/videosondemand/home_eng/videos_query.asp?sCodigo=08-0129#. See also the references of this chapter to the case of *la Cantuta* and the treatment of siblings by the Court.

[90] IACtHR, *Plan De Sánchez v. Guatemala*, judgment on the merits, 29 April 2004, paras. 47–48.

Nevertheless, as the Commission or the next of kin of the victims were unable to identify other people, the Court considered, at the reparations stage, that although it was unable to establish compensation for victims who had not been duly identified it reserved the right to determine other forms of reparation in favour of all the members of the communities affected by the facts of the case, among other reasons due to the gravity of the facts.[91] A total of 317 victims were duly identified before the Court. The reparations awarded by the Court are given in the table below.

The Court dealt with the case of *Moiwana v. Suriname* in a similar manner. It required those persons of the Moiwana community who had not proven their identity to the satisfaction of the Court (using identity cards or similar documents) to do so to receive their award within 24 months of the decision by the

Case of Massacre of Plan de Sánchez v. Guatemala (2004)

Victims	Pecuniary damages	Non-pecuniary damages	Satisfaction measures (apply to all victims and to the members of the community)[92]
To each of the surviving victims[93] To the members of the Community	USD 5,000	USD 20,000	Obligation to investigate, prosecute and punish those responsible (right of the victims to know the truth). Public act acknowledging State responsibility in the village of Plan de Sanchez, with the presence of high State authorities and with the members of the different communities affected, in Spanish and in Maya-Achi. Translation of the judgment of the Court to Maya-Achi. Publication in a national newspaper of national circulation of the proven facts of the case and other parts of the judgment.

[91] IACtHR, *id*, judgment on reparations, 19 November 2004, paras. 62 and 86.

[92] *Id*, paras. 90–116.

[93] The Court also distinguished between victims whose identity has been duly proven (because an identity card or similar document was presented to the Court) and those other victims who had not adequately proven their identity but who were named by the Commission or other victims. The Court also awarded reparations to them but conditioned such awards. Each of those victims would have to prove their identity somehow to the State when claiming the reparation awarded. *Id*, para. 67.

Continued

Victims	Pecuniary damages	Non-pecuniary damages	Satisfaction measures (apply to all victims and to the members of the community)
			USD 25,000 for the members of the community as guarantee of non-repetition and to honour the collective memory of the victims.
			Housing programme for the surviving victims of the massacre who lost their houses as a result of the State's actions.
			Medical and Psychological treatment to victims including medicines.
			Development programmes for the members of the community (dissemination of Maya-Achi culture, maintenance and improvement of roads in the area, sewage system and potable water supply, supply of teaching personnel with intercultural skills and the establishment of a health centre).

Court. Nevertheless, the Court recognised that Suriname did not have in place a good and accessible system to register persons in the country or to provide them with identity cards, therefore it was not possible to require the victims to prove the impossible.[94] As a result, the Court established alternative methods to prove their identity such as "a statement before a competent state official by a recognised leader of the Moiwana community members, as well as the declarations of two

[94] In *Aloeboetoe*, the Court had already considered that Suriname was not providing means of identification to people living in the area of the Saramakas. Therefore, the Court concluded that "Suriname cannot, therefore, demand proof of the relationship and identity of persons through means that are not available to all of its inhabitants in that region. In addition, Suriname has not here offered to make up for its inaction by providing additional proof as to the identity and relationship of the victims and their successors", *supra* n. 34, paras. 64–65.

additional persons, all of which clearly attest to the individual's identity".[95] And again, the Court awarded reparations – satisfaction measures – to the N'djuka community and not only to individual persons in view of the gravity of the facts and their existence as a collective unit.[96]

The case of *Mapiripán v. Colombia*[97] further refined this approach by awarding reparations to potentially identifiable victims after the decision of the Court. The AUC, a paramilitary group in Colombia, with the help and acquiescence of the military in Meta, took over the town of Mapiripán for some days and massacred approximately 49 persons who were then thrown into the Guaviare River. As a result of the massacre and subsequent threats and intimidation, several persons were displaced from Mapiripán, making it impossible to fully identify the victims of the case.[98] This was acknowledged by the Court, which considered that it will not be able to award material damages to unidentified victims.[99] Nevertheless, the Court was of the view that as Colombia recognised its international responsibility in the case, any unidentified victim could claim reparations as ordered by the Court. Unidentified victims could claim reparations if they:

1) Appeared within 24 months of the notification of the identification of the remains of their next of kin before the national mechanism set up for reparations in the case; and
2) Proved their relationship with the deceased using an identity card, a birth certificate or with the declaration of two attesting witnesses.[100] As a result, and in contrast with *Moiwana* or *Plan de Sanchez*, the Court awarded moral damages to persons other than the identified victims as potentially identifiable ones.[101]

[95] IACtHR, *Moiwana v. Suriname*, judgment on the merits and reparations, 15 June 2005, para. 178.

