The Inter-American System of Human Rights

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Preface

In the 1970s and 1980s central and Latin America was synonymous with some of the world's worst human rights violations. Much of the region was in a state of civil war or under the rule of brutal military dictatorships. Incommunicado detentions, torture and extra-judicial killings were frequent. A new phenomenon among human rights violation, the 'disappeared person', emerged in this region in this period. In the past decade, with the transition to democratic rule in much of the region, new challenges have arisen. Peace agreements or transition arrangements have raised the issue of what human rights guarantees are required and how they should be given effect to, the legacy of amnesties for human rights violations have posed the question of what should be done about such violations committed by past regimes and the claims of indigenous peoples have become ever more difficult to ignore.

At the centre of all of these issues has been the inter-American human rights system, represented primarily by the Inter-American Commission and Court of Human Rights. In the first half of the 1980s this system, which was established and funded by the region's states, struggled to fashion a response to the wave of gross human rights violations which swept across the continent. However since the Commission's path breaking country report on Argentina in 1979 and the Court's recognition and condemnation of the phenomenon of disappearances in the Velasquez Rodriguez case in 1988 it has played an increasingly prominent role. Rulings on issues such as fundamental guarantees in states of emergency and the validity of amnesty laws passed by previous regimes have set precedents for human rights lawyers throughout the world. The system's innovative mechanisms such as the country report have excited the interest of human rights lawyers well beyond the Americas, as has the rule by which a petitioner's factual assertions are accepted as true in the absence of contradiction by the state.

As human rights lawyers in Europe we are aware of some of these developments but not of their detail. Perhaps too struck by the rapid development of our own regional human rights system in the past twenty years and the lack of material (particularly English language material) on the inter-American system, we felt that lawyers in this part of the world had failed to pay as much attention as they should have to such an important and developing regional system. To this end the Human Rights Law Centre at the University of Nottingham organized a conference on the inter-American system in London in November 1995. The conference was exceptionally well attended. Testimony both to the interest in the topic among human rights
International human rights treaties generally require that the States Parties provide an effective remedy to the victim of a human rights violation. Failure to provide a remedy or prove ineffectual, or to accept petitions meeting stated admissibility criteria in order to decide if a violation has been committed and the Inter-American Court to issue judgments on reparations. The Inter-American Convention contains the broader mandate:

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 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.

**DRAFTING HISTORY OF ARTICLE 63(1)**

The drafting history of Article 63(1) reveals no debate about conferring broad competence on the Court to order reparations. The Inter-American Commission on Human Rights, whose first draft of the Convention was

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1 For example, the International Covenant on Civil and Political Rights, Art. 2(3)(a) requires that each State Party undertake 'to ensure that any person whose rights or freedoms as a human being recognized as violated shall have an effective remedy, notwithstanding that the measure or situation that constituted the violation has been committed by persons acting in an official capacity.'


3 Art. 45(1), American Convention on Human Rights, see Appendix III. Contrast the comparable provision in the European Convention on Human Rights: 'If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.' Art. 50, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 312 UNTS 222 (emphasis added).
the basic working document at the Conference of San José, gave the Court the power to award compensation in its draft Article 52(1). The Commission itself had worked from three drafts prepared by the Inter-American Council of Jurists (ICJ), the Government of Chile and the Government of Uruguay. All of these earlier drafts generally replicated the language of Article 50 of the European Convention on Human Rights and were thus more restrictive than the draft finally produced by the Commission. The Commission did not indicate the reasons for or origin of the changes it made.

Guatemala's written comments on the Commission's draft for the San José Conference proposed to strengthen the Article further, to add that the Court might also order remedies for the consequences produced by the act or measure that impaired the injured's rights and that the injured party be guaranteed the enjoyment of his violated right or freedom. Committee II, which dealt with the provisions on the organs of protection, largely accepted these proposals. The Rapporteur stated that Committee II had approved a text which is broader and more categorically in defense of the injured party than the Draft.7 The Plenary adopted the Committee version of Article 63(1) without discussion, giving the Court the three duties or powers it currently enjoys to order measures that: (1) ensure future respect for the right or freedom that was violated, (2) remedy the consequences of the violation, and (3) compensate for the harm.

**JURISPRUDENCE OF THE COURT**

The Court began functioning in 1979, after the Convention had entered into force the previous year. It has since issued eight judgments on damages; the matter is pending in two cases.8 One proceeding was dismissed after the parties reached a settlement approved by the Court.9 In all but one case, the Court issued its judgment on reparations after the issue was briefed by the parties following the Court's decision on the merits. In Gangaram Panday, the Court did not follow this procedure, but awarded a 'nominal' sum in its judgment on the merits.

The Court's jurisprudence on damages reveals less generosity towards victims than might be expected on the basis of the text of Article 63(1) and its drafting history. The opinions are not consistent and indicate a fundamental misunderstanding of the sometimes different interests and roles of the victims and the Commission. Nonetheless, the Court's judgments represent the most wide-reaching remedies afforded in international human rights law. The following discussion reviews each of the Court's decisions on reparations in chronological order. There follows a general comparative analysis and critique of the Court's treatment of the topic.

