

BRINGING EFFECTIVE REMEDIES HOME: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM, REPARATIONS, AND THE DUTY OF PREVENTION

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Abstract

This article explores how the Inter-American Court of Human Rights applies pecuniary and non-pecuniary reparations judgments in an effort to compel States to comply with the duty of prevention and non-repetition as embodied in Article 1 of the American Convention of Human Rights. Using Peru as a case study, the author argues that such judgments fail to induce States to guarantee internal domestic remedies, the mechanism used by citizens to check State compliance with the international duty to protect human rights, including the right to reparation, thus creating victim reliance on the Court for redress. In conclusion, the author proposes that the Court begin to use punitive measures in order to compel States to begin erecting internal remedies at home and thus strengthening domestic protection of human rights.

1. INTRODUCTION

The ultimate goal of an international human rights tribunal like the Inter-American Court of Human Rights (hereinafter 'Inter-American Court' or 'the Court') should be to render itself obsolete. In an ideal setting, the Court will have served its purpose the day all member States take every step possible to prevent human rights violations, or when not possible, guarantee their non-repetition by ensuring effective internal remedies that lead to prompt criminal investigations and just compensation for victims, measures that will help deter future violations. As the overarching object and purpose of the American Convention of Human Rights (hereinafter 'American Convention'), prevention and non-repetition should constantly inform the decisions and opinions of the Inter-American Court. That is, as the primary enforcement mechanism of the American Convention, the Court should carry out its work in the best way possible to move us closer to this ultimate goal, no matter how far off this ideal may appear to be.

This article examines how the Court, as a non-penal tribunal, relies on pecuniary and non-pecuniary reparations as its primary tool for inducing States to bring their internal norms, both on paper and in practice, into compliance with the international obligations embodied in the American Convention. As an evolving body of law, reparations, which arise out of the general right to a remedy recognised in international law, have recently gained increased attention but primarily for their restorative justice purposes of compensating victims who are harmed as a result of a

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wrongful act or omission of a State. This general trend plays down the deterrent function of reparations as a means of compelling States to fulfil their international obligations such as those found in the American Convention.

Deterrence occurs when States alter internal policies and practices in order to avoid future scrutiny and costly reparation payments ordered by the Court. In particular, as part of this scheme, States begin to guarantee that remedies in domestic courts are both accessible and effective. Guaranteeing prompt civil and criminal recourse serves both the individual's interest of protecting her right to redress, as well as the community's interest of ensuring the State's compliance with human rights norms, and the prevention of their violation. In other words, every legal claim brought both individually and collectively serves as a constant check on the State's use or abuse of its power. When working optimally, this arrangement eliminates the need of an international entity like the Court to review the State's compliance with international obligations since individuals will have assumed this role.

Relative to other regional systems of human rights, the Court has been credited for being progressive in relation to its landmark reparation judgments, which have contributed greatly to international jurisprudence. The true test of the effectiveness of the Court's use of reparations, however, is its actual impact on the behaviour of States, not only in terms of paying off judgments ordered by the Court but also in erecting human rights protections within their own system, including adequate and effective internal remedies. Yet, as will be discussed, the reparation judgments of the Court have yet to alter the behaviour of member States on a more consistent and systemic level. To support this argument, the author uses the case study of Peru as an example of a State that has begun to pay compensation ordered by the Court while failing to ensure effective domestic remedies for victims of human rights violations at home.

In response to this reality, the author proposes that the Court move away from depending on the strict compensatory rationale that links reparations to the harm suffered by the victim, and instead begin to sanction States for human rights violations just enough to give them incentive to alter their internal practices. If faced by more onerous reparation judgments from the Court, States may be motivated to guarantee the right to a remedy within its domestic jurisdiction, thus eliminating the dependence of victims on the Inter-American Court. Alternatively, until the Court strengthens the deterrence function of its reparation judgments, States may be more likely to comply with the Court's reparation judgments, paying compensation to a handful of successful litigants, while allowing impunity to reign with respect to the majority of other human rights complaints.

In other words, without incentive, there will be no political will to address internal inadequacies of internal remedial mechanisms, nor to erect truly effective internal protections that go towards preventing human rights violations. While it is hoped that States will protect human rights because of their intrinsic value and importance, pragmatism now requires a cost/benefit approach to altering State behaviour; namely by increasing reparation payments as sanctions to persuade States to identify and implement all necessary measures to protect these rights within their territory.

This article recognises that the political feasibility of this proposal is coloured by the practical restraints faced by the Court whose very existence is bound by the realities of a consensual treaty system in which States agree to be subject to the Court's contentious jurisdiction, but in reality face only diplomatic pressure if they

should ignore their international obligations, at which point they may even decide to withdraw their consent altogether. Probably for this reason, the Court has been cautious in its expansion of reparations, for instance avoiding punitive damages altogether and instead relying on more conventional, accepted forms of reparations that nevertheless serve a punitive function while retaining their legitimacy as being compensatory in nature. Time and circumstances, along with judicial honesty, will reveal the true feasibility of this proposal. However, despite the relative youth of the human rights movement, we have been pleasantly surprised by other encroachments on sovereignty. For instance, in 1998 the *Pinochet* Case expanded the extraterritorial reach of jurisdiction in ways never before expected. In fact, 50 years ago, the idea of a State subjecting itself to the scrutiny of an international human rights tribunal stretched the imagination of even the most steadfast idealist.

2. THE OBJECT AND PURPOSE OF THE AMERICAN CONVENTION: PREVENTION AND NON-REPETITION

The concept of prevention and the non-repetition of human rights violations form the bedrock of the American Convention as reflected in Article 1(1) which obliges all State parties ‘to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms...’¹ States do not have a choice in this matter but rather are obliged to protect human rights under both treaty law and customary law,² not just by ensuring investigations of and reparation for human rights violations but also guaranteeing their non repetition.³ As explained by Antonio Augusto Cançado Trindade, current judge of the Court,

The 1948 American Declaration on the Rights and Duties of Man, accompanied by the 1948 Inter-American Charter of Social Guarantees, represents the starting point of the process of generalization of human rights protection on the American continent. The American Declaration, like the Universal Declaration of Human Rights of the same year, comprised a wide range of human rights (civil, political, economic, social, and cultural), *aiming at the protection of human beings not only under certain circumstances or in circumscribed sectors as in the past, but in all circumstances and in all areas of human activity.*⁴

¹ American Convention on Human Rights, 22 November 1969, *International Law Magazine*, Vol. 9, p. 693, OEA/ser.K/XVI/1.1/Doc. 65 (English) Rev.1. Corr.2 (1970) (entered into force 18 July 1978) [hereinafter: the American Convention].

² See *Velásquez Rodríguez* Case, Judgment on the Merits of 29 July 1988, Inter-American Court of Human Rights (Series C), No. 4, paras 164-165 [hereinafter: *Velásquez Rodríguez* Judgment]: ‘The Restatement of the Foreign Relations Law of the United States suggests that a state is obligated to respect the human rights that it has accepted under treaty or “that states generally are bound to respect as a matter of customary international law...”’; Restatement (Third) of the Foreign Relations Law of the United States 701 (1987).

³ *Loayza Tamayo* Case, Reparations Judgment of 27 November 1998, Inter-American Court of Human Rights (Series C), No. 42, para. 85 [hereinafter: *Loayza* Case].

⁴ Cançado Trindade, Antonio Augusto, ‘Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century’, *Tulane Journal of International and Comparative Law*, Vol. 8, 2000, p. 5, at pp. 7-8 (emphasis added).

To actualise the goal of protection as set forth in the American Declaration, the Organization of American States (OAS) created the American Convention on Human Rights, which was adopted on 22 November 1969 and entered into force 18 July 1978.⁵ Article 33 of the American Convention provided for the establishment of the Inter-American Court of Human Rights to assume competence 'with respect to matters relating to the fulfilment of the commitments made by the States parties to this Convention' and resolve cases in which member States allegedly violated their obligations under the American Convention.⁶ Once a State agrees to its contentious jurisdiction, the Court has the power to hear cases of human rights violations brought against it, interpret and apply the obligations set forth in the American Convention and order appropriate, and binding, remedial measures when necessary.⁷

The inception of the Inter-American Court coincided with the prevalence of oppressive dictatorships that produced systematic and gross human rights violations that came to characterise the general political milieu of Latin America during the 1980s and 1990s.⁸ Of the wide continuum of rights covered in the American Convention, it has been the right to life, integrity, and personal liberty, and to the protection of judicial guarantees that have consumed most of the Court's attention.⁹ Given the reality of this situation, the work of the Court has focused on demanding the cessation of violations, such as the release of a person unjustly imprisoned, the localisation of someone disappeared or the prompt investigation of someone tortured or murdered.

Such urgent measures obviously do not prevent the violation that already occurred and for that reason the Court as part of its remedial recommendations has regularly called for guarantees of non-repetition to prevent the future occurrence of such transgressions. Beginning with the first two landmark cases *Velásquez Rodríguez* (1988) and *Godínez Cruz* (1989), the Court established the duty of States to prevent future violations of human rights as essential for fulfilling the requirements to respect and ensure the exercise of fundamental rights as established in Article 1(1) of the Convention.¹⁰ It is through its reparation judgments, however, that the Court wields its power to compel States to comply with this duty.

⁵ For history of the Inter-American Court of Human Rights, see the official website of Court at www.corteidh.or.cr/inf_general/historia.html. See also, generally, Davidson, Scott, *The Inter-American Human Rights System*, Ashgate Publishing Company, Aldershot, 1997.

⁶ American Convention, *supra* note 1, Articles 61, 62 and 63.

⁷ Article 61(3) provides, 'The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.'; American Convention, *supra* note 1.

⁸ Cançado Trindade, *loc.cit.* (note 4), at para. 34.

⁹ King-Hopkins, Kimberly D., 'Inter-American Commission on Human Rights: Is its Bark Worse than its Bite in Resolving Human Rights Disputes?', *Tulsa Law Journal*, Vol. 35, 2000, p. 421, at p. 425.

¹⁰ Cançado Trindade, *loc.cit.* (note 4), at para. 23 (referring to the *Velásquez Rodríguez* Case, compensatory damages, Judgment of 21 July 1989, Inter-American Court of Human Rights (Series C), No. 7 [hereinafter: *Velásquez Rodríguez* Case] and the *Godínez Cruz* Case, compensatory damages, Judgment of 21 July 1989, Inter-American Court of Human Rights (Series C), No. 8 [hereinafter: *Godínez Cruz* Case]).

3. THE TWO FUNCTIONS OF REPARATIONS: REDRESSING HARM AND DETERRING FUTURE VIOLATIONS

The Court writes that reparations, ‘is a generic term that covers the various ways a state may make amends for the international responsibility it has incurred (Restitutio Integrum, payment of compensation, satisfaction, guarantees of non-repetition among others)’.¹¹ However, the development of the law of reparations has led to more refinement of terminology relevant to the field, which is presented here in order to facilitate the discussion on reparations to follow.

‘Reparation’ is generally thought to refer to ‘the range of measures that may be taken in response to an actual or threatened violation; embracing both the substance of relief as well as the procedure through which it may be obtained’.¹² It may consist of economic compensation from the State through civil and/or administrative remedies or criminal investigations and trials to clarify responsibility. ‘Remedy’ or ‘remedies’ refers to ‘the (procedural) means by which a right is enforced, or the means by which a violation of a right is prevented or redressed’.¹³ Thus, the ‘duty to repair’ also includes the obligation to afford an effective route to obtain it. Similarly, redress refers to the action of repairing, restoring or remedying the injury or harm. All of these definitions embrace the compensatory function of reparations.

3.1 *The Compensatory Function of Reparations*

To bring States parties into compliance with their duty under Article 1(1) of the American Convention, the Court relies on its power to order non-penal reparations. Specifically, Article 63(1) of the American Convention prescribes that:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that 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.¹⁴

Pursuant to Article 63(1) the Court, at the time of writing, has issued 21 reparation judgments, seven of which were subject to further interpretation.¹⁵ Credited with one of the more progressive approaches to reparations among the various regional and international human rights systems,¹⁶ the Court has embraced the concept of

¹¹ *Loayza Case*, *supra* note 3, para. 85.

¹² Echeverria, Gabriela, *Reparation: A Sourcebook for Victims of Torture and Other Violations of Human Rights and International Humanitarian Law*, Redress Trust, London, 2003, p. 8. (Adapting terminology from the UN Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law discussed later in this article). Redress document found at: www.redress.org/publications/SourceBook.pdf.

¹³ *Idem*.

¹⁴ American Convention, *supra* note 1.

¹⁵ See www.corteidh.or.cr/serie_c/index.html.

¹⁶ Penrose, Mary Margaret, ‘Impunity – Inertia, Inaction, and Invalidity: A Literature Review’, *Boston International Law Journal*, Vol. 17, 1999, p. 269, at p. 287.

restitutio in integrum as its guiding principle in deciding reparations.¹⁷ *Restitutio in integrum*, in principle, seeks to restore the *status quo ante*, that is, to re-establish the situation to what existed before the commission of the international unlawful act or omission, or where not possible, compensate the victim through the payment for damages. The overarching principle, however, is that '[t]he award of reparations must in effect wipe out all consequences of the illegal act'.¹⁸

Professor Roht-Arriaza points out that the 'basic paradox at the heart of reparations' is that they 'are intended to return the victim to the position he or she would have been in had the violations not occurred – something that is impossible to do'.¹⁹ The Court has recognised this paradox, stating in the *Aloeboetoe* Case that *restitutio in integrum* refers to 'one way in which the effect of an international unlawful act may be redressed, but it is not the only way in which it must be redressed, for in certain cases such reparation may not be possible, sufficient or appropriate'.²⁰

For instance, it would be impossible to reinstitute the pre-existing situation in the case of extra-judicial killings, disappearances, torture and other grave human rights violations. For that reason, the Court, in its reparation decisions, calculates economic values to cover the damages caused by the violation, including physical or mental harm; psychological or physical pain or suffering; loss opportunities including education, loss of wages and the capacity to earn a living; reasonable medical and other expenses in rehabilitation (which can include legal, medical, psychological and other care and services); damages to property, goods and business; damages to reputation or dignity; and reasonable legal and expert fees.²¹

The Right to a Remedy Belongs at Home

The Court in making such orders for reparations through the application of Article 63 of the Convention is in fact merely enforcing victims' rights to a remedy that they could not access in the courts of their own country. The right to an effective remedy can be found in all major international human rights treaties, similar to that found in the Universal Declaration of Human Rights, which provides, '[e]veryone has the right to an effective remedy by the competent national tribunals for acts

¹⁷ Velásquez Rodríguez Case, *supra* note 10, at para. 26.

¹⁸ Pasqualucci, Jo M., 'Victim Reparations In The Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure', *Michigan Journal of International Law*, Vol. 18, No. 1, 1996, p. 25.

¹⁹ Roht-Arriaza, Naomi, 'Reparations Decisions And Dilemmas', *Hastings International and Comparative Law Review*, Vol. 27, Winter 2004, p. 157, at p. 158.

²⁰ *Aloeboetoe et al. Case*, Reparations Judgment of 10 September 1993, Inter-American Court of Human Rights (Series C), No. 15, at para. 49 [hereinafter: *Aloeboetoe Case*].