[96] It is important to note that although the N'djuka community was not considered by the Court in the section titled "beneficiaries of reparations" as such, the Court stated the following some paragraphs later: "Given that the victims of the present case are members of the N'djuka culture, this Tribunal considers that the individual reparations to be awarded must be supplemented by communal measures; said reparations will be granted to the community as a whole in subsection D". This permits to conclude that the community was acknowledged by the Court as a recipient of reparations. *Id*, para. 194.

[97] IACtHR, *Mapiripán v. Colombia*, judgment on the merits, 15 September 2005.

[98] *Id*, paras. 96.29–96.67.

[99] *Id*, para. 247.

[100] *Id*, para. 257.

[101] Something similar took place in *Castro Castro Prison v. Perú*, judgment, 25 November 2006, para. 420.

Indeed, it ordered the following:

Mapiripán v. Colombia (2005)

Victim[102]	Moral damage	
For the approximately 49 persons who were executed o disappeared (whether identified or not)	USD 80,000	USD 10,000 In addition for the two minors that were executed
Mother, father, wife, companion, and children of the executed/ disappeared	USD 50,000 (for each of them)	
Sister or brother of the executed/ disappeared	USD 8,500 (for each of them)	
To the persons who were boys and girls when the facts of the case took place	USD 5,000 (for each of them)	

In this case, the Court did not award reparations measures to the members of the community or to the community as 'victim' or 'injured party' as in the cases of *Massacre of Plan de Sánchez* and *Moiwana*. However, the Court did award satisfaction measures such as the construction of a monument in Mapiripán to remember the massacre, which is deemed as a non-repetition measure benefiting future generations. The following table provides an overview of the satisfaction measures that were awarded in the *Massacres of Plan de Sanchez* and *Mapiripán*.

Comparative table – massacres of Plan de Sanchez and Mapiripán

Satisfaction measures	Massacre of Plan de Sanchez	Mapiripán[103]
Obligation to investigate, prosecute and punish those responsible (right of the victims and their next of kin to know the truth)	X-C[104]	X-C
Identification of the Victims and their next of kin		X
Establishment of a mechanism to monitor reparations in the case in relation to the victims and next of kin		X
Public act acknowledging State responsibility/apology	X-C[105]	X-C

[102] *Mapiripán*, *supra* n. 97, paras. 288–290.
[103] *Id*, paras. 294–318.
[104] X refers to measures awarded by the Court in the case.
[105] X-C refers to measures awarded to the members of the community or the community as injured party and/or to others beyond such intermediate community. The Court usually refers to "society as a whole" to mean those others who benefit from reparations measures.

Continued

Satisfaction measures	Massacre of Plan de Sanchez	Mapiripán
Building a Monument		X-C
Translation of the judgment of the Court to Maya-Achi	X-C	
Publication in a national newspaper of national circulation of the proven facts of the case and other parts of the judgment	X-C	X-C
25,000 USD for the community as guarantee of non-repetition and to honour the collective memory of the victims. The money should be used to main-tain the Chapel where the victims pay homage to those who were executed during the massacre.	X-C	
Housing programme for the surviving victims of the massacre who lost their houses as a result of the State's actions.	X	
Medical and Psychological treatment to victims including medicines.	X	X
Development programme for the community (dissemination of Maya-Achi culture, maintainance of roads in the area, sewage system and potable water supply, supply of teaching personnel with intercultural skills, establishment of a health centre	X-C	
The State should guarantee the safety of the displaced persons who decide to return to Mapiripan		X
Human Rights Training and education		X-C

This table facilitates the consideration of the third development of this period: the recognition of members of a community as 'victims' and 'injured party.' Indeed, the Court recognises that reparations have an important collective dimension.[106] Such recognition is reflected in the awards of the Court in two different but interrelated areas. Firstly, some of the reparations awards included in the table have as a recipient the members of a particular community or the community as is the case

[106] IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, judgment on the merits and reparations, 17 June 2005, para. 188.

in *Massacre of Plan de Sanchez* with the money given to maintain the Chapel where the community pays homage to those executed in the massacre. In the case of *Massacre of Plan de Sanchez* the Court did not consider the members of the community as a whole to be victims of violations under the ACHR.[107] However, it treated them as injured parties even though it did not name them as such in the section entitled "beneficiaries" of reparations.[108] Nevertheless, in this section of the judgment the Court stated that "... [it] reserves the possibility to determine ... other forms of reparation in favour of all the members of the communities affected by the facts of the case".[109] On the contrary, in the case of *Moiwana* an interesting development took place. The Court considered the members of this community as victims of multiple violations of rights under the ACHR. Therefore, the reparations awards in this case were to the victims as such and not to them qua injured parties. Such a view by the Court also implies that it has extended the concept of victim to also include members of certain communities.

