

American University International Law Review

Volume 23

Issue 1 *Academy on Human Rights and Humanitarian
Law Articles and Essays Analyzing Reparations in
International Human Rights Law*

Article 6

2007

Dissuasive Measures and the "Society as a Whole": A Working Theory of Reparations in the Inter- American Court of Human Rights

Judith Schonsteiner

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Schonsteiner, Judith. "Dissuasive Measures and the "Society as a Whole": A Working Theory of Reparations in the Inter-American Court of Human Rights." *American University International Law Review* 23, no.1 (2011): 127-164.

This Academy on Human Rights and Humanitarian Human Rights Award is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

DISSUASIVE MEASURES AND THE “SOCIETY AS A WHOLE”: A WORKING THEORY OF REPARATIONS IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

JUDITH SCHÖNSTEINER*

INTRODUCTION	128
I. INDIVIDUALS AS BENEFICIARIES OF REPARATION	
AWARDS	131
A. THE INDIVIDUAL VICTIM	131
B. THE CONCEPT OF “NEXT OF KIN”—THE GROUP VIEW ON BENEFICIARIES OF REPARATIONS	133
C. DEVELOPMENT PROGRAMS AND MEASURES DIRECTED TO “MEMBERS OF THE COMMUNITY”	135
II. REPARATION ADDRESSED TO THE “SOCIETY AS A WHOLE”	139
A. THE INTER-AMERICAN COURT’S EXPLICIT USE OF THE CONCEPT	140
B. MEASURES PURSUANT TO ARTICLES 1(1) AND 2 WITH EFFECTS ON THE “SOCIETY AS A WHOLE”	144
1. <i>Non-repetition Guarantees</i>	145
2. <i>The Obligation to Investigate, Prosecute, and Punish</i>	147
3. <i>Granting of Legislative Measures</i>	148

* Judith Schönsteiner holds an LL.M. in International Human Rights Law from the University of Essex, United Kingdom, and is a doctoral candidate at the University of Essex Department of Law. I would like to express my sincere gratitude to my doctoral supervisor, Clara Sandoval Villalba, for all of her support. She inspired my writing about the reparation jurisprudence of the Inter-American Court and made most precious comments to earlier versions of this article. I also am very grateful to Dinah Shelton, and to Victor Madrigal Borloz and Viviana Krsticevic for instructive discussions in the fall of 2005. Finally, I thank Laura Sierra for her fine editorial work. The shortages and errors are certainly my sole responsibility.

C. REPARATION MEASURES BENEFITING THE “SOCIETY AS A WHOLE”	153
1. <i>Public Apology and Institutionalized Remembrance</i> ..	153
2. <i>Training of Public Officials, Improvement of Prison Conditions and Protection for Judicial Officials</i>	156
III. DEMOCRACY, PARTICIPATION AND “SOCIETY AS A WHOLE”	159
CONCLUSIVE REMARKS.....	162

INTRODUCTION

Addressing non-monetary remedies to the “society as a whole” is an underlying rationale of jurisprudence in the Inter-American Court of Human Rights (“Inter-American Court”); measures awarded in this context are intended to serve dissuasive purposes.

“Society as a whole” is a concept exclusive to the Inter-American System, referring to all individuals of a society, regardless of social divisions or cleavages.¹ In recent decisions, the term “society as a whole” has been partially replaced by expressions like the “Peruvian society” or the “Colombian society.”² The concept is particularly

1. The European Court of Human Rights uses the concept of “community as a whole” in relation to the “public interest” of society which has to be counterbalanced with the individual’s interest. The term “community as a whole” is thus not parallel to “society as a whole” in the Inter-American context. *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1, 57, 59-60. Recent developments in European jurisprudence might in general lessen the gap between the Inter-American and European doctrines: The European Court has in some cases included more beneficiaries within the scope of reparation. *See, e.g., Sejdic v. Italy*, App. No. 56581/00 (Grand Chamber Mar. 1, 2006) (suggesting that recent reforms to the Code of Criminal Procedure could be sufficient to remedy a systemic problem in the administration of justice); *Broniowski*, 2004-V Eur. Ct. H.R. 1. *See generally* Valerio Colandrea, *On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdic Cases*, 7 HUM. RTS. L. REV. 396 (2007).