²¹ See, for example, *Loayza Case*, *supra* note 3, at para. 139 (suffering); *The 'Street Children'*, Reparations Judgment of 26 May 2001, Inter-American Court of Human Rights (Series C), No. 77, at para. 84 (reputation) [hereinafter: *The Street Children Case*]; *El Amparo Case*, Reparations Judgment of 14 September 1996, Inter-American Court of Human Rights (Series C), No. 28, at para. 28 (lost wages) [hereinafter: *El Amparo Case*]; *Castillo Páez Case*, Reparations Judgment of 27 November 1998, Inter-American Court of Human Rights (Series C), No. 34, at paras 112-133 (costs) [hereinafter: *Castillo Páez Case*]. These are also the basic forms of reparations recommended by Special Rapporteur Theo van Boven. See *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, GA Res. 1999/33, UN GAOR, 56th Session, Annex, Agenda Item 11(d), at p. 5, UN Doc. E/CN.4/2000/62 (2000) [hereinafter: *Basic Principles*].

violating the fundamental rights granted him by the constitution or by law'.²² Similarly, Article 25(1) of the American Convention confers on individuals 'the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention'. This article also requires State parties to provide a legal system that possesses authority to enforce reparation judgments issued in favour of victims.²³

Various normative resources also enshrine the concept of a right to redress, such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, unanimously adopted by the General Assembly in 1985, calling on the State to provide restitution when public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws.²⁴ Although not adopted by States in treaty form, the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ('ILC Articles') also serve as an authoritative source on the modern law of reparations, since they codify the basic rules of international law concerning the responsibility of States for their internationally wrongful acts.²⁵

Although the concept of a right to a remedy and reparation dates back to the creation of the human rights system, and has been reinforced in subsequent human rights instruments like the Inter-American Convention, it only began to attract heightened attention starting with the 1990s.²⁶ In 1989, the Sub-Commission of the United Nations Human Rights Commission on Prevention of Discrimination and Protection of Minorities ('Sub-Commission') appointed a Special Rapporteur Mr. Theo van Boven to consider the issue of how to define the basic obligation under international law to ensure effective means of redress for victims of human rights violations.²⁷ In turn, Van Boven, confirmed that '[t]he question of reparation for

²² For further discussion, see Joyner, Christopher C., 'Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability', *Denver Journal of International Law and Policy*, Vol. 26, 1998, p. 591, at p. 592. For an exhaustive list of international human rights treaties which include an 'effective remedy' provision, see introduction to Basic Principles, *supra* note 21.

²³ For further discussion, see Cançado Trindade, *loc.cit.* (note 4), at para. 12.

²⁴ GA Res. 40/34, UN GAOR, 40th Session, Supp. No. 53, at p. 213, UN Doc. A/40/53 (1985).

²⁵ Draft Articles on Responsibility of States for Internationally Wrongful Acts, pt. 2, Articles 28-41, in: *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th Session, Supp. No. 10, at p. 43, UN Doc. A/56/10 (2001) [hereinafter: ILC Draft Articles] visited at www.org.un/law/ilc; also reprinted in: Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002. See, for discussion, Shelton, Dinah, 'Righting Wrongs: Reparations In The Articles On State Responsibility', *American Journal of International Law*, Vol. 96, October 2002, p. 833

²⁶ Roht-Arriaza, Naomi, 'Accountability For International Crime And Serious Violations Of Fundamental Human Rights: Combating Impunity: Some Thoughts On The Way Forward', *Law and Contemporary Problems*, Vol. 59, 1996, p. 93, at p. 93.

²⁷ UN Resolution 1989/13 of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities asked Special Rapporteur Theo van Boven to study the right to restitution, compensation, and rehabilitation for victims of human rights violations. After the production of three successive drafts of basic principles and guidelines, the UN Commission on Human Rights approved Van Boven's final draft in Resolution 1996/35. The UN Commission on Human Rights Resolution 1998/43 appointed Special Rapporteur M.C. Bassiouni to revise Van Boven's final draft, taking into account the views of States and non-governmental organisations. Bassiouni's revision also considered the Basic Principles and Guidelines on Impunity by Special Rapporteur Louis Joinet and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 24.

victims of gross violations of human rights and fundamental freedoms has received insufficient attention and should be addressed more consistently and more thoroughly both in the United Nations and other international organizations, as well as at the national level'.²⁸

For more than a decade, beginning with van Boven's appointment and continuing with the work of his successor Mr. M. Cherif Bassiouni, the body of the draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law were developed through a series of expert meetings, seminars, and State reviews. The development of these Basic Principles helped to stimulate a growing interest among academics and scholars as well as give rise to a coalition of non-governmental organisations from around the world who have followed the development of the Basic Principles, submitting their most recent comments in April 2004.²⁹

The contributions of the international community along with growing jurisprudence from international adjudicating bodies, have helped to solidify universal recognition and acceptance that the right to redress is a fundamental human right. This shift helps communicate that reparations are not left to the discretion of a decision maker or State, nor are they an 'afterthought' in the secondary stage that follows a judgment on the merits based on the violation of more commonly recognised rights like life and liberty. Rather, they are the legal consequences that automatically flow from a breach of an unlawful act under international law, and thus 'every violation of an international obligation creates a duty to make reparation'.³⁰

In fact, the intent behind developing the Basic Principles was not to propose new standards but rather to articulate and codify pre-existing law pertaining to the right to redress.³¹ In effect, the right to reparations has never been just the prerogative of nations but instead a fundamental obligation under treaty and customary law.³² In his report to the Sub-Commission, Special Rapporteur Van Boven underscores the *jus cogen* nature of this obligation, stating

[I]t is generally accepted by authoritative opinion that States not only have the duty to *respect* internationally recognized human rights but also the duty to *ensure* these rights, which may imply an obligation to ensure compliance with

²⁸ Final Report submitted by Mr. Theo van Boven to the 45th Session of the United Nations Commission on Human Rights, UN Doc. E/CN.4/Sub.2/1993/8, para. 136 [hereinafter: 1993 Van Boven Report]. Mr. van Boven repeated this conclusion in later reports, see, for example, Commission of Human Rights Resolution 1997/29.

²⁹ Redress (UK) leads the 'the Reparation Coalition' consisting of a wide representation of human rights groups around the world in order to promote the adoption of the draft of the Basic Principles, *supra* note 21. See generally, www.redress.org/law_reform_advocacy.html, in particular their July 2003 published position paper. During the 60th Session of the Commission on Human Rights, Resolution E/CN.4/2004/L.53 was adopted to convene a third Consultative Meeting to review and finalise the Draft. The Office of the High Commissioner for Human Rights will hold the meeting in November 2004. See www.un.org/News/Press/docs/2004/hrcn1092.doc.htm.

³⁰ See, Shelton, *loc.cit.* (note 25), at pp. 835 and 837-838; and also Tomuschat, Christian, 'Reparation for Victims of Grave Human Rights Violations', *Tulane Journal of International and Comparative Law*, Vol. 10, 2002, p. 157, at p. 160.

³¹ Roht-Arriaza, *loc.cit.* (note 19), at pp. 162-163.

³² The Court established this fact in its first contentious case on Reparations. See *Velásquez Rodríguez* Case, *supra* note 10, para. 25 (citing *Factory at Chorzow*, Jurisdiction, Judgement No. 8, 1927, P.C.I.J., Series A, No. 17, p. 29; *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *I.C.J. Reports*, 1949, p. 184).

international obligations by private persons and an obligation to prevent violations. If Governments fail to apply due diligence in responding adequately to or in structurally preventing human rights violations, they are legally and morally responsible.³³

The Inter-American Court in 1989 clarified this point in its advisory opinion in which it declared, ‘the absence of an effective remedy for violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking’.³⁴

Despite these positive advancements in the acceptance of the right to redress under international law, the realisation of this right at the national level falls short of that contemplated in international law. In response, the Inter-American Court has begun to more clearly articulate the obligation of States to guarantee the right to an effective remedy under Article 25 of the American Convention in combination with the general duty to ensure and protect the enjoyment of human rights under Article 1(1). In the *Baruch Icher Bronstein Case* (2001), the Court stated,

this Court has reiterated that the right of everyone to a simple and prompt recourse or any other recourse to a competent judge or tribunal for protection against acts that violate his fundamental rights is one of the basic pillars, not only of the American Convention but also of the rule of law itself in a democratic society, within the meaning of the Convention (...). By attributing functions of protection to the domestic legislation of the States Parties, Article 25 is closely related to the general obligation in Article 1.1 of the American Convention...³⁵

This language unequivocally reflects the general international consensus that access to an adequate and effective remedy is itself a human right, but also a fundamental feature of a human rights protection system.

3.2. The Deterrence Function of Reparations

Dinah Shelton, a leading authority on the subject of reparations, confirms that despite the centrality of reparations in international law,

jurisprudence and doctrine almost completely fail to discuss the theoretical foundation of or rationale for reparations. The various and potentially conflicting aims of compensatory justice, deterrence, and punishment that could provide a coherent basis for developing detailed rules are largely unexamined, as are contemporary theories of law and economics and

³³ See 1993 Van Boven Report, *supra* note 28, at para. 41 (citing to (Third) Restatement of the Law, para. 702, Reporters’ note 2; and Meron, Theodor, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford, 1989, p. 165).

³⁴ Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, 6 October 1987, Inter-American Court of Human Rights (Series A), No. 9, at para. 24 (emphasis added) [hereinafter: IACHR, Advisory Opinion 9/87].

³⁵ *Icher Bronstein Case*, Judgment of 6 February 2001, Inter-American Court of Human Rights (Series C), No. 74, at para. 135 [hereinafter: *Icher Bronstein Case*].

restorative justice. This gap leaves open the question why and to what extent reparations should be afforded.³⁶

While the theory behind reparations waits to be fully developed, the limited discussion until now recognises, sometimes simply through logical inference, that the duties to conduct criminal investigations of human rights violations and to compensate victims are not only in themselves obligations of States and rights of individuals but also means for ensuring non-repetition of future human rights violations. This symbiotic relationship creates a dual function of reparations, which ‘has the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations’.³⁷

Analysing the ILC’s State Responsibility Articles, Shelton writes, ‘two conceptual premises appear to underlie the reparations articles: (1) the importance of upholding the rule of law in the interest of the international community as a whole, and (2) remedial justice as the goal of reparations for those injured by the breach of an obligation’.³⁸ She highlights a critical point, which is that States owe the ‘duty to repair’ to both the individual and the international community. While the harm to the injured party may at times be distinct from harm to the community, reparations take on importance for both not only in principle but also for utilitarian purposes.

Comments found in the legislative history of the Article 63 reparation provision of the American Convention, indicate that the drafters purposefully made the provision expansive in order to enhance the protection of human rights.³⁹ Similarly, the *travaux préparatoires* of the International Covenant of Civil and Political Rights, which also guards individuals from abuse of the State, recognised that ‘proper enforcement’ depends on guarantees that individuals possess a legal remedy granted by national authorities that would be enforced by the competent authorities.⁴⁰

As recognised by Special Rapporteur Van Boven, compensation or awards granted to an injured party not only redress the damage suffered by the individual, but ‘also do justice to the purposes and principles of the human rights protection system’.⁴¹ In his general recommendations, the Special Rapporteur includes the provision that ‘[t]he question of reparation should be viewed in the overall context of the promotion and protection of human rights and fundamental freedoms and of preventing and correcting human rights abuses’.⁴²

In purely practical terms, the prevention quotient arises out of the cost to the State that paying reparations causes, with economic analysis informing choices of efficiency and changes in the State’s future behaviour.⁴³ The State will take

³⁶ See Shelton, *loc.cit.* (note 25), at p. 837.

³⁷ See 1993 Van Boven Report, *supra* note 28, at para. 136(2).

³⁸ See Shelton, *loc.cit.* (note 25), at p. 838.

³⁹ See, e.g., Liskofsky, Sydney, ‘Report on the Convention on Human Rights adopted by Inter-American Specialized Conference on Human Rights’, reprinted in: Burgenthal, Thomas and Norris, Robert E. (eds), *Human Rights: The Inter-American System*, Booklet 15, Oceana, Dobbs Ferry, 1982 and Supp. 1993, at pp. 87 and 88.

⁴⁰ UN GAOR, 10th Session, Annex, Agenda Item 28, p. 15, UN Doc. A/2929 (1955).

⁴¹ See 1993 Van Boven Report, *supra* note 28, at para. 86.

⁴² *Ibidem*, at para. 136(2).

⁴³ See, e.g., Kaplow, Louis and Shavell, Steven, ‘Accuracy in the Assessment of Damages’, *Journal of Law and Economics*, Vol. 39, 1996, p. 191.

measures to prevent future transgressions in order to avoid future costs of litigation. Mr. Van Boven instructs that, in practice, reparation judgments, or friendly settlements, should not be ‘merely a trade-off’ between the parties, but must contemplate the concerned Government redressing the causes of the violations which may have occurred and taking the necessary measures to prevent the re-occurrence of such violations.⁴⁴

Under this economic paradigm, States may calculate that it is less costly to ensure that their agents, such as special training, conduct themselves in conformity with international human rights norms. Where training fails, investigation and appropriate punishment, perhaps even prosecution, will be consistently applied so that individuals acting on behalf of the State will consider the real consequences of violating rights in the future and hopefully have the incentive not to commit subsequent violations of human rights. In addition, measures include the creation of expeditious and fully effective internal remedies that victims can employ to vindicate their own right to a remedy while also that of society in general, thus exerting pressure on the State to prevent the re-occurrence of violations.

Although never articulating the deterrence purpose of their own reparation orders, the Court nevertheless acknowledges the connection between reparation and prevention. Special Rapporteur Van Boven has interpreted the Inter-American Court’s reparations judgments to clearly serve a prevention function, writing,

[i]n the Court’s approach, which is very similar to the approach of the Human Rights Committee (...) the obligation to prevent and the obligation to restore are closely interlinked. Moreover, it is clear that the preventive approach should receive due priority and emphasis because an ounce of prevention is more effective than a pound of cure. It is also worth noting that among the means of redress the Court mentions in a subsequent order are the investigation of the violations committed, the punishment of the guilty and the provision of adequate compensation. In other words, redress means that full justice should be done vis-à-vis society as a whole, the persons responsible and the victims. Compensatory measures form part of a policy of justice.⁴⁵

The Court, indeed, seems to rely on its own reparation judgments to promote prevention, and thus protection, of human rights, although not expressly so. For instance, the language in the *Velásquez Rodríguez* Case implies the nexus between prevention and redress of violations through effective internal remedies, stating that

[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim compensation.⁴⁶

⁴⁴ See 1993 Van Boven Report, *supra* note 28, at para. 86.

⁴⁵ *Ibidem*, at para. 8.

⁴⁶ See *Velásquez Rodríguez* Judgment, *supra* note 2, at para. 174.

In subsequent decisions, the Court reinforced the links between Article 8(1) (fair trial), Article 25 (judicial remedy) and Article 1(1) of the American Convention, emphasising the need to combat against impunity.⁴⁷ Judges Cançado Trindade and Abreu-Burelli opined in their concurring opinion in the *Loayza Tamayo* Case that, ‘[o]ne cannot thereby deny the close link between the persistence of impunity and the hindering of the very duties of investigation and of reparation, as well as of the guarantee of non-repetition of the harmful facts’.⁴⁸ These decisions and opinions reflect the general understanding that ‘the seeds of future violations are sown, in part, in the failure to come to terms with past cycles of violations (...) and anti-impunity measures are no longer seen as simply a question of national choice’.⁴⁹

However, until recently it has been left to the prerogative of States to decide how to best comply with international law. For this reason, in ordering measures of prevention, supranational review bodies like the Inter-American Court have traditionally applied a cautious, hands-off approach out of respect for the delicate balance of sovereignty that hemlines their power.⁵⁰ For this reason, reparation judgments are often the only leverage available to monitoring bodies like the Court whose purpose is to encourage, perhaps even compel, States to take all necessary steps towards prevention.