The most explicit recognition of members of a particular community as victims and injured parties is provided in *Saramaka v. Suriname*. It is not a gross human rights violations case but nevertheless establishes an important precedent for the future jurisprudence of the Court. In the instant case the Court expressly indicated that

> The Tribunal has previously held that in a contentious case before the Court, the Commission must individually name the beneficiaries of possible reparations. However, given the size and geographic diversity of the Saramaka people, and particularly the collective nature of reparations to be ordered in the present case, the Court does not find it necessary in the instant case to individually name the members of the Saramaka people in order to recognize them as the injured party. Nevertheless, the Court observes that the members of the Saramaka people are identifiable in accordance with Saramaka customary law, given that each Saramaka individual belongs to only one of the twelve matrilineal lös in which the community is organized.
>
> Thus, in accordance with the Court's jurisprudence regarding indigenous and tribal peoples, the Court considers the members of the Saramaka people as the "injured party" in the present case who, due to their status as victims of the violations established in the present Judgment (...), are the beneficiaries of the collective forms of reparations ordered by the Court.[110]

Such awards to the members of the community or to the community as a whole are common in cases where the Court considers that the rights of members of

[107] *Massacre of Plan de Sanchez*, judgment on the merits, *supra* n. 90, paras. 47–48.

[108] Since the *Loayza Tamayo* case the Court includes a section in every judgment on reparations entitled "beneficiaries" where it identifies those persons that will be the recipients of the awards. In those sections the Court deals with direct and indirect victims and injured parties.

[109] *Massacre of Plan de Sanchez*, *supra* n. 90, para. 62. See also fn 98 of this chapter.

[110] *Saramaka v. Suriname*, *supra* n. 14, paras, 188–189. See also *Sawhoyamaxa Indigenous Community v. Paraguay*, judgment on the merits and reparations, 29 March 2006, paras. 204–209.

such groups have been breached. The Court understands by members of the community or to the community as a whole, those peoples, indigenous or not,[111] who are connected by a strong and unique bond with their ancestral land that determines their culture, way of life, beliefs and survival.[112]

Secondly, the table also illustrates other reparations measures such as human rights training and education of armed forces and security agencies that benefit both individual members of the community, (such as the people of the town of Mapiripán), and more importantly, the 'society as a whole'.[113] The Court has not clearly defined the meaning of those terms. Nevertheless, the Court tends to use these terms in the context of State parties' general obligations under the ACHR, namely to: 1) Take all necessary measures to respect the rights under the Convention; 2) Ensure their free and full exercise; 3) Adopt all necessary measures, (beyond that of a legislative character), that are necessary to make domestic law, national institutions and practices compatible with articles 1 and 2 of the Convention;[114] and 4) In the context of the obligation States have to fulfil the right to know the truth that belongs to victims of gross human rights violations and their next of kin.[115]

Indeed, when the Court considered Colombia's obligations to investigate, prosecute, and punish the perpetrators of disappearances of the direct victims in *19 Tradesmen v. Colombia*, it recalled that these obligations 'benefit [...] not only the next of kin of the victims, but also *society as a whole*, because, by knowing the truth about such crimes, it can prevent them in the future'[116] (emphasis added). This case underscores how the Court can infer 'society as a whole' to be synonymous with the State in question. For example, in more recent cases it is common to find references to the benefit that such reparation measures would bring to 'Peruvian Society,'[117] 'Colombian Society'[118] and 'Paraguayan Society'.[119]

[111] *Moiwana*, *supra* n. 95 and Saramaka v. Suriname, *id.*

[112] *Awas Tingni v. Nicaragua*, judgment on the merits, 31 August 2001, para. 149, and *Moiwana*, *id*, paras. 86.6, 101, 129–135.

[113] See as illustrations the following cases where the Court refers to "society as a whole": IACtHR, *Trujillo Oroza v. Bolivia*, judgment on reparations, 27 February 2002, para. 110; *La Cantuta v. Perú*, 29 November 2006, judgment on the merits and reparations, para. 162; *Almonacid Arellano v. Chile*, judgment on the merits and reparations, 26 September 2006, para. 157. See also, J. Schönsteiner. "Dissuasive Measures and the "Society as a Whole": A Working Theory of Reparations in the Inter-American Court of Human Rights" in 23(1) *American University International Law Review* (2008), 127–164.

[114] IACtHR, *Trujillo Oroza v. Bolivia*, judgment on reparations, 27 February 2002, para. 110.

[115] *La Cantuta* and *Almonacid Arellano*, *supra* n. 113.

[116] IACtHR, *19 Tradesmen v. Colombia*, judgment on the merits and reparations, 5 July 2004, para. 259.

[117] IACtHR, *Gómez Palomino v. Perú*, *supra* n. 80, para. 78 and 139.

[118] IACtHR, *Ituango Massacres v. Colombia*, judgment on the merits and reparations, 1 July 2006, para. 399.

[119] IACtHR, *Goiburú v. Paraguay*, judgment on the merits and reparations, 22 September 2006, para. 165.

The measures that benefit society as a whole are satisfaction and/or non-repetition.[120] As such they do not aim to provide reparations to 'society as a whole' as an injured party in the terms of article 63.1 of the ACHR. On the contrary, the collective dimension of such measures is their result as they serve to restore the legal order, they work to prevent future violations and as a form of dissuasion.[121] Therefore, while these measures aim to produce structural changes that could allow the State in question to fulfil its human rights obligations, they also have the potential to benefit both the communities who have suffered violations and future generations as such measures would prevent repetition of breaches. This means that beyond the intrinsic relationship that exists between the concepts of 'victims' and 'injured parties,' the reparations awards of the Court also benefit others that could be called beneficiaries. Nevertheless, such persons are not necessarily 'injured parties' and cannot necessarily claim to have been harmed.