**The Honduran Cases**

Velasquez Rodriguez and Godinez Cruz were the first contentious cases decided by the Court.10 The Inter-American Commission on Human Rights submitted these cases against Honduras to the Court, alleging state responsibility for the disappearance of the two named individuals. The Court found the government responsible and asked the parties, viz the Commission and the Honduran Government, to negotiate an agreement on the amount of damages.11 The Court kept the case open, reserving the right to approve the agreement or, if no agreement were reached, to set the amount and order the manner of payment.12 The Court noted that in the circumstances of a disappearance it could not order that the victim be guaranteed the enjoyment of the rights and freedoms violated.13 The Court refused to award costs because they had not been pleaded.14

Subsequently, the Court seemed to recognize the importance of the precedent that these cases would set on the subject of reparations, whether
or not the parties reached agreement. By resolution, it authorized the President to initiate whatever studies and name whatever experts might be convenient so that the Court would have the elements necessary to set the form and amount of compensation.16

No agreement was reached between the parties: Honduras argued that the compensation given should be 'the most favorable benefits' that Honduran legislation provided for Hondurans in the case of accidental death. The Commission countered that the amount and form of payment constituting just compensation should be determined by the requirements of international law. The two sides did agree on a designation of beneficiaries which was limited to the wife and children of the disappeared, 'once they had fulfilled the requirements of Honduran law to be recognized as heirs of the victims.' The Court rejected even this limited agreement, holding that 'the family members... need only show their family relationship. They are not required to follow the procedure of Honduran inheritance law.' In fact, the secretariat of the Court, under instructions from the President, requested information from Honduran officials, including 'the names and status of their wives; and those of any concubines recognized in any official document... names and civil status of their children, those of the marriage and any outside the marriage.'17 The parties returned to Court.

In pleadings, the victims asked for more than monetary compensation: they asked the Court to order Honduras to take various remedial measures. These included an end to disappearances in Honduras; an investigation and public disclosure of what had happened to the disappeared in some 150 cases; trial and punishment of those responsible;18 'a public act to honor and dignify the memory of the disappeared. A street, park, elementary school, high school, or hospital could be named for the victims of disappearances'; actions against death squads and in favor of humanitarian organizations; and an end to all forms of pressure against the families of the disappeared 'a public recognition of their honor.'

The monetary compensation sought included establishment of a fund for the primary, secondary, and university education of the children of the disappeared; guaranteed employment of working-age children; and establishment of a retirement fund for the parents of the disappeared.

The attorneys for the victims, designated as 'counselors or advisers to the Commission' in order to permit them a role before the Court,19 asked for a public hearing to receive a psychiatric report on the moral damages suffered by the victims' families.

The Commission's claims were also extensive. It sought to have Honduras investigate, prosecute and punish those responsible for the disappearances. The request for compensatory damages included payment to the spouse of 'the highest pension recognized by Honduran law' and payments to the children through completion of their university education; title to an adequate house; general damages for the wife and children (200,000 lempiras20), damages for lost earnings (2,422,420 lempiras) and emotional harm (4,845,000 lempiras), based upon an expert opinion offered by the victim's family. In addition, the Commission specifically requested punitive damages in the amount of 2,422,000 lempiras. The Commission supported some of the other measures requested by the family under the heading of moral damages; for example, public homage through naming a street, thoroughfare, school or other public place and a public condemnation of disappearances. On its side, the government offered 150,000 lempiras.

The Court considered at length the basis for an award of damages, noting that international law requires restitution of the status quo ante where possible and compensation where it is not possible:

It is a principle of international law, which jurisprudence has considered 'even a general concept of law,' that every violation of an international obligation which results in harm creates a duty to make adequate reparation. Compensation, on the other hand, is the most usual way of doing so (Factory at Chorzow, Jurisdiction, Judgment No. 8, 1937 (PCJ, Series A, No. 17, 29; Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949, 184).

Reparation of harm brought about by the violation of an international obligation consists in full restitution (restitutio in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.21

16 Velasquez Rodriguez, Compensatory Damages, above n. 9, para. 4.
17 Id. para. 13(4), (5).
19 Only the States Parties and the Commission have the right to submit a case to the Court. Art. 61, American Convention on Human Rights. The Commission is represented by Delegates, who may be assisted by any person of their choice, including attorneys for the victims. Art. 22, Rules of Procedure of the Court. This is the only means by which the victims may directly participate in arguing their case before the Court. See further, Thindale, 149 above.
20 Two lempiras equal approximately one US dollar.
21 Velasquez Rodriguez above n. 8, paras. 6, 25-6.
The Court seems to suggest that awards for emotional harm are particularly appropriate in cases of human rights violations. Indemnification under this heading is to be based upon the principles of equity. Reparations generally are to be effective and independent of the limitations of national law.

In regard to some of the claims, the Court referred back to the decision on the merits. It noted that some of the measures claimed would constitute a part of the reparation of the consequences of the violation of rights rather than being part of the indemnity. In this regard, it reiterated the continuing Honduran duty stated in the judgment on the merits to investigate the cases, prevent future violations and punish those responsible. The Court also found, like the European Court, that its judgment on the merits is a type of reparation and constitutes moral satisfaction of significance and importance. No requests for non-monetary reparations were granted.

The Court rejected the claim for punitive damages, finding that the expression ‘fair compensation’ used in Article 63 (1) is compensatory in nature and not punitive. It also found that an award of amounts meant to deter or to serve as an example ‘is not applicable in international law at this time.’