Erecting safeguards to ensure prevention is an amorphous and daunting task. It is no doubt the very essence of the work of the human rights movement. In fact, the birth of the international human rights system arose in response to a global and systematic failure to prevent human rights violations. The current persistence of human rights violations worldwide informs us that there is no easy or magical solution for prevention. Interestingly, the Court has recently become bolder in using its power under Article 63(1) to delineate preventive measures that must be executed by States, perhaps in response to their persistent failure to prevent human rights violations.

A decade after the Court linked prevention to criminal investigation, punishment and compensation for victims in the *Velásquez* judgment, it began to order internal reform including, but not limited to, the annulment of trials,⁵¹ annulment of domestic laws due to their incompatibility with the Convention,⁵² the demarcation of indigenous land,⁵³ the making of forced disappearance a domestic crime and training State agents on the phenomenon of disappearance,⁵⁴ the training of members of the Armed Forces on human rights and on international law

⁴⁷ See, for example, *Cesti Hurtado* Case, Reparations Judgment of 31 May 2001, Inter-American Court of Human Rights (Series C), No. 78, at paras 64-66.

⁴⁸ Joint Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu-Burelli in *Loayza* Case, *supra* note 3, at para. 3.

⁴⁹ Roht-Arriaza, *loc.cit.* (note 26), at p. 93. See also Joyner, *loc.cit.* (note 22), at p. 620.

⁵⁰ For further discussion, see paragraph 5 of this article.

⁵¹ *Castillo Petrucci* Case, Judgment of 30 May 1999, Inter-American Court of Human Rights (Series C), No. 52.

⁵² *Barrios Altos* Case, Judgment of 14 March 2001, Inter-American Court of Human Rights (Series C), No. 75 [hereinafter: *Barrios Altos* Case]; *The Last Temptation of Christ* Case, Judgment of 5 February 2001, Inter-American Court of Human Rights (Series C), No. 73.

⁵³ *Mayagna Community (sumo) Awas Tingni* Case, Judgment of 31 August 2001, Inter-American Court of Human Rights (Series C), No. 79.

⁵⁴ *Trujillo Oroza* Case, Judgment of 27 February 2002, Inter-American Court of Human Rights (Series C), No. 92 [hereinafter: *Trujillo* Case].

limitations in the use of force⁵⁵ and even suggesting the contents of amendments to legislation.⁵⁶ While at times provoking the ire of States that view the Court as ‘meddling’ in their internal matters, these decisions have contributed to our understanding of measures that promote the duty of prevention embodied in Article 1 of the American Convention.⁵⁷

However, in these judgments, the Court is simply reinforcing Article 2 of the American Convention, which calls upon States to give domestic legal effect to the rights and freedoms referred to in Article 1 ‘not already ensured by legislative or other provisions’. Judge Cançado Trindade, a consistent advocate of the Court’s order of such measures, views Article 1 – respecting and guaranteeing protected rights – as ‘ineluctably intertwined’ with Article 2 – harmonising domestic law with the international norms of protection.⁵⁸ According to the Court, the obligation of ensuring respect for human rights – which underlies the duty of prevention – is achieved primarily through complying with ‘the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights’.⁵⁹

This organisation of public protection measures may be legal, political, administrative and cultural in nature, but must be appropriate for not just protecting human rights – preventing their violation – but also for providing adequate recourse when these rights are violated, including the punishment of perpetrators and the indemnification of harm suffered by victims.⁶⁰ In effect, prevention requires erecting effective legal recourse whose absence or inadequate functioning has often been blamed for systematic violations of human rights and the breakdown of the rule of law, especially in Latin American countries whose cases are frequently reviewed by the Inter-American Court.⁶¹ It is a generally accepted phenomenon that ‘periods of mass human rights violations or civil conflict almost always involve inoperative courts...’⁶²

⁵⁵ *Caracazo Case*, Judgment of 29 August 2002, Inter-American Court of Human Rights (Series C), No. 95.

⁵⁶ *Hilaire, Constantine and Benjamin et al. Case*, Judgment of 21 June 2002, Inter-American Court of Human Rights (Series C), No. 94.

⁵⁷ An illustration of this point is the reaction of the Government of Peru to the Court’s order to reform its anti-terrorist laws in the *Loayza Tamayo Case*. See *Loayza Tamayo Case*, Completion of the Sentence Resolution of the Inter American Court of Human Rights of 27 November 2003, at paras 5-9 [hereinafter: *Loayza Compliance Resolution*]. See also discussion below in text corresponding with footnotes 126-134.

⁵⁸ See, for example, Dissenting Opinion of Judge A.A. Cançado Trindade in *Caballero Delgado And Santana Case*, Reparations Judgment of 29 January 1997, Inter-American Court of Human Rights (Series C), No. 31, para. 9 [hereinafter: Cançado dissent, *Delgado Case*].

⁵⁹ See *Velásquez Rodríguez Judgment*, *supra* note 2, para. 166.

⁶⁰ See *ibidem*, at para. 175. For more detailed discussion, see also, Rodríguez Rescia, Victor M., ‘Reparations in the Inter-American System for the Protection Of Human Rights’, *ILSA Journal of International & Comparative Law*, Vol. 5, 1999, p. 583, at pp. 586-587; Penrose, *loc.cit.* (note 16), at pp. 290-291.

⁶¹ See, for example, discussion of the internal conflict in Peru, *Final Report of the Peruvian Truth and Reconciliation Commission Found* at www.cverdad.org.pe/ifinal/conclusiones.php [hereinafter: Final Report Peru Truth Commission].

⁶² Roht-Arriaza, *loc.cit.* (note 19), at p. 165.

The early 19th Century landmark United States Supreme Court ruling *Marbury vs Madison*⁶³ established the necessity of judicial review – resorting to the courts to vindicate one’s rights – as a principal remedy against governmental violation of constitutional rights.⁶⁴ Without judicial review and subsequent enforcement, the fundamental maxim of law *ubi ius, ibi remedium* – where there is a right, there is a remedy – becomes meaningless. Moreover, judicial review also ensures that other legal and political reforms instituted by the State, like those recommended by the Court, will conform both on paper and in practice with the State’s international obligations. For example, the United States civil rights movement was greatly influenced through impact litigation brought under the Federal Civil Rights Act of 1964, and provides an illustration of how using internal remedies can alter internal domestic practices and policies.⁶⁵ By providing effective domestic remedies, States take concrete steps towards the prevention of future human rights violations, and thus make the good faith (*pacta sunt servanda*) efforts obligated under international law to comply with under Article 1(1) of the American Convention to ensure every person’s enjoyment of his or her human rights.⁶⁶

Through earlier dissenting opinions, Judge Cançado Trindade took an emphatic position on the affirmative duty emanating from Article 2 of the American Convention, contending,

[t]he efficacy of human rights treaties is measured, to a large extent, by their impact upon the domestic law of the States Parties. It cannot be legitimately expected that a human rights treaty be ‘adapted’ to the conditions prevailing within each country, as, a contrario sensu, it ought to have the effect of improving the conditions of exercise of the rights it protects in the ambit of the domestic law of the States Parties.⁶⁷

Judge Cançado Trindade’s test measures the efficacy of human rights protection within State territory on the actual effectiveness of internal mechanisms and

⁶³ 5 U.S. (1 Cranch) 137 (1803).

⁶⁴ *Ibidem*, at 177.

⁶⁵ See Paterson, Eva, ‘Brown at Fifty: Fulfilling the Promise’, *The Recorder*, 14 May 2004, visited at www.equaljusticesociety.org/press_recorder_2004_may_14.html; Civil Rights Act of 1964 (Pub. L. 88-352) Volume 42 of the United States Code, beginning at section 2000e. Title VII prohibits employment discrimination based on race, colour, religion, sex and national origin, amended in part through The Civil Rights Act of 1991 (Pub. L. 102-166). Various sections of the law provide for the recovery of compensatory and punitive damages in cases of intentional violations. See, for example, 42 USCS, para. 1981a (2000). See generally, Brooks, Roy L. *et al.*, *Civil Rights Litigation: Cases and Materials. Cases and Perspectives*, Carolina Academic Press, Durham, 2nd ed., 2000, pp. 9-13; D’Angelo, Raymond (ed.), *The American Civil Rights Movement: Readings and Interpretations*, McGraw-Hill, New York, 2001.

⁶⁶ In its various compliance resolutions, the Court has signalled that under Article 27 of the 1969 Vienna Convention, States cannot avoid international responsibilities for reasons of internal order. See *Cantoral Benavides* Case, Completion of Sentence, Resolution of the Inter-American Court of Human Rights, 27 November 2003, at consideration no. 5 (citations to other Court resolutions omitted), citing to International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights), Advisory Opinion Oc-14/94 of 9 December 1994, Series A, No. 14.

⁶⁷ See Cançado dissent, *Delgado* Case, *supra* note 58, at para. 5. See also his Dissenting Opinion in the *El Amparo* Case, *supra* note 21.

measures used to alter internal State practices. In fact, assessing the existence of adequate and expeditious remedies within the national borders, as required by Article 2, provides a direct assessment of the degree to which States are complying with the prevention/protection duty under the American Convention as embodied in Article 1(1).

Using Peru as an example, however, one can detect an undesirable trend in which States may comply with judgments issued by the Court in individual cases but not necessarily guarantee general access to internal redress for all victims, such as through criminal investigations and prosecutions as well as victim compensation. As a result, human rights victims in Peru have come to believe that only through the Inter-American System will they receive reparations. This dependency, in effect, further undermines the effectiveness, and even legitimacy, of redress in Peru's domestic context since these procedures become nothing more than a tedious step to arrive at the doors of the Inter-American Commission of Human Rights (the 'Commission') and, in some cases, the Inter-American Court.

4. A GLITCH IN THE SYSTEM? VICTIM RELIANCE ON THE COURT FOR REPARATIONS

Technically, the design of a regional human rights treaty system, like that of the Inter-American System, includes an international tribunal, such as the Court, as a last resort. The Court is never supposed to become a regular appeals court or final instance, such as found in the highest court of a State. Quasi-judicial or judicial organs that exercise regional supervision of alleged human rights violations must be subsidiary to that of the State,

not only in the sense that domestic remedies must exist, but also that human rights should be enjoyed, in principle, without the need to resort continuously to the regional enforcement mechanisms. The international human rights system (...) can never replace, on a regular basis, the task of states of respecting and guaranteeing human rights. Like any other system of international supervision, it is supposed to operate when national mechanisms, including legislative mechanisms, have failed in the ultimate sense, but not when they fail as a matter of course.⁶⁸

National courts should always be given priority jurisdiction, and international tribunals should play a temporary role when domestic remedies are unavailable and/or ineffective.⁶⁹ This concept is embodied in the 'exhaustion of domestic remedies' requirement outlined in Articles 46(1)(a) and 46(2) of the American Convention that must be satisfied before the Commission and then the Court, under its contentious jurisdiction, will accept the case.⁷⁰ These articles are more than just procedural requirements; rather, they reflect the overarching point of a regional

⁶⁸ Medina, Cecilia, 'Introduction to the Symposium: Toward Effectiveness in the Protection of Human Rights in the Americas', *Transnational Law & Contemporary Problems*, Vol. 8, 1998, p. 337, at p. 338.

⁶⁹ Joyner, *loc.cit.* (note 22), at p. 618.

⁷⁰ American Convention, *supra* note 1.

human rights system being a temporary instrument when domestic systems fail to address a victim's right to a remedy.⁷¹

In this way, the status of internal mechanisms, whether they are available and effective, serves as an important evaluation of a State's compliance with its obligation under Article 1(1) of the Convention. Unfortunately, the current situation of Latin American nations like Peru is one in which they fail as a matter of course to guarantee domestic remedies. Even in the rare case where a law establishes the right to reparation, making it technically available, the national courts rarely apply it effectively.

4.1. The Case of Peru: Creating a Milieu of Human Rights Protection

Peru provides a case study of a nation which has suddenly begun to demonstrate increased cooperation with the orders of the Inter-American Court, but continues to fail in guaranteeing effective remedies at home. Specifically, Peru entered a stage of transitional justice in 2000 when former authoritarian ruler Alberto Fujimori was forced from office after the revelation of a series of corruption scandals, sending significant army generals and politicians to jail and providing the political opening for a new commitment to democracy, the rule of law and respect for human rights.

As one significant gesture to demonstrate this new commitment, the Government made payment of outstanding reparations judgments ordered by the Court, resulting in a handful of substantial indemnifications.⁷² In addition, the State established the Inter-Institutional Working Commission to Follow-Up the Recommendations Made by the Inter-American Commission of Human Rights ('Working Commission') to handle the large number of friendly settlements (a total of 159) ordered by the Inter-American Commission with the task of designing 'an integral non-monetary reparations program', in part to avoid the cases being brought to the Court.⁷³

As another significant signal of a new commitment to democratic change, interim president Valentín Paniagua established the Truth and Reconciliation Commission (TRC) through an executive decree in 2001. The TRC called for clarifying the processes, facts and responsibilities of the violence and human rights violations that ravaged the country from 1980 until 2000 and were attributable to terrorist organisations as well as agents of the State. When the TRC concluded its

⁷¹ *Velásquez Rodríguez* Case, Preliminary Exceptions, 26 June 1987, Inter-American Court of Human Rights (Series C), No. 1, para. 91. See in this connection also *Judicial Guarantees during States of Emergency* (Articles 27(2), 25 and 8 of the American Convention on Human Rights), IACHR, Advisory Opinion 9/87, *supra* note 34, at para. 24.

⁷² Letter to the Manuel Ventura Robles, Secretary of the Inter-American Court for Human Rights from Marcela Arriola Espino, Executive Secretary of the National Council of Human Rights (Miraflores, Peru, 28 November 2002) [hereinafter: Arriola Espino letter] (letter on file with the author). Also see the text corresponding with notes 125-130 in this article, for fuller discussion of Peru's withdrawal from the Court's contentious jurisdiction. See, for examples, *Castillo Páez* Case, Compliance with the Sentence Resolution of the Inter-American Court of Human Rights, 27 November 2003, at paras 9-12 [hereinafter: *Castillo* Compliance Resolution]; *Loayza Tamayo* Case, see *Loayza* Compliance Resolution, *supra* note 57, at para. 26; *Neira Alegria and others*, Compliance with the Sentence Resolution of the Inter American Court of Human Rights, 28 November 2002, at para. 29.