During this period, the use of presumptions for the establishment of injured parties experienced drastic and not always consistent change. In 2001, the Court extended to siblings the presumption that they suffer moral damages similar to those of parents of a disappeared or arbitrarily killed person, who suffer as a result of their child's torment. Indeed, in *Paniagua Morales v. Guatemala*, the Court held that the moral damages suffered by the brother of the dead victim was duly proven as there was clear evidence of the strong emotional ties between the two brothers by virtue of their having lived under the same roof. Nevertheless, the situation of this brother was not the same as the rest of the siblings of the deceased, as they could not prove the same emotional ties. Despite this, the Court presumed the existence of moral damage and awarded them reparations arguing that "with regard to the victim's other siblings, it is evident that they form part of the family and even when they do not appear to have participated directly in the measures taken in the situation by the mother and by the sister-in-law, this does not mean that they were indifferent to the suffering caused by the loss of their sister, particularly when the circumstances of death were so singularly traumatic".[122]

The Court has continued to apply this presumption to the siblings of disappeared or arbitrarily killed persons[123] as seen in cases like *Pueblo Bello v.*

[120] The obligation to train security personnel is a non-repetition measure while the obligation of the state to investigate, prosecute and punish the perpetrators of gross human rights violations is a satisfaction measure, a non-repetition measure as well as a primary human rights obligation of the State.

[121] International Law Commission, *Draft Articles on State Responsibility*, A/56/10, 2001, commentary to article 30, 89–90.

[122] IACtHR, *Paniagua Morales v. Guatemala*, judgment on reparations, 25 May 2001, para. 110.

[123] The Court, however, has not always been consistent with this rule. In *Gómez Palomino v. Perú*, the State did not recognise its international responsibility for the inhuman treatment that the siblings of the main victim claimed to have suffered as a result of a violation of Art. 5 of the

Colombia[124] or *Goiburú et al v. Paraguay*.[125] It should be noted, however, that the Court seems to be revising the application of this presumption to siblings. For example, in *la Cantuta v. Perú*, ten persons were subjected to disappearance as part of a systematic practice of disappearances within the country.[126] In this case, the Court only deemed some siblings of the direct victims as 'victims' and 'injured parties' based on the fact that there was evidence that they had suffered inhuman treatment and moral damages and not as a result of the Court applying the presumption under discussion.[127] As a result, the Court did not treat other siblings as victims or award them reparations as injured parties because the Court considered that it lacked sufficient evidence to prove damages even though the Commission and the legal representatives of the next of kin found otherwise.[128]

As a result of the decision of the Court in this case, the representatives of the victims requested that the Court interpret different parts of the judgment. In particular, they asked the Court to explain why it did not consider some siblings as victims under article 5.1 of the ACHR and/or as injured parties. The Court reaffirmed its view that in the case of siblings evidence was required to prove damages under article 5.[129] Judge Cançado Trindade clearly states in his concurring opinion that this constitutes a setback in the practice of the Court, especially when the facts of the case were so serious:

> How can an international human rights tribunal such as this Court put upon the [siblings] or their next of kin the *onus probandi* not only of the facts, but of feelings as well? How can it demand from the alleged victims or their next of kin the evidence of a damage that can be considered a non-pecuniary damage? And, even when, with a great effort of the imagination, this was possible, what purpose would

ACHR. The Court, to look at whether they were victims of a violation or Article 5, analysed in detail their relationship with the victim. The distinction between this case and those where the Court applied the presumption for moral damages can be explained because here the Court was dealing with a claim of a violation of a Convention right and not with reparations. If this argument is acceptable, then the IACtHR is not contradicting its jurisprudence with this case. Nevertheless, it should be noted that the Court is not entirely clear when distinguishing the grounds to claim, as the next of kin of a direct victim; that X person has suffered a violation of art. 5 of the ACHR and/or has suffered moral damages. The reasoning of the court in relation to both points tends to overlap.

[124] *Pueblo Bello*, *supra* n. 80, para. 257.

[125] *Goiburú*, *supra* n. 119, para. 159.

[126] IACtHR, *la Cantuta v. Perú*, *supra* n. 113, paras. 216–220.

[127] *Id.*

[128] *Id*, para. 128.

[129] Since the Court is now ready to find that some of the next of kin of the direct victim could also be considered victims, for instance, of inhuman treatment, the prior approach of the court of applying the presumption of suffering to the next of kin (or some of them) when awarding moral damages at the reparations' stage has shifted and is now applied when the Court considers whether such next of kin could be considered as a victim of article 5 of the ACHR (the right to human treatment). Therefore, there seems to be an intrinsic link between moral damages and violations of article 5 of the ACHR.