In regard to the measure of damages awarded, the Court rejected the notion that criteria for accidental death, such as those in the rules concerning life insurance, should be the measure of a death that was ‘the result of serious acts imputable to Honduras’. Instead, the damages must be calculated as a loss of earnings based upon the income the victim would have received up to the time of his possible natural death, adjusted by the fact that the children ‘who should be guaranteed the possibility of an education which might extend to the age of twenty-five’ could begin work at that time. The starting point was the salary the individuals received at the time of disappearance, adjusted as necessary ‘to arrive at a prudent estimate of the damages, given the circumstances in each case.’ In Velásquez Rodríguez, the amount was set by the Court at 500,000 lempiras. The Court interpreted its award concerning the establishment of a trust fund ‘under the most favorable conditions permitted by Honduran banking practice’ to mean that any act or measure by the trustee must ensure that the amount assigned maintains its purchasing power and generates sufficient earnings or dividends to increase it. The trustee has to perform the task ‘as would a good head of family’ with the power and the duty to select various investments that will achieve the mandate. The decision of the Court to place the award in a trust fund was precisely because it is an institution that ‘is designed to maintain and increase the real value of the assets.’ The Court therefore rejected the Commission’s request that the government be ordered to disburse additional sums periodically to maintain constant the value of the original award for so long as the trust.

The final issue dealt with by the Court in the Honduran cases concerned the mode of payment. The Court ordered a lump sum payment within 90 days, free of taxes, or payment in six equal monthly installments, beginning within 90 days. In the latter case, the amount remaining due would be subject to interest at current rates in Honduras. Without any indication of the basis of its judgment, the Court divided all amounts awarded between the wife, who received one-quarter, and the children, who shared three-quarters. The Court ordered establishment of a trust fund for the children, created in the Central Bank of Honduras ‘under the most favorable conditions permitted by Honduran banking practice.’ The children receive monthly payments from the fund until age twenty-five, when it is to be distributed.

The Velásquez Rodríguez and Godínez Cruz judgments on compensatory damages were the subject of further proceedings when the Commission asked for a clarification. The problem arose due to high levels of inflation in Honduras and the need to protect the value of the award. The Commission asked that the amount of the award be indexed, calculated in United States dollars of 20 October 1989, and that it maintain that same value throughout the life of the trust. In agreeing with the Commission, the Court repeated that compensation due victims or their families must attempt to provide *restitutio in integrum* for the damages caused by the measure or situation that constituted a violation of human rights.

The desired aim is full restitution for the injury suffered. This is something that is unfortunately often impossible to achieve, given the irreversible nature of the damages suffered, which is demonstrated in the instant case. Under such circumstances, it is appropriate to fix the payment of ‘fair compensation’ in sufficiently broad terms in order to compensate, to the extent possible for the loss suffered.

Moral damages are the Court defines as ‘the result of the psychological impact suffered by the family ... because of the violation of rights and freedoms guaranteed by the American Convention, especially by the dramatic characteristics of the involuntary disappearance of persons.’ The Court seems to be rightly suggesting that one factor in assessing moral damages is the egregiousness of the conduct of governmental authorities. The family demonstrated the existence of moral damages through expert psychiatric testimony which ‘the government could not disprove.’ Moral damages were set at 250,000 lempiras.

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22 *Velasquez Rodríguez*, Interpretation of the Compensatory Damages Judgment, above n. 8 para. 20; *Godínez Cruz*, Interpretation of the Compensatory Damages Judgment, above n. 8 para. 20.

23 Id. para. 27.

24 *Velasquez Rodríguez*, above n. 8 para. 50 (emphasis added).
remains in effect. However, the Court did order the government to pay lost opportunity costs resulting from its failure to comply with the judgment in the time ordered: interest and the decline in value of the lempira since the date of judgment. This constituted a real loss which must be compensated by the government.

Some eight years later, the Honduran government paid the award.

**Aloeboteoe**

In the *Aloeboteoe* case the Court dealt only with the issue of reparations, after Suriname accepted responsibility for the kidnapping and deaths of seven young men of the Saramaca tribe. Six of the men were forced to dig their own graves before being killed. One was shot and seriously wounded while trying to escape. He later died of his wounds after testifying about the massacre. On behalf of the victims’ families, the Commission sought indemnification for material and moral damages, other non-monetary reparation, and reimbursement of expenses and costs incurred by the victims’ next of kin. The Commission also argued that the Saramaca tribe suffered direct moral damage and was entitled to compensation.

The Court faced a difficult issue of identifying the persons in the families of the decedents who would be entitled to compensation. The Saramacas are descendants of African slaves who maintain a traditional culture, including a matriarchal social structure and polygamy. Marriages are not registered with the government, partly due to lack of knowledge and partly because the government has failed to provide accessible facilities to register births, deaths and marriages.

The Court, applying a generally recognized choice of law principle, determined that local law should apply to determine next of kin and beneficiaries of the victims. Surinamese law holds that a victim's next of kin includes the legally recognized spouse, the children, and perhaps dependent parents of the victim. The law does not recognize polygamy. In contrast, Saramaca tribal customary law accepts multiple marriages and the duty of adult children to care for their parents. The Court found that Surinamese family law was not effective in the region and was therefore not the local law for purposes of the case. As a result, the multiple wives and children of the victims were recognized by the Court.

The Commission and the lawyer for the victims argued that the tribe itself had suffered an injury because under tribal customs 'a person is a member not only of his or her own family group, but also of his or her own village community and tribal group'. It was argued that in the Saramaca culture a communal matrilineal group takes responsibility for the welfare of its members and for such matters as determining which family members are to share in compensation rendered. The attorneys relied on the decisions of earlier international tribunals which found that the right to recover rests on the direct personal loss, if any suffered by each of the claimants. 'The direct personal loss referred to is pecuniary in nature and is measured principally by the degree of financial dependence which existed between the claimant and the deceased.' The Court rejected this part of the claim.