⁷³ Supreme Decree 005-2002-JUS published on 25 February 2002; modified by Supreme Decree No. 006-2002-JUS (1 March 2002).

two-year investigation in August 2003, it produced nine volumes based on 16,917 testimonies, 14 public hearings, and hundreds of archives produced by not only the Peruvian Government but also that of the US State Department.⁷⁴

The TRC estimated that approximately 69,280 people had been killed during Peru's 20-year internal conflict, making it the country's most deadly war. In the section of the Final Report addressing the issue of accountability, the Commissioners state that the terrorist group Sendero Luminoso was responsible for 54 per cent of the deaths and disappearances reported to the TRC, and the armed forces were responsible for 36 per cent. In addition, it estimated that thousands of victims were tortured, raped, unjustly and arbitrarily imprisoned on charges of terrorism and disappeared.⁷⁵

As part of its mandate, the TRC was charged with elaborating proposals for providing measures to repair the harm caused to these victims and their families, as well as recommending institutional, legal, educational and other reforms as guarantees of prevention. As a consequence, it produced the Program of Integral Reparations (PIR), one of the most comprehensive truth commission reparation programs to date, including symbolic reparations (*e.g.* public gestures, acts of recognition, memorials *etc.*), reparations in the form of services like health and education, restitution of citizen rights, individualised economic reparations, and collective, community-wide reparations.⁷⁶ The TRC also presented 43 cases to the Public Minister's Office for further criminal investigation, many of which were already cases that had been presented to the Inter-American Court such as the *Barrios Altos* Case and *La Cantuta* Case.⁷⁷

4.2. Even if Available, Domestic Remedies are Not Effective

Despite the large numbers of victims revealed by the TRC, virtually none of them won compensation through civil claims or saw perpetrators sent to jail for their crimes during Peru's 20-year conflict. In fact, the TRC acknowledged that the lack of effective remedies contributed to the impunity that permitted the systemic and grave human rights violations that arose out of the prolonged and devastating conflict. Even with Peru's break from the past and its commitment to address past violations, the author has observed through her own research and work in Peru, that remedies for human rights violations in Peru are both largely unavailable and ineffective even four years after the transition began.⁷⁸

This observation contrasts with the ideals set by the work of the TRC. In its Program of Integral Reparations, the Peruvian Truth Commission explained, 'the

⁷⁴ 'Conclusiones Generales Del Informe Final de la CVR' [General conclusions of the Final Report of the TRC], in: Final Report Peru Truth Commission, *supra* note 61.

⁷⁵ *Idem*.

⁷⁶ 'Programa Integral de Reparaciones' [Integral programme of reparations], in: *ibidem*, at Tome IX/sec 2.2.

⁷⁷ 'Los casos Investigados por la CVR' [Cases investigated by the TRC], in: *ibidem*, at Tome VII/sec 2.22 and 2.45.

⁷⁸ Comments and analysis of domestic remedies in Peru based on study and observation conducted on site by the author from January 2002 up until publication. With a few exceptions, most interviews were conducted under the promise of confidentiality, thus names will not be used (transcripts on file with the author).

obligation to repair is connected as much to internal Peruvian law as to international law'.⁷⁹ It placed special emphasis on the State's responsibility to respect, and make respected, internationally recognised human rights, adding that when a violation cannot be prevented the State has a duty to order a serious investigation, identification and punishment of perpetrators as well as 'the duty to provide reparations to the victims'.⁸⁰ The TRC clarifies that this State responsibility gives rise to a corresponding and unequivocal right of individuals and groups under the State's protection 'to obtain just reparations'.⁸¹

Without Justice for All: the Failure to Investigate and Prosecute Human Rights Violators

Seven months after the TRC concluded its work, the Public Minister's Office announced that only three of the 43 criminal cases presented by the TRC were opened for criminal investigation, the others being archived for lack of evidence.⁸² Around the same time, criminal investigations ordered by the Inter-American Commission, in particular in the 159 cases being negotiated between the State and the petitioners, remained inactive.⁸³ The president of Peru's Constitutional Court even went on record to express his disapproval that the Public Minister's Office had not yet opened investigations in 100 cases of human rights violations.⁸⁴ The 2003 United States State Department Country Reports on Human Rights Practices, released in February 2004, also lists numerous cases of human rights violations in Peru that have never been investigated, or where arrests occurred, but without further progress.⁸⁵

Complicating matters, the Public Minister issued a directive that permitted the application of statutes of limitations to human rights crimes and also declared that only crimes recognised in national law could be prosecuted (most of which were enacted in 1998 towards the end of the conflict).⁸⁶ This order, in fact, affected a criminal investigation opened in 2001 pursuant to the Inter-American Court order in the *Cantoral Benavides* Case⁸⁷ but closed in November 2003 despite evidence held by the Government that implicated the identified perpetrator. In the decision to close the case, the Public Minister's Office explained that the statute of limitations had expired, and that torture had not been encoded as a crime in 1993 when

⁷⁹ See 'Programa Integral de Reparaciones' [Integral programme of reparations], in: Final Report Peru Truth Commission, *supra* note 61, at Tome IX/sec 2.2, at p. 142 (translation by author).

⁸⁰ *Idem* (translation by author).

⁸¹ *Idem* (translation by author).

⁸² Véliz, Ana, 'Si no hay denuncias de fiscales es porque no existen pruebas' [If there are no indictments it is because there is no evidence], *La República*, Lima, Peru, 3 March 2004.

⁸³ 'Deudos reclaman participar en pacificación' [Families insist on participating in pacification], *La República*, Lima, Peru, 20 February 2004.

⁸⁴ 'TC extrañado porque Fiscalía no investiga 100 casos de DDHH' [Constitutional tribunal perturbed because the Attorney General is not investigating 100 human rights cases], *El Correo*, Lima, Peru, 6 March 2004.

⁸⁵ Bureau of Democracy, *Human Rights, and Labor. United States State Department Country Reports on Human Rights Practices - 2003*, 25 February 2004, at www.state.gov/g/drl/rls/hrrpt/2003/27916pf.htm.

⁸⁶ 'Advierten obstáculos en investigaciones sobre DD HH' [Sign of obstacles in the investigation on human rights], *El Peruano*, Lima, Peru, 2 March 2004.

⁸⁷ *Cantoral Benavides*, Judgment on the Merits, 18 August 2000, Inter-American Court of Human Rights (Series C), No. 69, at para. 12.

Cantoral was tortured, thus its application in this case would raise issues of retroactivity.⁸⁸ It should be noted that in March 2003, before the criminal investigation was archived, Peru paid USD 176,000.00 in compensation to *Cantoral* and his family pursuant to the order of the Inter-American Court.⁸⁹

The prosecutor's decision went not only against the judgment of the Inter-American Court in *Cantoral* but also against its March 2001 decision in the case of *Chumbipuma Aguirre and others* ('*Barrios Altos*' vs *Peru*), in which the Court established the inadmissibility of amnesty provisions, statutes of limitations and the establishment of measures designed to eliminate responsibility by impeding the investigation and sanction of perpetrators of grave violations of human rights, including torture, considered to be non-derogable rights in International Law.⁹⁰

Peru's general failure to prosecute perpetrators of torture, although various sources have documented the systematic use of torture by security forces in Peru, provides perhaps the most salient example of how it fails to guarantee adequate and effective remedies in the domestic context.⁹¹ After torture was encoded as a crime in Peru in 1998,⁹² two of a little less than a hundred cases resulted in the conviction of perpetrators of torture by 2000.⁹³ As of 2003, the total number of convictions amounted to just three.⁹⁴

Unjust Compensation: Victims without Indemnification

In November 2003, Peruvian President Alejandro Toledo finally responded the TRC's Program of Integral Reparations (PIR) after numerous consultations and postponements. He presented his 'Plan for Peace and Development', earmarking approximately USD 840 million of foreign economic aid for decentralised investments, activities and services that attend to the conditions of extreme poverty and populations with a high degree of marginalisation to elevate living conditions,

⁸⁸ See Chiara, Walter and Laplante, Lisa, 'Prosecutors in Peru: Testing the Limits of Impunity', *Redress Reparation Report: Bi Annual Journal*, April 2004, visited at: www.redress.org/publications.

⁸⁹ *Cantoral Benavides*, Compliance with the Judgement Resolution, 27 November 2003, at para. 18, visited at: www.corteidh.or.cr/Cumplimientos/Cantoral%2027_11_03.doc. This resolution also details other reparation measures made by Peru in partial compliance with the orders of the Court.

⁹⁰ *Barrios Altos* Case, *supra* note 52, at para. 41. The Court reaffirmed the inadmissibility of statutes of limitations in the *Bulacio* Case, Judgment of 18 September 2003, Inter-American Court of Human Rights (Series C), No. 100, at para. 116. Before the Inter-American Court's ruling, the Constitutional Court of Peru found the amnesty laws unconstitutional but was ignored by the authoritarian regime of former president Alberto Fujimori. Sentencia del Tribunal Constitucional, Exp. No. 013-96-I/TC Lima, 28 April 1997, Fundamento Cuarto.

⁹¹ See, for example, *Report of the Special Rapporteur Sir Nigel S. Rodley*, submitted pursuant to Commission on Human Rights Resolution 1998/38, UN Doc. E/CN.4/1999/61, 12 January 1999, para. 580. See also Inquiry under Article 20: Peru, *Summary account concerning the results of the proceedings concerning the inquiry on Peru*, UN Doc. A/56/4, para. 20, pp. 144-193, 16 May 2001.

⁹² Penal Code of Peru, Title XIV, Capitulo III, Delitos Contra la Humanidad, Article 321 (1998).

⁹³ See IACHR 2000 Report, Chapter 2, paras 44-45 and 50.

⁹⁴ Coordinadora Nacional de Derechos Humanos, *Informe Anual 2003: Año de Avances y Retrocesos en la Vigencia de los Derechos Humanos* [Annual Report 2003: Year of advances and regressions in the protection of human rights] 35, Lima, Peru, 2004, visited at www.dhperu.org/Index.html. For a fuller discussion of the status of reparations for torture in Peru, see Redress, *Reparation for Torture. A Survey of Law and Practice in Thirty Selected Countries*, London, May 2003, visited at: www.redress.org/AuditProjectReport.html.

assure social peace and citizen security.⁹⁵ Toledo omitted any mention of individual economic reparations, sparking harsh criticism from victims who said he was confusing social development with reparations, thus failing the first much anticipated test of the government's political commitment to implementing PIR.⁹⁶

Although they continue to use it as a lobbying tool, victims and advocates remain realistic about the likelihood of obtaining individual economic compensation through PIR. Few human rights victims in Peru have won favourable monetary judgments in vindication of the violations of their rights, although Peru's law recognises such a right through both national and international law. Even among seasoned human rights attorneys in Peru who spoke with the author, hardly any could actually refer to a successful civil reparations case for human rights violations, and in her own investigation the author located only one case in which a woman sued the army for torture that after 8 years of litigation resulted in a favourable judgment, but has yet to be enforced. When informed of this unprecedented case, seasoned human rights lawyers first expressed surprise but quickly distinguished it as an anomaly since the facts indicate that before the legal complaint was filed the army had already admitted to the illicit acts thus making it easier to prove fault and damage.⁹⁷ In general, human rights lawyers in Peru do not even allocate resources towards filing civil claims due to the near impossibility of succeeding.

The prohibitive cost of bringing this type of case dissuades most potential plaintiffs, along with their general lack of faith in the judicial system to protect their rights, a belief confirmed by the small number of successful cases.⁹⁸ Even where plaintiffs may win reparations, they cannot rely on the State apparatus to enforce the judgment.⁹⁹ A victim may also seek economic reparations by joining a civil suit to a criminal case, such as for torture, however this recourse is hardly ever used since there are few prosecutions as discussed above, and even where there is such a case the defendants rarely have the funds to pay the amount of indemnification fixed by the judge.

⁹⁵ 'Pronunciamento del Presidente Alejandro Toledo sobre el Informe de la Comisión de la Verdad y Reconciliación' [Pronouncement of President Alejandro Toledo on the report of the Truth and Reconciliation Commission], 11 November 2003, visited at [www.db.idpproject.org/Sites/idpSurvey.nsf/0F5B71925BF6D160C1256DEF003890AE/\\$file/GoP+truth+comision+21Nov03.pdf](http://www.db.idpproject.org/Sites/idpSurvey.nsf/0F5B71925BF6D160C1256DEF003890AE/$file/GoP+truth+comision+21Nov03.pdf); plan made official through Decreto Supremo No. 092-2003-PCM in *El Peruano* (22 November 2003).

⁹⁶ Laplante, Lisa, 'Reparations is Justice', *LatinamericanPress/Noticias Aliadas*, 18 December 2003.

⁹⁷ *Lucila Qunitanilla Quispe vs Ministerio de Defensa – Ejército Peruano* (Indemnización por Responsabilidad Civil Extracontractual [Indemnification for civil extracontractual responsibility]), Primera Sala Civil de la Corte Superior de Justicia de Lima: No 830-2001 (23 July 2002) (on file with the author).

⁹⁸ In a study conducted by the *Instituto de Investigaciones Económicas y Sociales* (ECOS) in Lima, Peru, 74.2 per cent of Peruvians questioned lacked faith in the judicial system. 'Mayoría desaprueba el Poder Judicial' [Majority disapprove of the judiciary], *El Comercio*, 14 February 2002, www.elcomerciope.com.pe/Online/.

⁹⁹ See IACHR, *op.cit.* (note 93), at paras 231-234. See also Office of the Ombudsman, *Informe Especial 19: Incumplimiento de Sentencias por el Parte de la Administración Estatal* [The failure of the Administration to enforce judgements], Lima, Peru, 1998, visited at www.ombudsman.gob.pe/informes7.htm.

4.3. Peruvian 'Indultados': Proving the Ineffectiveness of Available Remedies

A group of victims in Peru is testing the limits of Peru's commitment to providing remedies for human rights violations. Specifically, hundreds of people who were arbitrarily and unjustly imprisoned for terrorism, during which time the majority was subjected to torture, have won significant legal advances in their search for monetary reparations. However, as will be discussed, their litigation strategy includes, even assumes, that they will need to resort to the Inter-American Court to ultimately vindicate their right to reparation.

The term 'Liberated Innocents' refers to people caught in the wide sweep of the State's 1992 anti-terrorist law, which stripped away fundamental procedural protections, resulting in the unjust imprisonment of hundreds of innocent people. Countless spent many years, sometimes as much as ten, waiting for their vindication. While some of these people were eventually acquitted and released after years of detention at the conclusion of their trial (the *absueltos*), others won their freedom through the review of a special *ad hoc* Commission established in 1996 that used the mechanism of pardon (the *indultados*).¹⁰⁰

The Liberated Innocents, through their domestic litigation, have confronted many of the ways in which domestic remedies are available, but nevertheless ineffective. For example, although in 1988 the Peruvian National Congress created the National Compensation Fund intended to compensate those subjected to arbitrary detention and for judicial error in criminal proceedings,¹⁰¹ this mechanism has lain dormant until present because the legislature never transferred the necessary funds to support it.¹⁰² Even if it were operating, this provision only applies to persons who were acquitted and not pardoned. In response to the absence of an effective remedy, a group of *indultados* filed a claim with the assistance of Peruvian Congresswoman Anel Townsend for reparations. They resorted to the highest court in the nation to clarify their right to reparation after failed attempts to seek recourse in the nation's civil courts.