> it serve, if the determination of the non-pecuniaty damage is normally done through a judgment of equity?
>
> ...
>
> It is possible to imagine, as a general rule, that in our Latin American societies, where family ties are maintained tight (or at least tighter than in other post-industrial social environments), a brother or sister of a person massacred or disappeared will not undergo a personal suffering? Is it possible to imagine, as a general rule, that they will not continue to suffer in the case of a violent death of a brother or sister? Is it possible to imagine, as a general rule, that they will not continue to suffer in the event of a forced disappearance of a brother or sister? For me, this is unimaginable, as a general rule. Even so, this Court stated, in the present case of *la Cantuta*, that it requires additional evidence of the damage to the brothers or sisters of the people illegally detained, executed, and disappeared ...[130]

This position clearly constitutes a setback for the Court. Whenever a sibling of a deceased victim wants to be considered as a 'victim' under article 5 of the ACHR, the onus is on the sibling, his/her legal representative or the Commission to prove that the sibling and the deceased had a very strong emotional bond. A mere consanguinity link will not suffice for this purpose.

This period reflects the IACtHRs' understanding of the terms 'injured party' and 'victim' allowing several conclusions to be drawn. First, the Court accepts the existence of both direct and other (indirect) victims of gross human rights violations regarding disappearances, arbitrary killings, arbitrary detention and inhuman treatment. Thus, the term 'victim' should be understood to mean the person(s) or other members of a community, whose rights under the ACHR or other relevant treaties, have been violated according with decisions or judgments of the Court resulting from:

1) The first and direct infringement of rights of the person (direct victim); and/or
2) New violations resulting from a primary violation (indirect victim).

The second category refers to those persons who suffer inhuman treatment as a result of the arbitrary killing, disappearance of inhuman treatment/arbitrary detention of a beloved one or whom, as a result of subsequent facts to the primary violation, suffer a new violation of their rights as when there is a lack of effective investigation, prosecution and punishment of the perpetrators. The important point is that both direct and indirect victims are 'victims' and not only 'injured parties' for the Court. This has important implications at the reparations stage, as already noted, as they are entitled to more substantial reparations awards

[130] IACtHR, concurring opinion in the interpretation of the judgement in *la Cantuta*, *supra* n. 24, paras. 44, 46.

at least for moral damages. Equally, as we have already seen, the concept of victim extends to members of the community.

Further, the Court recognises the possible existence of potentially identifiable unknown victims that were not duly identified before the Court during the proceedings. The Court also awards them reparations for moral damages as seen in the case of *Mapiripán*. They can have access to such reparations if they prove their identity before domestic institutions in the way required by the Court in the relevant judgment.

Additionally, the analysis above suggests that the Court has deliberately avoided defining the term 'injured party' because the term's vagueness provides the Court with the flexibility to deal with the possible universe of affected persons by gross human rights violations in a better way. Therefore, the term 'injured party' should be read as an umbrella term that covers all those who have been affected by the violations of the ACHR or other applicable treaties as determined by the Court. The concept includes:

i. victims as determined by the Court in the judgment (nowadays the majority of those who receive reparations awards);
ii. the next of kin of victims of gross human rights violations if they have not been considered also as victims (as in the case of *Bámaca Velásquez*);
iii. some of the next of kin as successors/heirs of a deceased person;
iv. dependents (as recognised in the case of *Aloeboetoe*); and
v. members of a community.

Also, the evolution of the case-law within the Inter-American system suggests that the IACtHR has a tendency to treat as 'victims' of violations of rights under the ACHR those formerly treated only as 'injured parties'. However, this does not mean that the term 'injured party' is no longer applicable in the Court's jurisprudence. The term 'injured party' continues to be relevant in cases such as *Bámaca Velásquez* and when dealing with community harm. This is true regardless of recent cases such as *Moiwana* and *Saramaka* that suggest that the Court has moved towards considering members of such communities as 'victims' of violations under the ACHR and not merely as 'injured parties.' It should be noted that the concept is important to grant reparations to members of the extended family, to possible dependents and to others such as eyewitnesses or members of intermediate communities who cannot claim to be indigenous or tribal.

Finally, the IACtHR's recent interpretation in *la Cantuta v. Perú*, represents a serious threat to the achievements mentioned above. The threat comes by virtue of the Court's consideration that two of the siblings of the disappeared did not prove the harm they suffered in order to be treated as victims of violations under article 5 of the ACHR (right to human treatment). In relation to reparations, the Court added the following statement:

> ...the injured party is made up by those people that have been declared victims in the Judgment and in favour of who the Tribunal "[w]ill order[...] that the consequences of the measure or situation that have made up the violation of those rights be repaired.[131] (sic)

If this statement leads to the conclusion that the siblings are not entitled to be deemed as 'injured parties' for reparations because the Court did not consider them as victims, then the Court is contradicting its own case law.[132] The Court has previously recognised persons and even communities, who were not treated as 'victims' as 'injured parties,' in its judgments.[133] If this similarly means the Court has begun to limit the concept of 'injured party' to include only the victims of human rights violations under the ACHR, this should be deemed a monumental step backwards regarding the treatment owed to those subjected to gross and systematic human rights violations, particularly if the Court applies such a rigid burden and standard of proof as seen in the case of *la Cantuta*. The recent case of *Kimel v. Argentina*[134] also uses the same narrow concept of injured party as *la Cantuta*, and confirms the existence of a massive and regrettable change in the jurisprudence of the Court. An expansive concept of 'injured party' vis-à-vis that of 'victim' seems to be important to compensate, as far as possible, the suffering that has been borne by people, beyond those of 'direct victims' and their next of kin, to include other persons and their communities. Such a reading is possible under article 63.1 of the ACHR and as previously noted, has been sustained by the Court in its judgments since it decided its first case.