Regarding the quantum of compensation, the Commission argued that material damages for each dependent should be based on the total loss to the family members. According to the Commission, the proper formula requires estimating net present value of the amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant, plus (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and (c) reasonable compensation for mental suffering or shock. Adjusted by a number of additional factors, net present value requires calculating: (i) the age at death of each victim and annual earnings at that time, (ii) the life expectancy of each victim determined by actuarial tables, (iii) annual earnings taking into account inflation rates.

Although it listed the factors applied in the *Lusitania* arbitration, the Commission calculated and demanded only lost revenues: the personal services and value to the family of the decedent were not considered. This factor may have been considered too subjective or difficult to apply. Whatever the reason, the absence of an award for personal services, plus

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27 *Aloeboteoe*, above n. 8.
28 The Court found no issue under the Convention with regard to the recognition of polygamy. In contrast, the all male Court refused to place the monetary compensation under the control of the female head of the family because this would involve gender discrimination.
29 Id. at para. 19.
31 The Commission relied on the *Lusitania* Cases (1923) for its method of calculating damages, see *Opinion in the Lusitania Cases*, Judgment of 1 Nov. 1923, 363.
32 The additional factors listed in the Commission brief, and taken from the *Lusitania Cases*, are: (a) the age, sex, health, condition and station in life, occupation, habits of industry and sobriety, mental and physical capacity, frugality, earning capacity and customary earnings of the deceased and the uses made of such earnings by him; (b) the probable duration of the life of deceased but for the fatal injury, in arriving at which standard life-expectancy tables and all other pertinent evidence offered will be considered; (c) the reasonable probability that the earning capacity of deceased, had he lived, would either have increased or decreased; (d) the age, sex, health, condition and station in life, and probable life expectancy of each of the claimants; (e) the extent to which the deceased, had he lived, would have applied his income from his earnings or otherwise to his personal expenditures from which claimants would have derived no benefits. Decedent's pain and suffering, life insurance proceeds, and punitive damages are not included. Commission Brief of 31 Mar. 1992, 7-8.
33 The Commission has similarly failed to include a valuation for personal services in all of the subsequent cases. Mental suffering and shock are considered the basis for moral damages.
the conceded 'extremely conservative' calculation of lost revenues, resulted in substantially less being claimed in material damages than was actually suffered.

The Commission sought moral damages for the psychological harm resulting from the deaths of loved ones, for being denied information as to the victims' whereabouts and for being unable to bury the bodies. They also sought to repair damage to the family members' position in their culture due to the loss of each husband/father because the traditional standing of each family is based in part on the contributions of working men to their parents and grandparents and their dignity reflects on the family as a whole.

In total, the victims and the Commission sought a lump sum of 5,114,484 Suriname florins, representing the material and moral damages, plus an annual sum representing actual damages of Sf 84,080 to the adult dependents, to be divided among them. The lump sum award consisted of Sf 1,114,484 in material damages to the children; Sf 660,000 in moral damages to the children; Sf 1,340,000 in moral damages to the adult dependents; and Sf 2,000,000 in moral damages to the tribe of the victims.

The victims in Aloeboetoe sought measures other than compensation: 1) an apology from the President of Suriname and the Congress, 2) publication of the Court's decision, 3) return of the bodies of six victims to the families, 4) the naming of a park or square or prominent street after the Saramaca tribe, 5) investigation and punishment of the responsible persons. Attorneys for the victims also sought both costs and fees, pleading these to avoid the defect the Court had found in the Honduran cases. They sought amounts for attempting to ascertain the whereabouts of the victims; and for pursuing the claim at the local level, before the Commission and before the Court, including attorney's fees. The requests for legal costs were Sf 715,618 and US$8,533, while the amount of expenses was Sf 32,375. The government argued that the Commission was working with outside attorneys, listed as attorneys for the victims, who performed work that the Commission should be doing. Further, the Court found that

The Commission and the lawyers for the victims underestimated the actual damages, choosing to base their calculations on 'extremely conservative assumptions' about the inflation rate in Suriname. They noted that the actual state of the economy would 'indicate much higher figures' and 'substantially higher' damages. Commission Brief, 9. It is not clear why this approach was taken.

The names and relationships of the family members and other dependents, as well as information relevant to material and moral damages, were obtained in large part through detailed questionnaires prepared by the Commission and administered to the Saramaca.

These costs included a visit to Suriname by the attorney representing the victim, a visit to the interior of the country by part of the non-governmental organization involved, the appointment of research assistants to prepare the three hearings for the case before the Commission and the initial memorandum to the Court, and the hiring of an associate professor to take over the law course of the victims' attorney.

The Court accepted some of the claims made by the Commission and the victims, such as the full amount of moral damages, while rejecting others, including the material damages claimed by parents of the decedents. Rather than rely on the Commission, the Court decided to appoint its own experts to assist in acquiring information to fix the amount of the compensation and costs. In addition, the Court sent its own Deputy Secretary to Suriname to gather additional information regarding the economic, financial and banking situation of the country.

In its judgment the Court emphasizes that the law on damages, including its scope and characteristics and the determination of beneficiaries, is governed by international law. Compliance with a judgment on reparations is not subject to modification or suspension by the respondent State through invocation of provisions of its own domestic law. In this regard, the Court distinguishes between future action by the State, which must conform to the Convention and ensure the enjoyment of the right or freedom that was violated, and reparations for past actions of the state. Where, as here, the violation involves a loss of life or other right that cannot be restored, compensation must be in an amount sufficient to remedy all the consequences of the violations that took place.