The Constitutional Court of Peru issued a declaratory judgment in October 2000, acknowledging that the arbitrary arrest and prolonged detention of *indultados* liberated specifically through the *ad hoc* Commission had resulted in lost jobs, interrupted studies, damaged health, break up of families and other damages. The Court invoked both the 1993 Peruvian Constitution as well as international standards to provide a limited right to reparation for this discrete group of victims.¹⁰³ Specifically, the judgment establishes the right to a remedy based on Article 14(6) of the International Covenant on Civil and Political Rights that recognises the right to indemnification when a person has been pardoned through the act of a judicial error (the same right recognised in Article 10 of the American Convention). The Court explained that this international right 'forms part of our rights and has the power of law in conformity with Articles 55 and 200, clause 4 of

¹⁰⁰ *Defensora del Pueblo* [Ombudsman], *La Labor de la Comisión ad-hoc a Favor de los Inocentes en Prisión: Logros y Perspectivas* [The labour of the *ad hoc* Commission in favour of innocents in prison: Accomplishments and perspectives], Lima, Peru, 2000. In all of Peru, there are approximately 800 *indultados*, and an estimated 5,000 *absueltos*.

¹⁰¹ Regulated by Peruvian Public Law No. 24.973, which is based on Article 139(7) of the 1993 Peruvian Constitution.

¹⁰² IACHR 2000, *supra* note 87, at para. 128.

¹⁰³ Tribunal Constitucional de Peru, Expediente 1277-99-AC/TC (27 October 2000).

our Constitution, and is fully enforceable through the present action of compliance'.¹⁰⁴

Despite this legal victory, the victim's effort to apply this declared right is where the remedy unraveled. In its judgment, the Constitutional Court instructed each potential beneficiary to file his or her claim for damages to the civil courts for a determination of compensation owed. Among the handful of *indultados* who could afford the steep court fees to file such a claim, their inability to prove damages, usually due to the lack of documentary evidence, a paper trail of their losses, resulted in the dismissal of their cases. The majority of other potential applicants missed their opportunity for seeking redress either because they never learned of the Constitutional Court's judgment or feared filing their claim since the declaratory judgment was issued when the repressive regime of Fujimori was still in power.

In January 2003, another group of Liberated Innocents, comprised of both *indultados* and *absueltos*, approached various legal human rights organisations in Peru that had helped secure their release from prison in order to request their legal representation in their civil claims for compensation. The response was negative, mostly because these organisations consisted of seasoned criminal lawyers with no experience in civil litigation. Moreover, the forecast for these civil claims was negative given the few successful cases to date, thus hardly justifying the use of scarce resources for this cause.

Nevertheless, the Liberated Innocents took it upon themselves to teach themselves how to file six group claims as a solution to their inability to pay expensive court fees, and presented novel arguments to respond to why they filed beyond the country's two-year statute of limitations for civil claims. Learning from the previous unsuccessful claims, they even decided to omit actual material losses (*daño emergente/damnum emergens*) to avoid the same issues of evidence and proof of damages, and instead included only a calculated value for each month in captivity (*lucro cesante/lucrum cessans*) based on the minimum indexed salary for every month of unjust deprivation of liberty as well as moral damages, which they knew did not require specific proof according to the Inter-American Court.

At the time of publication, the results of these cases have been mixed. A typical response by the presiding judges has been to overlook the statute of limitation, but refuse to admit a collective claim arguing that damage could only be determined on an individual basis; some judges would not waive the fee for proceeding with the case (10 per cent of the total damages requested, a prohibitive cost for this largely indigent population). In response to these outcomes, one *indultado* who spearheaded this litigation, located an advisory opinion of the Inter-American Court that clarified how the inability to pay litigation fees is an exception to the exhaustion of domestic remedies requirement, and was preparing to file their complaint with the Inter-American Commission with the hopes of eventually reaching the Court.¹⁰⁵ Throughout the entire planning and filing of these cases, this group of Liberated Innocents moderated their expectations of winning reparations through domestic remedies, and early on they encountered limitations that led them to view domestic

¹⁰⁴ *Idem*. Translated by author from original text of judgment, p. 2.

¹⁰⁵ Exceptions to the Exhaustion of Domestic Remedies (Articles 46(1), 46(2)(A) and 46(2)(B) of the American Convention on Human Rights), Advisory Opinion OC-11/90, 10 August 1990, Inter-American Court of Human Rights (Series A), No. 11.

remedies as ineffective redress in affording them justice. Soon after, they began to anticipate and plan on resorting to the Inter-American system. They clearly understood, however, the need to continue with their cases in order to exhaust their domestic remedies.

Protecting the Right to a Remedy at Home

The legal argument in all of the claims of the Liberated Innocents is that the government owes them reparation, a right found in national and international law. Their argument to the Inter-American Commission will be that the State failed to guarantee their right to a remedy under Article 25 of the American Convention. While there have been more international cases related to a right to a remedy by challenging a State's failure to conduct criminal investigations of human rights violations, there are still virtually none contending that a State denied civil remedies such as those for restitution and compensation for human rights violations. States often frame compensation as a political decision weighed among competing social needs, pointing to the impossibility of making payments that require a reallocation of scarce resources in countries often already facing economic hardship. Moreover, when part of litigation, the subject of reparations is usually handled subsequent to initial determinations of a breach of a 'primary' substantive obligation that caused an injury. In other words, historically, the failure to provide reparations has not been considered as an independent cause of action.

This traditional approach may be changing. In fact, the Court wrote in its advisory opinion that 'respect' and 'ensure' provisions of Article 1 of the American Convention requires the State,

to take all necessary measures to remove any impediments which might exist that would prevent individuals from enjoying the rights the Convention guarantees. Any state which tolerates circumstances or conditions that prevent individuals from having recourse to the legal remedies designed to protect their rights is consequently in violation of Article 1(1) of the Convention.¹⁰⁶

When framed as a right, victim compensation for unlawful acts of the State can no longer be left to political discretion but rather is a legal duty. In a recent decision involving a petitioner who had been unjustly imprisoned under Peru's 1992 Anti-terrorism laws but released through a special repentance law (and thus not part of the Liberated Innocents), the Inter-American Commission acknowledged that the Inter-American Court's exhaustion of domestic remedies requirement in Article 46(2) 'is closely linked to the determination of possible violations of certain rights enshrined in the American Convention, such as the right to a fair trial and the right to judicial protection enshrined in Articles 8 and 25'.¹⁰⁷

While maintaining that this procedural requirement stands apart from the substantive norms of the American Convention, and should be decided beforehand

¹⁰⁶ Exceptions to the Exhaustion of Domestic Remedies, *supra* (note 105), at para. 34.

¹⁰⁷ *Luis Antonio Galindo Cardenas vs Peru* (Petition 11.568), Admissibility Decision, 27 February 2004, IACHR Report No. 14/04, para. 45. The Court established this principle early on in the *Fairen Garbi and Solis Corrales* Case, Judgment of 15 March 1989, Inter-American Court of Human Rights (Series C), No. 6, at paras 86 and 87 (1989).

and separately from the substance of the case, the Commission nonetheless clarifies that

the causes and effects that have prevented the exhaustion of the remedies under domestic law in Peru with respect to the present case will be examined in the report to be adopted by IACHR on the substance of the dispute, with a view to determining whether they indeed constituted violations of the American Convention.¹⁰⁸

The Liberated Innocents plan to test further how the procedural requirements of an effective domestic remedy are in fact substantive rights under the American Convention.

Victims without Choice? Peru's Failure to Repair

The Liberated Innocents, probably like other victims of human rights violations in Peru frustrated in their search for justice, feel justified in resorting to the international system. Their experience informs them that their government lacks the political will to provide just reparations for the unlawful harm caused by its policies and agents. Although the Truth Commission contemplated the Liberated Innocents as beneficiaries of the economic compensation included in their Program for Integral Reparations, the Government has made no effort to implement the specific provisions related to them.

Even before the TRC's recommended measures, the Government had already formed the *Comisión Especial de Asistencia a los Indultados Inocentes* (CEAII) (Special Commission for the Assistance of Pardoned Innocents) on 15 January 2002 through the lobbying efforts of the *indultados*.¹⁰⁹ CEAII was charged with the purpose of studying the situation of the *indultados* with the intent of designing a non-pecuniary reparations program, specifically referred to as the *Programa Integral de Reparaciones No Dinerarias* (Integral Program of Non Monetary Reparations), which would prioritise plans for health, employment, access to post secondary education and housing.

Many *indultados* feel indignant that the recommendations covered mostly public services that they believe were pre-existing entitlements, like education and health, already owed by the government as separate rights and thus not capable of replacing the right to reparations for the violation of their due process rights and unlawful and arbitrary imprisonment. Their reaction confirms the warning of commentators about the dilemma presented by non-monetary reparation schemes that 'conflate two separate obligations of government: to make reparation for wrongs it committed, and to provide essential services to the population'.¹¹⁰

Adding salt to the wound, the *indultados* point out that even these benefits have been poorly implemented. Once CEAII issued its final recommendations

¹⁰⁸ *Ibidem*, at para. 46.

¹⁰⁹ Created through Supreme Decree No. 002-2002-JUS (15 January 2002).

¹¹⁰ Roht-Arriaza, *loc.cit.* (note 19), at p. 188. For a thorough discussion on the problems of confusing social development with reparations, see Magarrell, Lisa, *Reparations for massive or widespread human rights violations: Sorting out claims for reparations and the struggle for social justice*, Paper presented at Commonwealth Legal Education Association Conference, Ontario, Canada, 12 June 2003 (on file with the author).

in September 2002,¹¹¹ various ministries responsible for implementing them lacked the will or understanding to do so fully, greatly disappointing the beneficiaries. For instance, while the CEAI's final recommendations included a provision for *vivienda* (housing), the language of this provision implies that housing would only be given to those *indultados* who did not already own their own property.¹¹² This condition undermined the value of the reparation as an acknowledgement of the right violated since technically reparation for a human rights violation is not need based. Furthermore, the government decided to give the beneficiaries only land, leaving it to the victims to find the resources for not only housing but also the costs of legalising the land. As of May 2004, the government had still not transferred title to this land, forcing the *indultados* to occupy it to prevent possession transferring to squatters. The government disapproved of their initiative but made no attempt to transfer title to the land that was intended as reparation for the harm it caused to these victims.

A rather sad irony should be noted regarding the *absueltos*, who suffered the same violations as the *indultados*, but who differ only in the manner in which they were released from prison. They were not included in the Constitutional Court's Declaratory Judgment nor in the CEAI's study, and thus find themselves in even greater disadvantage in claiming their right to a remedy. After encountering their own frustrations with redress in Peru, they too plan on resorting to the Inter-American system for redress.

4.4. A Precarious Situation: Victim Reliance on the Inter-American System

As evidenced by the preceding discussion, Peru, like many of its Latin American neighbours, faces a host of obstacles that undermine a victim's access to redress such as, 'statutory limitations; restrictions in the definition of the scope and nature of the violations; the failure on the part of authorities to acknowledge certain types of serious violations; the operation of amnesty laws; the restrictive attitude of courts; the incapability of certain groups of victims to present and to pursue their claims; lack of economic and financial resources'.¹¹³

Given these obstacles, significant monetary damages in Peru have been paid usually pursuant to an order of the Inter-American Court or a friendly agreement brokered by the Inter-American Commission.¹¹⁴ In fact, the reliance of Peruvian victims in Peru on the Inter-American System for redress is reflected by the relatively high proportion of cases against Peru in the Court's docket brought to date (see Table 1).

¹¹¹ *Informe Final de la Comision Especial de Asistencia a Los Indultados Inocentes (CEAI)*, Creado Por D.S. No. 002-2002-JUS (on file with the author).

¹¹² The recommendation reads, 'there exist pardoned innocents who for distinct circumstances lack their own housing, and for that reason the Peruvian State has considered awarding a non pecuniary reparation oriented towards satisfying this basic necessity' (emphasis added) (translated by author from original text); *ibidem*, at Anexo No. 8, p. 51.

¹¹³ See 1993 Van Boven Report, *supra* note 28, at para. 124.

¹¹⁴ Arriola Espino letter, *supra* note 72.

Table 1: Inter-American Court Cases by State
 (source: www.corteidh.or.cr/paises/index.html)

| Country | Total cases / just admitted, no published materials | Number of cases resulting in contentious reparation judgments |
|--|---|---|
| 1 Peru | 16/4 | 8 |
| 2 Argentina | 4 | 1 |
| 3 Uruguay | 0 | |
| 4 Paraguay | 3/3 | |
| 5 Chile | 1 | |
| 6 Bolivia | 1 | |
| 7 Brazil | 0 | |
| 8 Ecuador | 4/2 | 1 |
| 9 Colombia | 4/2 | 2 |
| 10 Suriname | 3/1 | 1 |
| 11 Venezuela | 2 | 2 |
| 12 Panama | 1 | |
| 13 Granada | 0 | |
| 14 Trinidad y Tobago | 4/1 | |
| 15 Costa Rica | 1/1 | |
| 16 Dominica Barbados | 0 | |
| 17 Dominican Republic | 1/1 | |
| 18 Haiti | 0 | |
| 19 Jamaica | 0 | |
| 20 Honduras | 5/1 | 2 |
| 21 Nicaragua | 3/1 | |
| 22 El Salvador | 1/1 | |
| 23 Guatemala | 9/1 | 4 |
| 24 Mexico | 1/1 | |
| Canada, USA, Belize, Bahamas, and Guyana have not ratified the American Convention | | |

As illustrated in Table 1, 16 of the 64 cases accepted thus far by the Inter-American Court were brought against Peru, with only Guatemala coming in a close second with 9 cases. On average, every other member State accounts for two to four cases.¹¹⁵ Significantly, of the 19 contentious sentences decided by the Court specifically on reparations, eight are against Peru.

As mentioned, Peru's compliance with the reparation judgments ordered by the Inter-American Court and Commission is partial adherence to its duty to respect and ensure human rights. However, the fact that victims still rely on the Court to win redress shows that ultimately Peru is still not fully complying with Article 1(1) of the American Convention. In fact, when reading the occasional newspaper headline that a human rights victim in Peru won thousands of dollars in reparations from the

¹¹⁵ See www.corteidh.or.cr/serie_c/index.html.

Inter-American Court or Commission, similarly situated victims feel resentment, noting that they have gone without equal compensation. A significant number of these victims are becoming astute, planning their own trips to the Inter-American System. Without effective domestic remedies, these human rights victims view the Court as the only feasible means of administering justice, especially in terms of economic compensation.

As a consequence, victim groups in Peru observed by the author consciously plan litigation with the intention of satisfying the requirement of exhausting internal remedies, which they presume to be unavailable and/or ineffective, a belief usually validated through their personal experience, in order to bring their complaint to the Court. When speaking with these victims, it is clear that many do not realise that the Inter-American system is structured in a way that not every case can reach the Court, rather only those recommended by the Commission. Moreover, they do not necessarily comprehend that the Court is designed to deal with individual violations and not large-scale violations, such as results from a governmental policy of gross and systematic human rights abuses.

Without the basis to bring a class action type of suit, the Court can only order reparation payments for the injured party in the case before it.¹¹⁶ Therefore, for the few cases that make it to this international forum, there are hundreds of others that will never be heard. In the end, most human rights victims will go uncompensated. While the ideal way to handle situations of massive violations would be a State administrated compensation scheme, such as that recommended by the Peruvian Truth Commission, history has shown that such a remedy is rare and usually delayed.¹¹⁷

Aside from the obvious issues related to legal principles as well as humanitarian concerns for victim suffering, one negative consequence of the majority of victims going without reparations is the weakening of the deterrence function to induce States to bring their internal practices in line with Article 1 of the American Convention. Escaping payment for their breaches of international law, the State will never feel the full economic brunt and will most likely be less deterred to prevent future violations, that is, they will not be motivated to take the necessary steps to ensure non-repetition, including the provision of available and effective domestic remedies. Not able to exercise their right to a remedy, victims will have no way to check on government compliance with international obligations. One can see that in this scenario, a vicious cycle ensues.