C. *Conclusions*

This chapter has analysed the terms 'victim' and 'injured party' used by the IACtHR when determining reparations under article 63.1 of the ACHR. Most of the chapter was focused on clarifying the understanding of the Court of these legal concepts as they are the filters that could allow a person to claim and receive reparations by

[131] IACtHR, interpretation of the judgment in *la Cantuta*, *supra* n. 24, para. 31.

[132] The interpretation of the judgment by the Court is confusing as the Court first indicates that they are not victims of article 5 and therefore cannot be treated as injured parties but some paragraphs later it indicates that it considered in the judgment that "all the next of kin", including the two siblings, were victims of violations of articles 8(1) and 25 of the ACHR (right to fair trial and judicial guarantees respectively), and a that as a result they were entitled to reparations as injured parties. Nevertheless, the Court did not award any reparations to them but it recommended in the interpretation of the judgment that they go to the domestic system and claim reparations for such violations. Paras. 33–35.

[133] See e.g., *Bámaca Velásquez*, *supra* n. 86; *Cantoral Benavides v. Perú*, judgment on the merits, 18 August 2000.

[134] IACtHR, *Kimel v. Argentina*, judgment on the merits and reparations, 2 May 2008, para. 102.

the Court. Understanding both concepts is, therefore, of outmost importance for those who suffer the consequences of gross human rights violations.

The practice of the Court contains important elements that should be carefully studied by other international and domestic courts and bodies dealing with similar situations. At the very least, regional human rights courts and domestic bodies in charge of implementing domestic reparations programmes, should broaden the concepts of 'victim' and use the concept of 'injured party' as distinct but related to the former. Indeed, it is clear that when gross violations take place a universe of persons experience suffering and other types of damages. International law has responded in some way or another to the suffering and damages experienced by direct victims and some of the next of kin either as injured parties or as indirect victims. Consequently, others such as members of the extended family such as siblings, members of the community, or eyewitnesses who have suffered (even if to a lesser degree) as a result of gross human rights violations, do not receive reparations. The concept of 'injured party' opens a new opportunity for redress in relation to all those other persons, an option that follows from article 63.1 of the ACHR that refers to 'injured party' and not to 'victim.' Such an approach could become important if combined with a creative approach to possible reparations measures. Here, however, it should be remembered that although the Court has used in its jurisprudence both terms: 'victim' and 'injured party', the latter concept is only used in exceptional cases nowadays and has been used mainly to grant reparations to the next of kin of a direct victim. Therefore, the concept has not been used by the Court in a revolutionary way. On the contrary, the approach of the Court has been timid even if important. Therefore, a more creative use of the latter concept could help to compensate the suffering of people other than victims and their close next of kin. This is a challenge that the IACtHR has to face in the future.

Clarifying the complex relationship and differences between the terms 'injured party' and 'victim' during different moments in the jurisprudence of the Court has made clear that although the two concepts are not equivalent, there is a relationship of dependence between the two of them that should continue to exist. Indeed, the achievements of the Court in terms of reparations for gross human rights violations are not merely the result of the different types of reparations measures it awards but of its understanding of the terms 'victim' and 'injured party' and more importantly, of the combination of the two concepts. Such a conclusion follows from the practice of the Court even if it considers that each case has to be looked at on its own merits at the reparations stage and that the previous treatment of other cases cannot be seen as a precedent for future ones.[135]

[135] *El Amparo*, *supra* n. 44, para. 3; *Neira Alegria v. Perú*, judgment on reparations, 19 September 1996, para. 52.

Despite this caveat, according to the Court the term injured party is an umbrella term that covers: victims (direct and indirect); potential victims; the next of kin of the victims who are not recognised as victims in the judgment; the next of kin of the victims as successors/heirs; dependents; and members of communities. The cases of *la Cantuta* and *Kimel* challenge such a structure, as they consider that 'injured parties' are only the victims of violations of the ACHR as decided by the Court, and no one else.[136]

This recent change jeopardises one of the most valuable contributions the Court has made to reparations for gross human rights violations under international law. Indeed, the combination of the concepts 'victim' and 'injured party' for the purposes of reparations places the work of the Court ahead of the content of the Basic Principles and closer to the understanding of the UN Convention on Disappearances. Indeed, as already noted, the Basic Principles consider as victims any individual and/or collective persons who suffer different types of harm as a result of gross human rights violations or of serious violations of humanitarian law but conditions the treatment of others such as next of kin or dependents to domestic law and to the appropriateness of such treatment. The dichotomy of 'injured party' and 'victim' goes beyond the Basic Principles as it considers that the next of kin of direct victims of gross human rights violations are also victims (at least those members of the nuclear family), that dependents could exist if duly proven and that other members of the extended family could also be victims and exceptionally injured parties. The IACtHR does not condition its understanding of the next of kin to what a state party to the ACHR considers them to be under domestic law. Equally, the Court has extended the concept of victim to 'indirect victims' of arbitrary killings, disappearances and inhuman treatment/arbitrary detention without distinctions based on whether the direct victim of a gross human rights violation is still alive.