The Court discusses for the first time the issue of proximate harm, noting that all human actions cause remote and distant effects. It is not clear what the purpose of this discussion is, although it may relate to the denial of the tribe's claim for moral damages or the claims of the parents of the victims. Whatever the underlying reason, the Court is singularly unhelpful in providing guidance to determine what harm will be deemed too remote from the act for the actor to bear responsibility. According to the Court, the responsible party must 'make reparation for the immediate effects of such unlawful acts, but only to the degree that has been legally recognized.' This suggests a double limitation: the injury must be immediate (undefined) and one that has already been recognized by law. This is an exceedingly difficult test to apply in a new court where there is no precedent. The Court also states that restitution in integrum is '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.'

Calculation of compensatory damages followed the approach taken in the Honduran cases and is similar to the Commission's proposals.
Compensation for actual damages is seen to comprise both indirect damages (daño emergente) and loss of earnings (lucro cesante). A 'prudent estimate of damages' is the income that the victims would have earned throughout their working life had they not been killed, based on the income that they would have earned for their economic activities during the month of June 1993.\footnote{The judgment is dated 10 Sept. 1993; the massacre took place 31 Dec. 1987. June 1993 was selected because in that month a free exchange market was established in Suriname. This made it possible to avoid the distortions produced by a system of fixed rates of exchange in a highly inflationary economy.} To avoid the problems that arose in the Honduran cases with high inflation in the country, the Court calculated the annual income of each victim in local currency then converted it into dollars at the free market exchange rate. Wages back to 1988 were computed, along with interest, and the resulting amount was increased by the current net value of the expected income during the rest of the working life of each of the victims. The amounts ranged between US$19,986 and US$55,991.

The victims were also found to have suffered moral damages due to abuse by an armed band that deprived them of their liberty and later killed them:

The beatings received, the pain of knowing they were condemned to die for no reason whatsoever, the torture of having to dig their own graves are all part of the moral damages suffered by the victims. In addition, the person who did not die outright had to bear the pain of his wounds being infested by maggots and of seeing the bodies of his companions be devoured by vultures.\footnote{Id. para. 51.}

As the Court noted, anyone subjected to the aggression and abuse described will experience moral suffering. The Court explicitly decided that such claims are survivable: the Court found that the deceased had 'an inherent' right to compensation that national law generally transmits to their heirs by succession. Successors are also presumed to have suffered their own actual and moral damages due to the loss of life. The burden of proof is on the other party to show that such damages do not exist. Claimants who are not successors, however, must provide specific proof justifying their right to damages. The Court applies this principle as well as 'rules, generally accepted by the community of nations' that designate spouse and children as successors. Only if there is no spouse or children, are the ascendant deemed successors. Nevertheless, the Court presumed that the parents suffered moral injury 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.'\footnote{Id. para. 76.} The Court accepted the total amount of moral damages claimed by the Commission, an equal amount for each victim, except the one who was wounded, who received one-third more than the others in light of his greater suffering.\footnote{Moral damages for the six was calculated at US$29,070; the seventh victim was awarded US$38,755.} One-half the amount went to the children and one-quarter each to the wives and parents.

The total amount of the reparations ordered in Aloeboetoe came to US$453,102. As in the Honduran cases, the Court ordered the establishment of a trust fund, only this time the Court ordered it to be established in dollars and administered by a Foundation. The Court appointed the members of the Foundation, whose duty was to obtain the best returns for the sums received in reparation and to act as trustee of the funds. The government was ordered to make a one-time contribution of US$4000 or its equivalent in local currency to the operating expenses of the Foundation. Suriname was ordered not to restrict or tax the activities of the Foundation or the operation of the trust funds. Each adult beneficiary may withdraw up to 25% of the sum due to them at the time the Government makes the deposit. The duration of the trust fund is between three and seventeen years, with semi-annual withdrawals permitted. The Foundation is permitted to set up a different system in undescribed special circumstances.

In Aloeboetoe, unlike the Honduran cases, the Court ordered specific non-monetary remedies, requiring that the government reopen and staff the school and health dispensary in the area where the victims' families lived. The Court did not discuss the other requests made by the Commission, except to note briefly the continuing obligation of Suriname to inform the families of the location of the bodies of the victims. The Court again rejected the request for fees and costs, except the costs of the next of kin in searching for the victims. The Court stated that the victims did not appoint anyone to represent them, which was a mistake of fact. In fact, the attorney in the case represented two NGOs and was designated 'legal advisor' to the Commission to facilitate his participation in the case.\footnote{David Padilla, attorney with the Commission, says 'the Court made a serious mistake of fact,' in the Aloeboetoe case. See D. Padilla, 'Reparations in Aloeboetoe v. Suriname,' 17 Hum. Rts.Q. 541, 548–9 (1995).} According to the Court, if the Commission fulfilled its function by 'contracting outside professionals instead of using its own staff' it could not demand attorney's fees.\footnote{Id., para. 114.}

### Gangaram Panday

The Court began to change directions dramatically with its decision in Gangaram Panday.\footnote{Gangaram Panday case, above n. 8.} Gangaram Panday was illegally detained and died...
while in government custody. The complaint alleged that Suriname violated the victim’s rights to life, humane treatment, personal liberty and judicial protection, as well as the general obligation to respect and ensure the Convention rights. The Court unanimously found a violation of the right to personal liberty, but, in its first divided opinion, held 4-3 in respect of the Article 4 claim that government responsibility for the victim’s death had not been proved. It also noted that the finding of responsibility for deprivation of personal liberty was reached ‘by inference.’ Seemingly because of this, it awarded nominal damages, not including lost earnings or other indirect damages, and did not award costs. The victim’s wife and any children were to be paid US$10,000 or its equivalent in Dutch florins within six months of the date of the judgment. The judgment is inexplicable and clearly wrong: the type and quantum of evidence leading to a finding of responsibility has no bearing on whether costs are awarded, nor on the amount of damages. The amount and type of evidence goes to a determination of whether or not the state is responsible and the degree of wrongfulness of a state’s conduct may be a variable in awarding moral damages; in no case does the amount and type of evidence affect the amount of loss suffered by the victims.