The reliance of victims of human rights violations on the Court as a last hope for reparations creates a precarious situation. Relatively speaking, the Court, and the human rights movement, in general, are still in the infancy stage, but we still do not know if victims' dependence on the Court is just a passing phase – a small glitch in the system – in the ongoing evolution of human rights protection. If it is not a temporary step in the eventual integration of international human rights law in domestic systems, and instead is a permanent flaw in the system, the object and purpose of the American Convention ultimately will be undermined. The Court will become more than an instrument to compel States to ensure internal protection of human rights under Article 1(1) of the American Convention and instead will become a *de facto* court of final appeal.

¹¹⁶ Pasqualucci, *loc.cit.* (note 18), at pp. 6-7.

¹¹⁷ Roht-Arriaza, *loc.cit.* (note 19), at p. 165.

This concern reverberates with that of Judge Cançado Trindade, who writes,

It is indeed surprising, and regrettable, that, at the end of five decades of evolution of the International Law of Human Rights, doctrine has not yet sufficiently and satisfactorily examined and developed the extent and consequences of the interrelations between the general duties to respect and to ensure respect for the protected rights and to harmonize the domestic legal order with the international norms of protection.¹¹⁸

Judge Cançado Trindade would perhaps agree that it is imperative that more attention be paid to ensuring that the judgments of the Court induce or even mandate States to strengthen their own internal remedies and wean victims from their reliance on the Inter-American System for redress. As one possible approach, this article proposes that the Court must re-examine the purely compensatory rationale for its reparations.

5. STATE NON-COMPLIANCE: FAILURE TO GUARANTEE THE RIGHT TO A REMEDY AT HOME

Since the Court's landmark reparation decision in *Valasquez*, it has created a solid body of jurisprudence regarding pecuniary and non-pecuniary reparations. Given the consensual nature of this regional human rights system, however, enforcement of these judgments has come mostly through diplomatic negotiations, protests, international publicity, and political and public sanctions.¹¹⁹ As a consequence, advocates recommend 'softer mechanisms' like monitoring and reporting, dialogue, capacity building and positive inducements to promote changes in State behaviour and to increase compliance, preferring measures of incentive over those of coercion.¹²⁰ There exists great caution in overstepping the boundaries of State sovereignty as reflected in Article 37(3) of the ILC's Draft Articles of State Responsibility which counsel against reparations that are either disproportionate or 'humiliating' to the responsible State.

The peculiar nature of the international legal system contributes to the sometimes awkwardness of the Court's judgments, since it

is not 'law' in the traditional legislative or penal sense. Rather, the essential format governing international treaty relations, the primary source of international law, is consensual – states either agree or refuse to be bound by a particular set of rules. Despite modern attempts to discredit a system based purely on principles of state sovereignty, sovereignty remains the cornerstone of modern international law. Nowhere has the drawback of

¹¹⁸ See Cançado dissent, *Delgado Case*, *supra* note 58, at para. 6.

¹¹⁹ Stephens, Beth, 'Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?', *Albany Law Review*, Vol. 60, 1997, p. 579, at p. 593.

¹²⁰ Alvarez, Jose E., 'Why Nations Behave', *Michigan Journal of International Law*, Vol. 19, 1998, p. 202; Hongju Koh, Harold, 'Why Do Nations Obey International Law?', *Yale Law Journal*, Vol. 106, 1997, p. 273. See Helfer, Laurence R. and Slaughter, Anne-Marie, 'Toward a Theory of Effective Supranational Adjudication', *Yale Law Journal*, Vol. 107, 1997, pp. 273-391.

sovereignty been more evident than in the case of combating impunity for gross violations of human rights.¹²¹

Given the lingering restrictions of sovereignty, the growth of human rights law has relied on diplomatic and political pressure that essentially shames a State to comply with Court orders in order to avoid embarrassing stigmas and tainted relations with other States.¹²²

These political measures often require ‘tremendous political clout’¹²³ and even then, a State may manage to undermine these strategies, such as in the case of Honduras which through its own political manoeuvrings managed to block the Organization of American State’s effort to oversee compliance with the Court’s judgment, perhaps setting a bad example for other States hoping to escape their own obligations.¹²⁴ Or, like in the case of Peru under the dictatorship of former President Fujimori, a State may withdraw its consent altogether to avoid the scrutiny of the Court.¹²⁵

In fact, experience has shown that compliance with international obligations rests greatly upon the political will of the State. When the work of the Court has directly impacted the protection of human rights in Latin America, it often arose out of the voluntary propensity of a government. Given its rocky relationship with the Court, Peru provides an interesting example of when political will makes a difference.¹²⁶ After a series of critical judgments ordered by the Inter-American Court, former president Fujimori withdrew Peru’s consent to the contentious jurisdiction of the Court in July 1999.¹²⁷ Even before it rejected the Inter-American Court’s competence to hear cases against Peru, the Peruvian Government had a spotty record in complying with the reparation judgments ordered by the Court.¹²⁸

When the new democratic government came to power following Fujimori’s flight in 2000, it promptly rejoined the Court as a sign of its commitment to complying with its international obligations, and began to take concrete steps towards fulfilling the Court’s reparation judgments, namely through substantial payments to the petitioners.¹²⁹ Moreover, the Constitutional Court of Peru found the 1992 anti-terrorism law unconstitutional in January 2003, in particular, provisions that granted jurisdiction to military courts.¹³⁰

¹²¹ Penrose, *loc.cit.* (note 16), at pp. 277-278.

¹²² Cassel, Douglass, ‘International Human Rights Law In Practice: Does International Human Rights Law Make a Difference?’, *Chicago Journal of International Law*, Vol. 2, 2001, p. 121, at p. 129.

¹²³ Stephens, *loc.cit.* (note 119), at p. 593.

¹²⁴ Pasqualucci, *loc.cit.* (note 18), at p. 56.

¹²⁵ Cassel, Douglass, ‘Peru Withdraws from the Court: Will the Inter-American Human Rights System Meet the Challenge?’, *Human Rights Law Journal*, Vol. 20, 1999, p. 167; Morrison, James, ‘Embassy Row: Peru Rejoins Court’, *Washington Times* A12, 2 February 2001.

¹²⁶ For illustration Peru’s resistance to Court orders during Fujimori’s regime, see Castillo Compliance Resolution, *supra* note 72, at para. 6.

¹²⁷ See generally, Cassel, *loc.cit.* (note 125).

¹²⁸ See, for example, *Castillo Petrucci et al.*, Compliance with the Judgment, 17 November 1999, Inter-American Court of Human Rights (Series C), No. 59; *Loayza Tamayo* Case, Compliance with the Judgment, 17 November 1998, Inter-American Court of Human Rights (Series C), No. 60.

¹²⁹ Arriola Espino letter, *supra* note 72. For general discussion, see Cassel, *loc.cit.* (note 122), at p. 128.

¹³⁰ Sentence of the Constitutional Court, *Marcelino Tineo Silva and More than 5,000 citizens*, File No. 010-2002-AI/TC.

This monumental decision was influenced by the Inter-American's condemnation of this law in the Court's *Loayza Tamayo* Case, in which it declared the Peruvian decrees that typified the crimes of terrorism and *traición a la patria* (sedition) to be incompatible with Article 8(4) of the Convention.¹³¹ Following the Constitutional Court of Peru's decision, the Government reformed the law and ordered new trials for almost a thousand people convicted of sedition.¹³² The Inter-American Court's order in *Loayza* to reform Peru's domestic law set an important precedent, and indicated the Court's propensity to widen its discretion during its deliberation over reparation measures. Specifically, it was the first time that the Court ordered the revision of domestic law in a contentious case after finding them incompatible with the American Convention.¹³³ Soon after the Court's 1997 judgment, the Government released Maria Elena Loayza Tamayo and ended the practice of using *jueces sin rostros* (masked judges). However, it was not until the end of Fujimori's regime that the factors were in place to reform the law altogether.¹³⁴

The author has observed that as Peru continues to duly comply with the judgments of the Court, whether out of authentic commitment to human rights or the desire to avoid negative criticisms and build legitimacy for its new government, the stronger the authority of the Inter-American Court becomes within Peruvian society. The fact that Peru represents the majority of cases before the Court (see Table 1), reflects not only the perceived validity of the Court as redress for human rights violations but also the growing reliance on this venue.

Moreover, as Peru continues to comply with the Inter-American Court's judgments, the perception that these orders are binding strengthens, although in reality Peru could still at any moment decide to withdraw its consent to the Court's jurisdiction. Reflecting this general perception, Peruvian human rights lawyers and victims voice unequivocally that the Court's decisions are obligatory, when in fact it is still a matter of the government's will to comply.

This phenomenon can be seen in national systems 'where citizens obey most laws despite the fact that many transgressions would go undetected and unpunished'.¹³⁵ Peru, by complying with the Inter-American Court's judgments, increases the expectation of future compliance. As these expectations grow, it may be that the

¹³¹ See *Loayza Tamayo* Case, Judgment on the Merits, 19 September 1997, Inter-American Court of Human Rights (Series C), No. 33. On reparations, see *Loayza* Case, *supra* note 3, para. 192(5) (ordering '[t]hat the State of Peru shall adopt the internal legal measures necessary to adapt Decree-Laws 25,475 (Crime of Terrorism) and 25,659 (Crime of Treason) to conform to the American Convention on Human Rights'). With great prescience, Cançado Trindade commented that the *Loayza Tamayo* Case was 'bound to become a cause celebre of transcendental importance in the history of the international protection of human rights on the American continent'. Cançado Trindade, *loc.cit.* (note 4), at para. 24.

¹³² 'Ejecutivo presentará segundo decreto antiterrorista' [The executive will present a second anti-terrorist decree], *El Comercio*, Lima, Peru, 30 January 2003.

¹³³ Although the Court found domestic laws incompatible in the *Suárez Rosero* Case, the Court did not order the State to reform them. The *Suárez Rosero* Case, Judgment on the Merits, 12 November 1997, Inter-American Court of Human Rights (Series C), No. 35, para. 110(5). The dissenting opinion of Judge Cançado leading up to the *Loayza* Case, reveal the initial hesitancy of the Court to do more than order compensatory reparations for injured parties, and instead also include measures of internal reform. See, for example, Cançado dissent, *Delgado* Case, *supra* note 58. See also his Dissenting Opinion in the *El Amparo* Case, *supra* note 21.

¹³⁴ See *Loayza* Compliance Resolution, *supra* note 57.

¹³⁵ Stephens, *loc.cit.* (note 119), at p. 593.

government will also begin to adopt the same unwavering belief that they are bound to pay reparation judgments. Victims, in turn, will continue to view the Inter-American Court as the optimal venue to win reparations.

5.1. *The Quick Pay-Off: Peru Neglects Domestic Remedies*

This positive trend on the part of the new Peruvian Government to comply with the judgments of the Court does not distract from the earlier discussion that the State still falls short of guaranteeing effective domestic remedies at home. Shelton warns of the risk of ‘giving states the impression that they can buy the right to violate the rights of others’.¹³⁶ In his concurring opinion in the *Blake Case*, Judge Alfonso Novales-Aguirre writes,

...the establishment of pecuniary compensation in the present case is not, in my opinion, sufficient reparation for the Blake family, inasmuch as it is the duty of Guatemala, as a State, to continue and intensify the investigation warranted by the case until its conclusion. In that way the families of Nicholas Blake and Griffith Davis obtain effective reparations and there is a precedential frontal assault on impunity.¹³⁷

Judge Novales-Aguirre recognises that States should not be able to simply pay for harm they cause without taking further efforts to counteract impunity by making domestic remedies effective.

Along these lines, the European Commission on Human Rights has held that compensation could not be deemed an effective remedy where the State had not taken reasonable measures to comply with its international obligations, such as allowing an administrative practice that continues to violate rights, in this case torture, prohibited under Article 3 of the European Convention of Human Rights.¹³⁸ The Commission held that the ‘[c]ompensation machinery can only be seen as an adequate remedy in a situation where the higher authorities have taken reasonable steps to comply with their obligations under Article 3 by preventing, as far as possible, the occurrence or repetition of the acts in question’.¹³⁹ In other words, States are not permitted to merely pay a premium for violating rights, while allowing the conduct or policy to continue under official authorisation or toleration.

According to Peruvian Human Rights Attorney, Gloria Cano, who frequently represents victims in the Inter-American system, the Peruvian Government has been quick to pay pecuniary damages ordered by the Inter-American Court and even initiate other non-pecuniary reparations like legal reform and criminal investigations. However, she has seen very little significant movement in these investigations

¹³⁶ See Shelton, Dinah, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 1999, p. 206.

¹³⁷ See Concurring Opinion of Judge Alfonso Novales-Aguirre, *The Blake Case*, Reparations Judgment of 22 January 1999, Inter-American Court of Human Rights (Series C), No. 48 [hereinafter: *Blake Judgment*].

¹³⁸ See *Donnelly and six others vs The United Kingdom*, 4 European Commission of Human Rights, Dec. & Rep 4, 234 (1975).

¹³⁹ *Idem*.

nor efforts to strengthen the application of internal mechanisms to give victims access to effective internal remedies.¹⁴⁰

Above all else, it is nearly impossible for victims to win indemnification for damage caused by human rights violations. In particular, when winning reparations is linked to a criminal trial, ‘the victims are effectively barred from seeking and receiving redress and reparation. In fact, once the State authorities fail to investigate the facts and to establish criminal responsibility, it becomes very difficult for victims or their relatives to carry out effective legal proceedings aimed at obtaining just and adequate reparation’.¹⁴¹ In Peru, victims having become informed of their right to compensation, view impunity as the State’s failure to make payments of indemnification, especially when criminal trials are impossible or impracticable, such as when perpetrators cannot be identified.

Reality on the ground reveals that Peru falls short of the principle that ‘[d]omestic remedies before competent and independent tribunals should not only be formally accessible, but also effective and adequate’.¹⁴² Applying this litmus test today reveals that while in the last 15 years the Court has helped the region make remarkable strides in getting States to start taking their duties under the American Convention seriously, the system is nonetheless far from actually achieving the ultimate goal embodied in Article 1(1) of the American Convention of non-repetition and prevention.

In 1998 Cecilia Medina, then acting as Vice Chairperson of the United Nations Human Rights Committee, commented, ‘[i]t is no light matter that, though all governments in the region are now elected, 70% of the 800 cases pending at the [Inter-American] Commission [for Human Rights] deals with the rights to life and to personal integrity, a fact that demonstrates that the continent remains far from a reasonable compliance with international human rights standards and obligations’.¹⁴³ These statistics reflect that domestic remedies are not functioning, otherwise the natural consequence would be that over the course of the decade from the time of the Court’s first judgment in 1989 until Medina’s observation, nations would have been adjusting internal accountability mechanisms so as to provide its citizens with effective and adequate remedies, thus decreasing the number of cases filed in the Inter-American System. In addition, the type of complaints before the Inter-American Court would have changed, perhaps representing more cases dealing with social, economic and cultural rights, since the violations of political and civil rights would have been gradually addressed over the years within domestic settings, or prevented altogether.