The UNCPPED, contains the most generous concept of victims of enforced disappearances. It does not restrict the treatment of a person as a victim to the direct victim or to the next of kin. It provides that "... any individual who has suffered harm as the direct result of an enforced disappearance" could claim to be a victim. Certainly, the Convention appears to go even beyond the IACtHR jurisprudence, at least in what refers to disappearances. However it is still too early to anticipate the understanding that the UNCPPED will have once the Convention enters into force and the Committee on Enforced Disappearances produces an authoritative interpretation of article 24.1 of the Convention. Nevertheless, even if the Committee will interpret the words "direct result" in flexible terms, the Committee is not a Court. The views of the Committee, even

[136] *La Cantuta*, interpretation of the judgment, *supra* n. 25 and 116.

if welcomed, will not be binding on States as are those of the IACtHR in relation to countries that have ratified the ACHR and accepted the jurisdiction of the Court. From this point of view, the current approach of the IACtHR is more significant. It is one of the few regional human rights courts that exist in the world and certainly the only one that has taken very seriously the obligation to afford fair and adequate reparations to those who have suffered gross human rights violations. This is all the more remarkable if it is remembered that the Court is doing so despite the permanent challenges and complaints of States over which the Court has jurisdiction.

This chapter has also drawn attention to the intrinsic relationship that exists between concepts such as 'victim' and 'injured party' and the use of presumptions *juris tantum*. It has been noted that while the Court lacked an enlarged concept of victim (covering direct and indirect victims), the Court used presumptions to consider as injured parties some members of the next of kin of a direct victim of gross human rights violations. This reiterates that more complex elements than the mere definition of victim or injured party are at stake when the identification of victims is taking place. The IACtHR has contributed greatly to international law by establishing a very creative approach and a flexible understanding of evidentiary matters in relation to State liability when gross human rights violations are at stake. The very nature of such violations demands this approach or impunity and lack of reparations for harm suffered would be the rule at the international level in addition to that of the domestic systems. Therefore, it should be regretted that the Court, despite such a well known approach, has decided to move to a more rigid system of standards and burdens of proof as seen in the case of *la Cantuta*.

In connection to this, the Court and its users should bear in mind that although the Court should guarantee equality of arms and fair procedures for both parties in any case, the parties before each case do not have the same *standi* in practical terms as the situation of an alleged victim is notoriously different from that of the State.[137] Such imbalance has to be corrected with the adoption

[137] This is a notorious fact. Most persons who suffer the consequences of gross human rights violations in the hemisphere are persons without economic means to engage in a legal case domestically and even less at the international level. Further, States do not have in place good legal aid systems for such persons and, in many cases, such affected persons do not even know that they can turn to the OAS system for the protection of their rights when domestic remedies are inadequate and/or ineffective. These are just some of the issues that should be borne in mind when the argument that the right of defence of the State might be breached because the Court adopts a victim oriented approach. See, for instance, IACommHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II/doc.68, 20 January 2007, available at: www.cidh.org/women/Access07/tocaccess.htm and the Report on *Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, OEA/Ser.L/V/II.129.Doc.4, 7 September 2007, available at: www.cidh.org/pdf%20files/ACCESS%20TO%20JUSTICE%20DESC.pdf.

of a flexible approach, for instance, to issues such as the identification of victims and, more importantly, to the award of reparations not only to victims (direct and indirect) but of possible injured parties that have not been treated as victims in cases of gross human rights violations.

The chapter has also indicated that the IACtHR uses the concept of 'potentially identifiable' or 'unknown victim' to refer to those persons (direct or indirect victims) whose identity was not established before the Court due to circumstances beyond its control. For example, as when massive displacement occurs resulting from a massacre. Cases like *Plan de Sánchez*, *Moiwana* and *Mapiripán* illustrate the way in which the Court has continued to refine its approach to the issue. In the latter case, the Court acknowledged that such potential victims exist and also awarded them moral damages.

Finally, it is important to note that the achievements of the Court in defining the terms victim/injured party has not been an easy job as the Court has had to face different challenges: from normative to political ones. In relation to the normative ones, the author has shown how the Rules of Procedure of the Court were amended over time with the view to increase the level of participation of victims and their next of kin in the proceedings before the Court. Such reforms have, at the very least, improved the handling of reparations claims. Indeed, it is possible to establish a clear correlation between the standing of victims, their next of kin or their legal representatives at the reparations' stage and the expansion of the concept of 'victim' as their increased participation opened the Court's eyes to the damage they suffered.