Apart from theoretical objections to the Court’s decision, the Court’s approach undermines respect for the Convention. It signals states accused of violations that they can avoid being held responsible48 or having to compensate victims if they succeed in withholding or concealing evidence that would prove the allegations.

**El Amparo**

In the *El Amparo* case,49 the Court held Venezuela liable to make reparations (‘obligada a reparar los daños’) and to pay fair compensation to the surviving victims and next of kin, after the government of Venezuela accepted responsibility for the deaths of fourteen fishermen and violations of the rights of two survivors. Venezuela decided not to contest the facts referred to in the complaint. The Court ordered that the state and the Commission decide the reparations and the form and amount of compensation by mutual agreement.

48 Since Suriname’s responsibility has been inferred, the Court decides to set a nominal amount as compensation. . . . Also based on the fact that Suriname’s responsibility has been inferred, the Court considers that it must dismiss the request for an award of costs.4 Id. para. 70, 71.

49 In contrast to its treatment of the evidence in the Honduran cases, where the Court held that the state cannot rely on failure of proof as a defense if the evidence cannot be obtained without the state’s cooperation, the Court failed to shift the burden to the government to explain how Gampiro Panday died. By not requiring the government to come forward with evidence on the treatment and fate of the victim during the period he was in government custody, the Court imposed a heavy and undue burden on future litigants.


In submitting the case to the Court, the Commission invoked Convention Article 1(1) (obligation to respect rights) together with Articles 2 (domestic legal effects), 4 (right to life), 5 (right to humane treatment), 8(1) (right to a fair trial), 24 (right to equal protection), 25 (right to judicial protection). In addition to a declaration of Venezuelan responsibility, the Commission asked for investigation and punishment of the actual and ‘intellectual’ authors of the wrong; a declaration regarding the incompatibility of Article 54(2) and (3) of the Military Code of Justice and an order for its revision; and reparations for the victims together with costs and attorneys’ fees.

The Court’s judgment reserved the right to review and approve any agreement reached on reparations and to determine the scope of reparations and amount of indemnities, court costs and attorneys’ fees should no agreement be reached. Although the Court makes no specific mention of the non-pecuniary reparations asked by the Commission, Judge Cançado Trindade, concurring in the judgment, added that the Court was reserving the right to decide on the compatibility of the sections of the Code of Military Justice with the Convention, and should have so stated.

The parties failed to reach agreement and the Court resumed proceedings. The Commission submitted a brief prepared by the attorneys for the victims in which it reiterated its claim for both pecuniary and non-pecuniary relief. The Commission emphasized the objectives of reparations, which are to re-establish respect for international norms by restoring the status quo ante, or paying damages when this is not possible. In this regard, the Commission and the victims viewed it as essential to go beyond the payment of compensation to conform to the requirements of Article 63(1) and the earlier judgment. In fact, only in respect of the right to life and personal integrity was compensation required, because of the irreversible nature of the injury. In regard to the other violations, the Commission argued that *restitutio in integrum* could be accomplished and should be ordered by the Court. Specifically, the Commission repeated its call for government action to reform the Code of Military Justice and investigation and punishment of the authors of the harm, as well as monetary compensation. In addition, satisfaction required unequivocal establishment of the truth, and restoration of the honor of the victims and their families. This required a public admission, published in the principal newspapers of the country and abroad, and a memorial or plaque in memory of the victims.

The claim for monetary compensation contained some new elements. Relying on the distinction made by the Court in the *Aloeboetoe* case between indirect damages and loss of earnings, the Commission sought to include in the damages claims the costs incurred by the victims and their
families as consequence of the violations. Without proof of the exact amount incurred by each family, due to the conditions in which they live, the attorneys asked for a lump sum of US$240,000 to be divided equally among the 14 families and two survivors. Lost earnings were calculated for the fishermen on the basis of the rural minimum wage in adjusted by the index of inflation. Based on a life expectancy of 69 years, this calculation was said to represent a 'prudent estimate of the damages.' The amount claimed for each of the deceased was between US$5508.59 and US$5558.85; on behalf of each of the two survivors US$2773.87 was claimed. The amount of moral damages was set in reference to the Amparo case. The brief argued that the psychological damage in El Amparo was equal to that in the earlier cases because the families knew that their relatives were murdered and additional violations were committed; the amount requested was US$125,000 per family of those who died and half that amount for the two survivors.

The Court issued its judgment on reparations on 14 September 1996. In regard to the indirect damages (daño emergente), the Court was persuaded by the Venezuelan argument that adequate proof of the costs was lacking and that the sum was disproportionate. Instead of the US$240,000 requested, the Court awarded US$2000 to each of the families and each of the survivors for the costs incurred regarding actions taken within the country.

Compensatory damages were assessed, as the Commission proposed, on the basis of the minimum wage for the country at the time of the incident in 1988 and the normal life expectancy of those who died. A twenty-five percent reduction represented the personal expenses of the deceased. In the case of the survivors the amount represented the period during which they could not work. On the basis of this calculation, the Court awarded

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between US$23,139.44 and US$28,641.52 to each of the families and US$4,566.41 to each of the survivors.