Perhaps in response to the evident failure of its decisions to permanently alter State practice with respect to domestic remedies, the Inter-American Court took a hard-line approach in the 2001 *Ivcher Bronstein* Case declaring,

it should be emphasized that, for [effective] recourse to exist, it is not enough that it is established in the Constitution or in the law or that it should be formally admissible, but it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to

¹⁴⁰ Author’s discussion with Gloria Cano, 29 January 2003. Transcript on file with the author.

¹⁴¹ See 1993 Van Boven Report, *supra* note 28, at para. 127.

¹⁴² Cançado Trindade, *loc.cit.* (note 4), at para. 29.

¹⁴³ Medina, *loc.cit.* (note 68), at pp. 350-351.

remedy it. Those recourses that are illusory, owing to the general conditions in the country or to the particular circumstances of a specific case, shall not be considered effective.¹⁴⁴

The Court's admonishment not only calls into question a discouraging trend in which member States are not making domestic remedies available or effective, but suggests that the international monitoring system has not given States the incentive to do so.

Mr. Louis Joinet, United Nations Special Rapporteur confirms the link between impunity and unavailable and ineffective remedies. He confirms that impunity signals the breakdown of internal enforcement mechanisms necessary to apply the securities and protections afforded every individual through the international conventions and agreements.¹⁴⁵ Impunity arises out of limits to the State's ability to prosecute and punish human rights violators, either due to limited financial resources, an ineffective judicial system, a lack of will or a desire to protect alleged human rights violators such as through amnesty laws.¹⁴⁶ However, as the Court acknowledged from the start, addressing impunity holds the highest priority in human rights enforcement since 'impunity fosters chronic recidivism of human rights violations'.¹⁴⁷

6. PUNITIVE REPARATIONS: INDUCING STATE COMPLIANCE

As discussed, despite a substantial body of jurisprudence regarding the general right to a remedy that has steadily developed since the Inter-American Court's first reparation judgment in 1989, the lack of effective remedies within domestic settings remains a major limitation to the universal observance of Article 1(1) of the American Convention.¹⁴⁸ Given the reality of this situation, the question becomes: what more can the Court do to induce States to not just make reparation payments in compliance with the Court's judgments while allowing investigations to linger for years on the desk of prosecutors and reform laws to look good on paper but be useless in practice? One argument would be that because compensatory reparations are not sufficient to induce States to assure effective domestic remedies, as discussed above, then the Court should issue punitive remedies that place a high enough cost on States to motivate them to guarantee effective internal remedies so as to avoid future litigation before the Court.¹⁴⁹

¹⁴⁴ *Iucher Bronstein Case*, *supra* note 35, at para. 136.

¹⁴⁵ See *Final report on the Question of Impunity for Perpetrators of Human Rights Violations prepared by Mr. Joinet* pursuant to Sub-Commission decision 1996/119, Human Rights Commission, 49th Session, UN Doc. E/CN.4/Sub.2/1997/20 (1997); and *Revised Final Report* prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Human Rights Commission, 49th Session, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1 (1997).

¹⁴⁶ Penrose, *loc.cit.* (note 16), at pp. 275-276.

¹⁴⁷ *Paniagua Morales and Others*, Judgment on the Merits of 8 March 1998, Inter-American Court of Human Rights (Series C), No. 37, para. 173 (1998).

¹⁴⁸ Stephens, *loc.cit.* (note 119), at p. 589.

¹⁴⁹ For a more detailed discussion on the impact of punitive damages, see Shelton, Dinah, 'Chapter 9: Punitive or Exemplary Damages', in: Shelton, *op.cit.* (note 136), at pp. 280-291.

The Court held in its first landmark decision *Velásquez Rodríguez*, which formed the foundation for all its subsequent reparation decisions, that although punitive damages are sometimes awarded in domestic courts they are ‘not applicable in international law at this time’.¹⁵⁰ The Court affirmed its position almost a decade later, stating that ‘[I]n the cases against Honduras [*Velásquez Rodríguez* Case and the *Godínez Cruz* Case], the Court held that the expression ‘fair compensation’ used in Article 63(1) of the Convention is ‘compensatory and not punitive’ and that international law does not, at this time, use the principle of compensation ‘to deter or to serve as an example’.¹⁵¹

The Court’s decision may have arisen out of the general trend that excludes the application of punitive damages in civil law systems in Latin American,¹⁵² or out of a general apprehension that prevents challenges to consenting State parties out of respect for their sovereignty, as already mentioned. While the phrasing of the Court’s declaration in *Velásquez* does not preclude forever the use of punitive damages, sanctions have never been explicitly incorporated in any of the Court’s subsequent reparation judgments, even for the most serious human rights violations. One commentator opined that, ‘[i]f punitive damages were not awarded in the *Velásquez* Case (...) where the violation was so egregious and the State did not accept international responsibility, it is difficult to imagine a case in which punitive damages would be awarded by the Inter-American Court’.¹⁵³

The concept of punitive damages, however, is not absolutely impossible to imagine as part of the Court’s repertoire of measures. For instance, punitive damages are applied, although often with controversy, in the Anglo-American common law system of civil damages if a defendant’s wrongful act is aggravated by violence, oppression, malice, or wanton and wicked conduct, in order to punish the defendants for this outrageous or evil behaviour and thus make him or her an example so as to deter other wrongdoers from doing the same.¹⁵⁴ Under the Alien Tort Claims Act in the United States, the US District Court for the Eastern District of New York applied punitive damages to ‘make clear the depth of the international revulsion against torture and measure the award in accordance with the enormity of the offense’ and ‘in order to give effect to the manifest objectives of the international prohibition against torture’.¹⁵⁵ The US Court acknowledged the rarity of this measure but felt it was necessary to deter the individual defendant in the future and others who may follow his example.¹⁵⁶

A handful of scholars and practitioners have acknowledged the evident weakness of regular, non-punitive reparations and have begun to call for more serious penalties. As one such commentator writes,

¹⁵⁰ *Velásquez Rodríguez* Case, *supra* note 10, at para. 38.

¹⁵¹ *Garrido and Baigorria* Case, Judgment of 27 August 1998, Inter-American Court of Human Rights (Series C), No. 39, at para. 44 (1998).

¹⁵² Pasqualucci, *loc.cit.* (note 18), at p. 42.

¹⁵³ *Ibidem*, at p. 44.

¹⁵⁴ Keeton, W. Page, *et al.*, *Prosser and Keeton on The Law of Torts*, Hornbook Series, West Pub. Co, St. Paul, 5th ed., 1984, at pp. 9-10. The Inter-American Court in deciding to preclude punitive damages in *Velásquez Rodríguez* Case acknowledged the use of punitive damages in Anglo-American courts. *Velásquez Rodríguez* Case, *supra* note 10, at para. 38.

¹⁵⁵ See *Filartiga vs Pena-Irala*, 577 F. Supp., p. 860, at p. 865 (E.D.N.Y. 1984).

¹⁵⁶ *Ibidem*, at para. 866.

[i]f stiffer penalties are in place and enforced, then those violating countries will be more apt to cooperate in the process and take the [Court's orders] more seriously. Serious penalties should include, but not be limited to: (1) substantial monetary fines against the violating countries; (2) automatic monetary damages from the violating countries to the victims or families of the victims; and (3) suspension or even termination from the OAS if repeated uncooperative behavior is noted.¹⁵⁷

Despite the fact that necessity may urge the application of punitive measures, many arguments counsel against their adoption. The most commonly articulated reason for not awarding punitive damages is that victims would enjoy an unjustified windfall.¹⁵⁸ An ironic result of imposing substantial reparation judgments could be that more victims would seek relief through the Inter-American System. Although, in theory there would be a temporary surge of petitioners that would diminish in the long-term as the desired objective of effective domestic remedies was realised.

Perhaps the greatest argument against punitive damages rests on the consensual nature of the Inter-American System whose very jurisdiction must be expressly accepted, as discussed above, which prevents the Court from being too aggressive with its orders. In addition, the political nature of punitive measures could potentially jeopardise the Court's legitimacy as an objective legal tribunal.¹⁵⁹ Finally, given that the expansion of international human rights law often relies on community acceptance, it could be that contemporary mores stops the Court at present from including punitive measures in its judgments.¹⁶⁰

Applying punitive measures to a State also raises theoretical complexities. The Inter-American Court observed the non-criminal intent of the Inter-American System, clarifying in the *Velasquez Rodriguez* Case that:

[t]he international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals, who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts.¹⁶¹

The Court's statement focuses on the fact that it does not put individual perpetrators on trial, but left the awkward question of how it should fulfil an implicit aspect of protecting the rights of victims, which entails preventing States

¹⁵⁷ King-Hopkins, *loc.cit.* (note 9), at p. 436.

¹⁵⁸ Pasqualucci, *loc.cit.* (note 18), at p. 43. In the *Velasquez Rodriguez* and *Godínez Cruz* cases the families of the victims made a formal promise to the court that they would put the money towards a fund for other families in Honduras whose loved ones were disappeared; *idem*. International funds like the United Nations Voluntary Fund for Victims of Torture and the Voluntary Trust Fund on Contemporary Forms of Slavery could serve as models should the Court decide to award punitive damages, as suggested by Special Rapporteur Van Boven. See 1993 Van Boven Report, *supra* note 28, at para. 133.

¹⁵⁹ Saul, Ben, 'Compensation For Unlawful Death In International Law: A Focus On The Inter-American Court Of Human Rights', *American University International Law Review*, Vol. 19, 2004, p. 523, at p. 567.

¹⁶⁰ Pasqualucci, *loc.cit.* (note 18), at pp. 22 and 42.

¹⁶¹ *Velasquez Rodriguez* Case, *supra* note 10, para. 134.

from breaching their international duties – duties that when violated constitute unlawful acts under international law. The International Law Commission has pointed out that, ‘a state commits an “international crime” if it breaches ‘an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole...’¹⁶²

Yet, it is impossible to bring criminal proceedings against a State, because ‘[n]o criminal court exists to try states for such violations, nor can a state be incarcerated’.¹⁶³ For that reason, the Court may have unavoidably begun to rely on civil reparations such as those used in tort law, as the only available proxy for punishment.¹⁶⁴ M. Cherif Bassiouni views ‘reparations’ imposed on States found to be responsible for international crimes to be ‘a hybrid between criminal penalty and civil damages’.¹⁶⁵ As one commentator observed, ‘[i]n modern writings, the demand for reparations has increased, perhaps in response to the demonstrated impotency of criminal justice at the international level.’¹⁶⁶

6.1. *Compensatory Reparations: De Facto Punitive Measures?*

Perhaps due to a heavy reliance on reparations, in practice they have come to take on an ambiguous function since the Court has not confined itself to limited terminology in which ‘compensation’ is used in a strict technical sense of economically assessable damages.¹⁶⁷ Writing in 1990, Christine Gray observed that reparation awards, especially in cases of personal injury and death, appear to be larger than expected but without explanation. She suggests that when reparations correspond with the gravity of the State’s unlawful act and are not connected to actual harm or pecuniary loss, they appear to be punitive in nature ‘although not so denominated’.¹⁶⁸ With the benefit of more than a decade of hindsight, her supposition gains strength.

The Court’s expansive approach with regard to calculating reparations can be interpreted to serve quasi-punitive functions in two ways: first, the amount of reparations is often determined in accordance with the gravity of the violation and not necessarily the actual damage suffered by the victim; and second, the basis for calculation is often vague and sometimes based on presumptions of harm that allow

¹⁶² ILC Draft Articles, *supra* note 25, at Article 19.

¹⁶³ Stephens, *loc.cit.* (note 119), at p. 584.

¹⁶⁴ US human rights litigator Beth Stephens points out the inadequacy of civil remedies, at least in cases against individual wrongdoers, when it deals with the more horrible and egregious breaches of human rights violations, writing that ‘[p]ayment to the individual cannot serve as an adequate reparation for the harm inflicted either on that individual or on the community as a whole. The clash between the pale concept of a tort and the reality of human rights abuses has led to criticism that civil tort litigation is an improper substitute for criminal prosecution’. *Ibidem*, at p. 604.

¹⁶⁵ See Bassiouni, M. Cherif, ‘The Prosecution of International Crimes and the Establishment of an International Criminal Court’, in: Bassiouni, M. Cherif (ed.), *International Criminal Law (Enforcement)*, Transnational Publishers, Ardsley, Vol. 3, 1987, p. 8.

¹⁶⁶ Penrose, *loc.cit.* (note 16), at p. 308.

¹⁶⁷ Rodriguez Rescia, *loc.cit.* (note 60), at p. 592.

¹⁶⁸ Gray, Christine D., *Judicial Remedies in International Law*, Oxford University Press, Oxford, 1990, p. 13, at p. 27 (stating that awards sometimes seem to represent more than just compensation but that it is impossible to identify if and to what extent this is true).

the Court to slap a penalty on the State even when technically the defendant has not proved damages. In effect, the court is able to, whether on purpose or not, to apply greater pressure on violating States to correct past errors and comply with international obligations, thus assuring the non-repetition of past violations.

If the only purpose of reparations was to amend harm to a victim, it would, in effect, diminish the overall purpose of the supervising role of the Court to scrutinise States and compel them to adjust internal practices to bring them closer to the object and purpose of the American Convention as embodied in Article 1. In reality, reparations are 'not simply backward-looking[;] [t]hey also right a balance going forward'.¹⁶⁹ Perhaps if not bound by concerns of sovereignty, the Court could more explicitly emphasise the punitive aspect of their reparation judgments.

To begin, the very idea of reparations can be characterised as 'penal in nature'.¹⁷⁰ Reparations in themselves serve as an admonishment of the State's wrongful act, they are in effect a moral judgment. Declaratory judgments were at one time considered to be adequate compensation for the victim because they create a stigma for the State, 'a moral sting of shame of violation'.¹⁷¹ In fact, a finding of liability 'puts a formal, official stamp upon a judgment, which may at least partially satisfy the need for acknowledgement of the wrong inflicted on the victims'.¹⁷² Moreover, as a consequence of the infringement upon the rights or freedoms and not of the damage suffered, the Court can impose what is called 'non-patrimonial satisfaction', which may include public disclosure of the truth, an apology or acknowledgement of wrongdoing.¹⁷³

Yet even with license to rely entirely on these non-monetary measures to express its disapproval of State behaviour, the Court explicitly decided that they are inadequate for such purposes, writing in the *Amparo* Case,

while a condemnatory judgment may in itself constitute a form of reparation and moral satisfaction, whether or not there has been recognition on the part of the State, it would not suffice in the instant case, given the extreme gravity of the violation of the right to life and of the moral suffering inflicted on the victims and their next of kin, who should be compensated on an equitable basis.¹⁷⁴

By linking reparations to the seriousness of the violation, the Court implies that it is the crime and not the damages that justify requiring a monetary fine levied against the State, demonstrating the quasi-punitive effective of civil damages. According to Victor M. Rodríguez Rescia, former Adjunct Secretary of the Inter-American Court of Human Rights and law professor, the gravity of the crime also influences non-patrimonial requirements imposed on the State. He explains, '[i]n the cases of flagrant violations, a compensation for damages reflects the graveness of the violation'.¹⁷⁵

¹⁶⁹ Roht-Arriaza, *loc.cit.* (note 19).