Reparation for Gross Violations of Human Rights Law and International Humanitarian Law at the International Court of Justice

*By Conor McCarthy**

A. *Introduction*

The issue of reparation for gross violations of human rights law and international humanitarian law has been placed firmly under the scrutiny of the International Court of Justice (ICJ) in recent years. Three cases in particular have brought questions regarding reparation to increased prominence in the jurisprudence of the Court. These include *Democratic Republic of the Congo v. Uganda*, the *Bosnia-Genocide* case and the *Wall* advisory opinion.[1] In particular, the findings by the Court in the first of these cases indicate some of the many difficult issues which arise in respect of reparation for gross violations of human rights law and humanitarian law. In that case the ICJ found in paragraph four of the judgment's *dispositif* that:

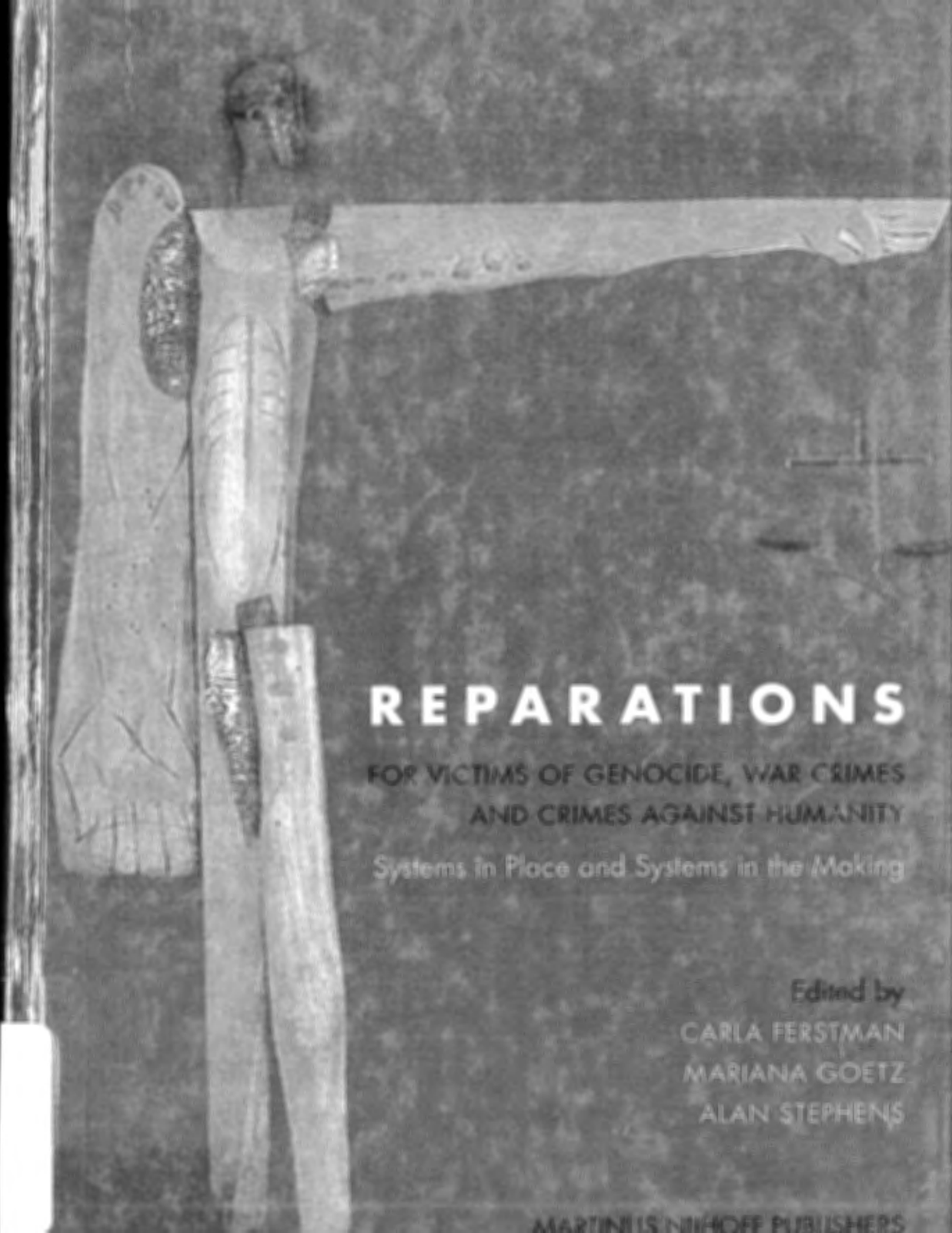
> ...Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law.[2]

* Jesus College, Cambridge.

[1] *Armed Activities in the Democratic Republic of the Congo (Democratic Republic of the Congo v. Uganda) (Merits)*, I.C.J. Reports (2005), 168 [*D.R.C. v. Uganda*]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits)* 26 February 2007 ["*Bosnia-Genocide*" case]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (Advisory Opinion)* I.C.J. Reports (2004) 136 [the "Wall" advisory opinion].

[2] *D.R.C. v. Uganda (Merits), id.*

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 283–312.



REPARATIONS

FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY

Systems in Place and Systems in the Making

Edited by
CARLA FERSTMAN
MARIANA GOETZ
ALAN STEPHENS

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