The Court addressed the Commission's argument equating the moral damages in this case with those in the Honduran cases. The Court rejected using prior cases as precedent, stating that each case must be looked at on its own facts. It noted that, like Suriname in the Aloebotoe case, the Venezuelan government recognized its responsibility in this case. It also cited with approval the Venezuelan reference to the practice of the European Court of Human Rights, where declaratory judgment of responsibility is often viewed as sufficient reparation. In doing so, the Court ignored the clear differences between the damages provision in the European Convention and Article 63(1) of the American Convention. In any event, the Court found that such a judgment would not be adequate reparation for moral damages in this case given the gravity of the violations. It awarded each of the families and each of the survivors US$20,000. All damages were ordered distributed according to the Commission's recommendation.

The treatment of non-pecuniary reparations followed the European Court practice. The Court rejected making an 'abstract' pronouncement on the compatibility of the Military Code of Justice with the Convention and thus refused the Commission's request. Investigation and punishment were again referred to as continuing obligations. For the remaining non-pecuniary measures, the Court found that a determination of Venezuelan responsibility and the judgment on damages constituted adequate reparations.

Finally, the Court once more denied costs and attorneys fees for proceedings before the Commission and the Court, continuing to confuse the representation of the victims with the work of the Commission.

Neira Alegria

The Neira Alegria case against Peru was submitted by the Commission in 1990. It alleged violations of Articles 1, 2, 4, 7, 8, and 25 of the Convention in regard to two men detained at a Peruvian correctional facility and accused of terrorism. During or after the military suppression of a riot at the prison the two men disappeared. The Commission sought to have Peru declared responsible for the disappearances and consequently for violations of the Convention. The Commission asked that the Court order Peru to investigate, identify and punish those the perpetrators; identify the next of kin of the victims; and repair the damage caused to them and their survivors.

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51 The brief listed professional fees for legal and administrative actions, medical costs, photocopying costs, telephone charges, the cost of translation of testimony, notary costs and other costs of legal assistance, plus the cost of publication of press communications.
52 During oral hearings on reparations, Venezuela labelled the sum demanded as 'astronomical' and 'disproportionate.' El Amparo case, above n. 8, para. 18.
53 During the hearings, the victims claimed that the Commission had made an error in calculating the damages based on the minimum wage. After further consultations, the Comission re-calculated the sums and arrived at figures between US$5508.59 and US$5558.85, calling it a radical modification that was procedurally incorrect.
54 According to the brief, all compensatory damages would be paid one-third to the surviving spouse and two-thirds to the children. One-half the moral damages would be given to the children, one-quarter to the spouse and one-quarter to the fathers. In response to the Rights which has repeatedly stated that recognition of a violation by the Court is normally an equitable reparation for all the damages caused.
55 Judge Antonio Cançar Cançar dissented on the issue of non-pecuniary damages, pointing out that reparations go beyond restitution in integrum and indemnification to include rehabilitation, satisfaction and, importantly, guarantees of non-repetition. In his view this adequately supports the requested non-pecuniary measures as laws may per se violate the Convention and need to be considered in contentious cases.
56 Neira Alegria et al., 1 A Court H.R. Series C No.20 (1995); Reparations, above n. 8.
kin of the whereabouts of the disappeared; pay monetary damages; and pay the court costs and attorneys’ fees.

The Court unanimously found Peru responsible for violations of the rights cited. Consistent with its prior practice, the Court left it to the parties to agree on compensation and retained jurisdiction over the case, whether or not the agreement was reached. The Court held that Peru must pay the expenditures that the victim’s next of kin may have incurred during the national proceedings as well as fair compensation. As usual, it insisted that

the Commission cannot demand that expenses incurred as a result of its own internal work structure be reimbursed through assessment of costs. The operation of the human rights organs of the American System is funded by the Member States by means of their annual contributions.57

The parties failed to reach agreement and on 19 September 1996 the Court issued its judgment on reparations. As in the Amparo case, the Court awarded each family US$2000 as compensation for its costs incurred in legal procedures in Peru. No costs were awarded for proceedings before the Commission or the Court. Lost earnings are calculated based on life span and monthly salary, discounted to present value. If the actual salary is not known, the compensation is based on the minimum monthly salary applicable in the country. The amounts awarded for lost earnings were US$31,065.88, US$30,102.38 and US$26,872.48. The Commission sought US$125,000 moral damages per victim, a sum which the government called “exorbitant”; the Court awarded US$20,000.

Other Cases

In the Caballero Delgado and Santana case,58 the Court found Colombia responsible for the detention and disappearances of the two named persons. It found that “reparations should consist of the continuation of judicial proceedings inquiring into the disappearance of Isidro Caballero-Delgado and María del Carmen Santana and punishment of those responsible in conformance with Colombia domestic law.”59 It also decided that Colombia was obligated to pay fair compensation to the relatives of the victims and to reimburse the expenses they had incurred in their actions before the Colombian authorities in relation to this proceedings. Once

more, the Court reminded the Commission that it cannot demand reimbursement of expenses incurred as a result of its own internal work.

The compensation and costs phase of the case remains open.60 The Commission has asked the Court for reform of the penal law of Colombia as it regulates habeas corpus and disappearances; investigation and punishment of those responsible; and actions to repair the damage caused to the honor and good name of the victims and their families. In damages, the Commission has asked for moral damages in the amount of US$125,000 for the two disappeared, based on the precedents in the Court’s jurisprudence to date. In addition, the Commission seeks moral and material damages for the families of the victims.