¹⁷⁰ See Davidson, *op.cit.* (note 5), at p. 205.

¹⁷¹ Cassel, *loc.cit.* (note 122), at p. 129.

¹⁷² Stephens, *loc.cit.* (note 119), at p. 605.

¹⁷³ *Velásquez Rodríguez* Case, *supra* note 10, at para. 33.

¹⁷⁴ *El Amparo* Case, *supra* note 21, at p. 35 (emphasis added).

¹⁷⁵ Rodríguez Rescia, *loc.cit.* (note 60), at p. 594 (emphasis added).

In general, the term ‘moral damages’ in international law and in civil law systems generally equates damages with emotional distress and ‘with damages for the loss of society, comfort, and protection under common law’.¹⁷⁶ However, the Court in the *El Amparo* Case indicates that it is also the nature of the right violated, not just the actual suffering that provides the basis for calculating compensation. Shelton believes that when there is ‘a dual focus on suffering of the victim and wrongfulness of government conduct, it seems that moral damages may partially substitute for punitive damages’.¹⁷⁷

In *Las Palmeras*, one of the most recent reparation decisions issued by the Court, the actual written judgment breaks down its discussion of reparations in terms of the right violated as opposed to the type of damage, as was the customary format in all previous published judgments. Specifically, the previous format of judgments broke down damages into ‘Pecuniary’, ‘Non-Pecuniary’, ‘Other Forms of Reparation’ and ‘Costs and Expenses’.¹⁷⁸ However, in 2002, the Court divided its discussion of reparations into ‘Reparation for Loss of Life’, ‘Reparation for the Infringement of the Right to a Fair Trial and to Judicial Protection’, ‘Other Forms of Reparation’ and ‘Legal Costs and Expenses’ in the written judgment of *Las Palmeras*.¹⁷⁹

While this change in subtitles may just be a minor alteration in format, it can also be viewed as a subtle shift in the way the Court views compensation as directly related to the type of violation and not just the consequent damage. In fact, under the section on ‘Reparation for Loss of Life’ the Court writes regarding the injured party,

None of the parties in this case have been able to provide any clues that might make it possible to know who n.n./moisés was, what he was doing at the site of the event, what his occupation and age were, where he was from, etc. Nor have his mortal remains been identified (...) Despite this total lack of information, Colombia is under the obligation to repair the damage caused. Given the circumstances of the case, the Court estimates, in fairness, that the amount of compensation owed by the State is US\$ 100,000.00...¹⁸⁰

In this paragraph, one sees that the Court continues to link compensation to damages, yet it does so admitting that it has no actual proof of damages. This contradiction combined with the subtitles used in the body of the Court’s judgment, seems to imply that the amount corresponds with the legal injury, the violation of being extra-judicially killed, and not the supposed material and non-material damages suffered by the victim. Moreover, the amount is not even called non-pecuniary losses or moral damages, yet is one of the more significant amounts set for any one individual since the *Velásquez Rodríguez* and *Godínez Cruz* Cases.

In applying moral damages, the Court has removed entirely any obligation to prove actual harm. Instead it developed a presumption of harm, allowing moral

¹⁷⁶ Pasqualucci, *loc.cit.* (note 18), at p. 33.

¹⁷⁷ See Shelton, Dinah, ‘Remedies in the Inter-American System’, in: *Proceedings of the 92nd Annual Meeting of the American Society of International Law*, American Society of International Law, Washington DC, 1998, p. 202, at p. 205.

¹⁷⁸ See, for example, *Trujillo* Case, *supra* note 54.

¹⁷⁹ *Las Palmeras* Case, Reparations Judgment of 26 November 2002, Inter-American Court of Human Rights (Series C), No. 39 [hereinafter: *Las Palmeras* Case].

¹⁸⁰ *Ibidem*, at paras 46-47.

damages to be automatically applied. As the Court stated in the *Aloeboetoe* Case ‘it is clear that the victims suffered moral damages, for it is characteristic of human nature that anybody subjected to the aggression and abuse described above will experience moral suffering. The Court considers that no evidence is required to arrive at this conclusion; the acknowledgement of responsibility by Suriname suffices’.¹⁸¹

In addition, the Court has also developed presumptions regarding ‘special damages’, regarding the expenses incurred by the victims for their efforts to investigate and sanction the actions that caused the violation of their rights. Although expenses and costs should normally be proven by evidence, the Court has awarded these damages even when there was insufficient proof.¹⁸² The principle of equity allows the Court to judge what is fair, and thus steps away from the bounds of strict mathematical calculations and precise formulas.¹⁸³ The removal of the prerequisite of proving harm assures that the Court will always be able to apply a monetary fine in the case of grave human rights crimes.

Compensatory Reparations: A Weak Substitute for Punitive Measures

Despite the potential use of civil reparations as quasi-punitive measures, in practice there are limitations to there being substitutes for actual sanctions. Foremost, judicial honesty requires the Court to avoid surreptitiously applying punitive measures disguised as compensatory reparations. Given the variety of all potential fact scenarios it may review, the Court may receive a case where the facts do not easily lend themselves to justifying a large compensation package. Without the ability to impose explicitly a monetary sanction, the application of punitive measures will be inconsistently applied even when a serious violation has occurred.

Reliance on purely compensatory reparations to deter States from ignoring their Article 1(1) obligations also runs the risk that the Court itself may exercise too much self-restraint in ordering costly reparations, thus undermining their punitive effect. That is, by setting modest compensatory damages, reparations lose their ability to cause enough economic hardship to compel States to ensure the availability of effective domestic internal remedies. For instance, after the generous moral damages award in *Velásquez Rodríguez* and *Godínez Cruz*, the Court settled on the fixed amount of USD 20,000 for moral damages in the majority of subsequent cases without explanation and regardless of the nature of the right violated or the suffering endured by the victim. In doing so, the Court ignored its own standard of considering the ‘particular circumstances of the case’ in setting moral damages.¹⁸⁴

In explaining the large moral damage awards set in the *Rodríguez* and *Cruz* Cases from the less significant ones in later cases, the Court explains that when the State takes responsibility for the violation it diminishes the amount of the award.¹⁸⁵ Perhaps like plea-bargaining, acknowledging guilt lessens the penalty. In this scenario, States may accept responsibility knowing it will lower the cost of damages. Their acceptance of responsibility will lower financial sanctions, thus undermine the deterrence function of expensive reparation orders.

¹⁸¹ *Aloeboetoe* Case, *supra* note 20, at para. 52.

¹⁸² *El Amparo* Case, *supra* note 21, at para. 21.

¹⁸³ Pasqualucci, *loc.cit.* (note 18), at p. 34.

¹⁸⁴ See, for example, *The Street Children Case*, *supra* note 21, at para. 107.

¹⁸⁵ See *El Amparo* Case, *supra* note 21, at para. 34.

Moreover, whereas the Court awarded moral damages to families of victims in the *Aloeboetoe* Case,¹⁸⁶ it appeared to backtrack from this expansive position three years later by denying moral damages to families in the *El Amparo* and *Neira Alegria* Cases.¹⁸⁷ These latter decisions led to speculation that the Court considered family of direct victims to have no claim for compensation for their own suffering despite their relationship or dependence on the victim.¹⁸⁸ However, eventually the Court again reversed this approach, ordering moral reparations for the suffering of the children and parents of the victim in the *Loayza* Case, although she was still living, thus returning to the *Aloeboetoe* standard.¹⁸⁹ This shift, however, reflects the capability of the Court to suddenly take a conservative approach. The unpredictability of this situation lessens the deterrence effect of moral damages since third parties will not be consistently awarded reparations, thus imposing less expense on the violating State.

Ultimately, the traditional custom of awarding compensation in direct correspondence to proven damages presents the greatest risk of relying on non-punitive reparations to sanction States. At any moment, the Court may insist that victims must offer evidence of their actual losses and suffering, or else forgo compensation. Despite the anomaly of the high award in *Las Palmeras* discussed above, in this same decision the Court once again clarified that, '[r]eparations, as their name suggests, are measures that tend to make the effects of violations that were committed disappear. Their nature and amount depend on the damage caused both on a pecuniary and on a non-pecuniary level'¹⁹⁰ indicating a steadfast adherence, at least in principle, to the damages requirement of reparations.

Linking compensation to damages poses special concern when victims cannot provide concrete evidence of losses, especially where the paper trail was lost, destroyed or never existed. For instance, the Court has used improvised criteria in an attempt to establish pecuniary losses, such as a victim's lost earnings that offer reasonable certainty. Yet, these efforts can be 'thwarted by the seasonal employment of the victims, the lack of employment and tax records, and geographical and cultural impediments...'¹⁹¹ In the absence of specific evidence of losses, the Court may at least make an award based on the *canasta alimentaria basica* (basic food

¹⁸⁶ In a case involving seven members of the Saramakas tribe in Suriname killed in a massacre, the court decided that parents of five victims who were not declared successors, and thus would not receive moral damages (the USD 29,070 set for six of the victims with the exception of a seventh victim whose more intense suffering amounted to an award of USD 38,755), could nevertheless receive moral damages. The Court wrote, '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'. *Aloeboetoe* Case, *supra* note 20, at paras 76-77.

¹⁸⁷ In *El Amparo*, in which 14 fishermen were murdered and two escaped, the Court set USD 20,000 in moral damages for each victim, instructing the amount to pass to the family of the deceased victims. No moral damages were awarded to the families for their independent moral damages. See *El Amparo* Case, *supra* note 21, at para. 37. Similarly, the court set USD 20,000 for three disappeared persons, the amount to be passed on to their families. *Neira Alegria* et al., Case Reparations, Judgment of 19 September 1996, Inter-American Court of Human Rights (Series C), No. 29, at para. 58 (1996).

¹⁸⁸ For further discussion, Pasqualucci, *loc.cit.* (note 18), at p. 34.

¹⁸⁹ See *Loayza* Case, *supra* note 3, at pp. 140 and 142.

¹⁹⁰ *Las Palmeras* Case, *supra* note 178, at para. 39.

¹⁹¹ Pasqualucci, *loc.cit.* (note 18).

basket), which looks at the consumer price index for subsistence goods, if that measure is higher than the minimum wage in the area.¹⁹²

The Court estimates lost wages based on the average wage of the country and then deducts 25 per cent to cover the personal expenses that the person would have incurred had he/she lived, or been in liberty, and thus would not have been shared with his or her family.¹⁹³ These amounts, however, are quite modest given the economic reality of Latin American countries and will rarely rise to a level where States will feel enough pinch in their budget to begin to alter internal practices.

Another risk is that if reparations rest on predictable calculations, then States will begin to engage in more ‘friendly settlements’ to avoid litigation in the Court and public exposure. Yet, as observed ‘in egregious cases of human rights violations, such as executions, severe beatings, or body dismemberments, friendly settlement is not an effective tool. There is nothing “friendly” about the reason the parties are coming together and it will be highly unlikely that such a dispute can be resolved in this manner’.¹⁹⁴

The risk of States engaging in a cost-benefit analysis increases, whereby the State agrees to certain measures without feeling compelled to make the type of dramatic internal changes that go towards prevention and non-repetition. When States voluntarily agree to comply with these friendly settlements, initiating investigations and compensating victims in these particular cases, these efforts may fail to produce substantial internal reform without the political will to make effective remedies available to all victims of human rights victims.

7. THE INEVITABLE EVOLUTION OF REPARATIONS

It is perhaps not unreasonable to advise the Court to operate with caution so as not to jeopardise the entire regional human rights system with aggressive reparation judgments intended to tip the scales in favour of internal reform but end up causing States to withdraw their consent to the Court’s jurisdiction. It is the ‘remnant of exaggerated state sovereignty’ that continues to undermine effective enforcement mechanisms,¹⁹⁵ since it was only with the United Nations Charter of 1945 that the ‘internationalising’ of human rights began making them more than the exclusive prerogative of States.¹⁹⁶

Through his persistent dissent, however, Judge Cançado Trindade contends that principles and methods of interpretation of human rights treaties must ‘bear always in mind the objective character of the obligations enshrined therein’ even if it means limiting ‘state voluntarism’.¹⁹⁷ Recognising that human rights law indeed arose out of Public International Law, he points out the point of divergence. Whereas the latter regulates State relations through reciprocity, the former strives to protect the individual from arbitrary public power with the ‘recognition that the State exists for the human being, and not vice-versa’.¹⁹⁸

¹⁹² *El Amparo Case*, *supra* note 21, at para. 28

¹⁹³ *Idem*.

¹⁹⁴ King-Hopkins, *loc.cit.* (note 9), at p. 437.

¹⁹⁵ Pasqualucci, *loc.cit.* (note 18), at p. 12.

¹⁹⁶ Cassel, *loc.cit.* (note 122), at pp. 134-135.

¹⁹⁷ Separate Opinion of Judge Cançado Trindade, *Blake Judgment*, *supra* note 137, at para. 33.

¹⁹⁸ *Idem*.

Accordingly, Judge Cançado Trindade calls on the Court to free itself from the old patterns of allowing States to invoke the 'absolute character of the autonomy of the will' when faced by *jus cogens* norms.¹⁹⁹ Through his provocative challenges to the Court, Judge Cançado Trindade advises that it free itself from conventional considerations and mechanical applications originating from the antiquated international law system, and to instead adopt a guiding principle that 'corresponds to the new ethos of our times', that is, one that constantly seeks to ensure the promotion and protection of human rights which ultimately requires the prevention of their violations.²⁰⁰

Judge Cançado Trindade's urgings press us to consider what must happen to bring States into conformity with this principle. Notwithstanding the pressure exerted by the legend of sovereignty, the gradual evolution away from the presumption of sovereignty, as partially evidenced by the large number of States that have accepted human rights treaties, is opening the way for the Court to impose more substantial costs on violating States. As more States begin to comply with Court judgments, its authority and legitimacy grows, creating a context in which it perhaps will be possible to expand its repertoire of reparations, including those with punitive intent.

On the contrary, if the Court continues to issue modest reparation judgments that permit States an easy pay-off to avoid public scrutiny, but ultimately fail to ensure internal reform, this too will jeopardise the legitimacy of the international system. As pointed out by Professor Joyner, '[i]f governments are unwilling to comply with and enforce laws against human rights violators, and if governments are willing to tolerate abuses and exacerbate conditions of impunity, then remedies for victims will remain more fiction than fact, more sieve than substance'.²⁰¹ If it is to do its best in enforcing the preventive purpose of Article 1(1) of the American Convention, the Court needs to see that the time may finally have come for it to reconsider the importance of deterrence and apply more punitive measures. Judges Cançado Trindade accompanied by Judge Abreu-Burelli pointed out in their concurring opinion in the landmark reparation decision in the *Loayza* Case, '[j]uridical concepts, while encompassing values, are product of their time, and as such are not unchangeable'.²⁰² The Court may consider heeding this consideration, otherwise its work may never end.

¹⁹⁹ Dissenting Opinion of Judge Cançado Trindade, *Blake* Case, Judgment on the Merits of 24 January 1998, No. 36, at para. 28.

²⁰⁰ Separate Opinion of Judge Cançado Trindade, *Blake* Judgment, *supra* note 137, at para. 34.

²⁰¹ Joyner, *loc.cit.* (note 22), at p. 624.

²⁰² Joint Concurring Opinion of Judges Cançado Trindade and Abreu-Burelli in the *Loayza* Case, *supra* note 3, at para. 7.