The Court discontinued the Maqueda case due to a friendly settlement achieved after submission of the case to the Court.61 The victim alleged he was being wrongfully imprisoned by the government of Argentina. The government agreed to release him. In turn, the applicant waived all claims to monetary damages and agreed to petition the Court to discontinue the case. The Court found the agreement to be consistent with the Convention in that the principal matter was the right to freedom which had been restored and granted the petition, although reserving the power to reopen and proceed with the case should any change occur that would so warrant.

SUMMARY AND CONCLUSIONS

The Court has been consistent in several aspects of its treatment of reparations. First, all awards begin with a declaratory judgment regarding the human rights that have been violated. Second, apart from the anomalous Gangaram Panday case, the Court has consistently invited the two sides to reach agreement on reparations and the amount of damages. Third, the Court generally awards costs for actual expenditures in internal legal and administrative procedures at the national level, while denying all costs and legal fees for proceedings before the Inter-American Commission and Court.

Other aspects of the Court’s decisions are less consistent. Some are hard to justify. First, the Court is reluctant to utilize its power to order nonpecuniary reparations, although these can be extremely important in remedying human rights violations. In some cases, applicants may be more concerned to know the truth, such as the whereabouts of the disappeared

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57 Neira Alegria, id. para, 87, quoting Aloecheboe, above n. 8, para 114.
59 Id. para. 69.
60 The Court also delivered an opinion on 2 Feb. 1996 in the case of Garrido and Baigorria against Argentina. The state accepted responsibility for the disappearances of the two individuals. The Court ordered the parties to negotiate an agreement on reparations. See above, n. 9, judgment in Garrido Baigorria case.
The Court's approach to compensatory damages is largely based on the arguments presented by the Commission. From the beginning, the Commission has articulated a standard which it has failed to apply in omitting claims for damages resulting from the loss of personal services of the victim. It also has underestimated the impact of inflation. The Commission in general has relied too heavily on the presentations of victims and their attorneys, failing to develop a coherent and consistent theory and practice of damages.

The standard and approach of the *Lusitania* cases offers a framework for developing a theoretical and practical approach to damages. Compensatory damages should repair all the proximate direct and indirect consequences of the harm. Moreover, with a dual focus on suffering of the victim and wrongfulness of government conduct, it seems that moral damages may partially substitute for punitive damages.

The greatest disappointment in the Court's approach thus far is in regard to costs and attorneys' fees. The recent approach of the Court, awarding $2,000 to each claimant for costs incurred at the national level, is partly due to the lack of proof presented by the Commission and the victims. It also seems that the claims made in the *El Amparo* case were excessive; it is hard to avoid the suspicion that they constituted an effort to receive attorneys fees for work done at the Commission and the Court, as well in national proceedings. If this is the case, the Court itself is largely responsible, due to its persistent denial of attorneys fees for the victims' lawyers in Court proceedings.

The Court apparently fails to see the difference between the interests of the Commission and those of the victims, although this was recognized in the initial proceeding before the Court. In the *Viviana Gallardo* case, the Court spoke of the need to reconcile the interests of the victims that the full enjoyment of their rights be protected and assured; the need to safeguard the institutional integrity of the system; and the interest of the government in a speedy judicial process. In that proceeding, the Court noted that no person is entitled to submit cases to the Court because individuals do not have standing. The system requires 'that the Convention be interpreted in favor of the individual, who is the object of international protection.' The Commission's role is likened to that of the ‘Ministerio Público’ which carries out an initial investigation, attempts a friendly settlement and proposes appropriate recommendations to remedy the violation it has found to exist.

Victims need their own attorneys before the Commission and before the
Court; indeed, this may be required for due process. Procedures before the Commission have not been created for the sole benefit of the States, but also in order to allow for the exercise of important individual rights, especially those of the victims. The victims and their families also must be able to recover costs and fees, otherwise the goal of *restitutio in integrum* is defeated.

In issuing its judgments on reparations, the Court should recall that Article 63(1) was deliberately expanded to ensure protection for the victims of human rights violations. These persons will only be able to vindicate their rights if they have access to legal assistance and that assistance will only come if it is compensated. To ensure *restitutio in integrum*, the Court must liberalize its views on attorneys fees and costs. The Commission represents the institutional interests in the system; the victims deserve and are entitled to their own representation. Where the state has caused the wrong, it should pay for the procedures necessary to achieve a remedy.

*See Article 8, American Convention on Human Rights.*

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**The Interaction between the Political Actors of the OAS, the Commission and the Court**

VERÓNICA GÓMEZ

**INTRODUCTION**

International or regional organs for the protection of human rights tend to be prisoners of the unending paradox of having been created and being nourished directly by the subjects they are meant to control. Although they may confer a number of powers on these organs, states both retain control over their functioning, by electing their members and allocating their budgets, and may play an important role in enforcing their decisions. This paradox may create institutional and political tension and thus interfere with the work of these organs and their effectiveness. The inter-American system of human rights protection is an interesting scenario for the analysis of this kind of tension.

This Chapter is an attempt to explore the interaction between the Inter-American Commission on Human Rights (the Commission), the Inter-American Court of Human Rights (the Court) and the Permanent Council and the General Assembly of the Organization of American States (OAS) and individual member States and explain its impact on the functioning and effectiveness of the inter-American system of protection. Three different kinds of tension will be evaluated: those that arise as human rights standards are interpreted and applied during the individual petition procedure before the Commission and in the advisory and contentious jurisdiction of the Court; those that derive from the need to make the work of the Commission and the Court effective; and, lastly, those that result from the exercise by member States of their control over the functioning of the organs, in respect of their composition, budget and, to some extent, mandate. Finally, consideration will be given to current OAS proposals to reform the human rights System. The rules and the players of the system will be briefly described as a prelude to the analysis of their interaction.