2. *See, e.g., Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 217 (Jan. 31, 2006) (recognizing that the Colombian society had a right to know the truth regarding human rights violations in accordance with the American Convention on Human Rights); *Gómez Palomino v. Peru*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 136, ¶ 78 (Nov. 22, 2005) (discussing that if Peruvian society knows the truth regarding human rights violations, it may find

used in the context of the right to the truth.³ Although the court does not recognize that the "society as a whole" has a right to the truth,⁴ it repeatedly states that the victims' and next of kin's right to the truth coincides with an expectation of the society as a whole.⁵ Apart from this explicit use of the concept, the Inter-American Court awards a wide range of measures that *de facto* benefit "society as a whole" rather than only or primarily the individual victim.⁶

Although the Inter-American Court explicitly excludes a punitive meaning in reparation awards,⁷ Judge Cançado Trindade argues that some reparation measures in the Inter-American system reveal a dissuasive or exemplary aspect.⁸ Dinah Shelton generally links the dissuasive function of remedies to the needs of the society: "In addition to redressing individual injury and sanctioning wrongdoers, remedies serve societal needs."⁹ This observation allows for the following argument to be made: When a non-monetary remedy is

ways to prevent similar violations in the future).

3. See *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 274 (Nov. 25, 2003) (reaffirming the theory that next of kin and "society as a whole" have the right to know the truth regarding human rights violations, and that this right is an important form of reparation).

4. See Douglass Cassel, *The Inter-American Court of Human Rights*, in VICTIMS UN-SILENCED 151, 160 (Catherine A. Sunshine & Mónica Ávila Paulette eds., Gretta K. Siebentritt trans., 2007), available at <http://www.dplf.org/uploads/1190403828.pdf> (pointing out that the court's "language" regarding society as a whole is "dictum").

5. *Mack Chang*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 274 (Nov. 25, 2003).

6. See, e.g., *Aloeboetoe v. Suriname*, 1993 Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 96 (Sept. 10, 1993) (requiring Suriname to reopen a school in Gujaba and create a permanent medical dispensary as reparation to the Saramaka tribe which has been affected by human rights violations).

7. See *Velásquez-Rodríguez v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 38 (July 21, 1989) (interpreting "fair compensation," as used in Article 63(1) of the American Convention on Human Rights, to include damages meant to compensate the victim, but not damages designed to punish the responsible state party). But see discussion *infra* Part II.B (addressing the view that exclusion of punitive damages from the definition of "fair compensation" is not appropriate).

8. See *Miguel Castro Castro Prison v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 55 (Nov. 25, 2006) (Reasoned Vote of Judge Cançado Trindade); *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 25 (Nov. 19, 2004) (Reasoned Vote of Judge Cançado Trindade) (arguing that one of the purposes of reparations is to guarantee the harmful acts will not be repeated).

9. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 354 (2005).

explicitly or *de facto* directed to the “society as a whole,” it is an indication that the judge considered the immediate need to efficiently and effectively redress the violation and especially to prevent its recurrence.

Prevention of recurrence cannot be achieved without considering the wider societal, legislative, executive, and judicial measures in the respective states. Inter-American jurisprudence reveals an overall consistent “working theory”¹⁰ of dissuasive intent in the court’s orders. While the term “punitive measures” is not appropriate to describe this practice because of a misleading resemblance to its use in criminal law, the term “dissuasive measures” suitably captures the intent of the judges of the Inter-American Court. Measures ordered pursuant to Articles 1(1) and 2 of the American Convention on Human Rights (“ACHR”) exemplify this practice,¹¹ and reparations granted pursuant to Article 63(1) of the ACHR confirm that the court orders dissuasive measures.¹²

This Article analyzes the reparation jurisprudence of the Inter-American Court in such a manner as to explore these assertions, particularly focusing on the question of who is the explicit or implicit beneficiary of each measure. In addition, this Article concentrates on measures that reach beyond individual victims to their next of kin or “society as a whole.” Finally, this Article addresses the court’s aim to strengthen democracy and the rule of law.

10. See Clara Sandoval, *A Critical View of the Protection of Refugees and IDPs by the Inter-American System of Human Rights: Re-assessing Its Powers and Examining the Challenges for the Future*, 17 INT’L J. REFUGEE L. 43, 47-48 (2005) (explaining the concept of “working theory” as the “legal and political assumptions . . . the Court deploy[s] in [its] daily work when having to interpret and apply the law of the system”).

11. See Organization of American States, American Convention on Human Rights arts. 1(1)-(2), Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR] (delineating general state obligations).

12. See *id.* art. 63(1) (providing that where a violation of a right or freedom protected under the ACHR occurs, the Inter-American Court shall require the reinstatement of that right or freedom and, where appropriate, order remedies and fair compensation to the injured party); see also *Loayza-Tamayo v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 164 (Nov. 27, 1998) (requiring Peru to amend domestic laws so that they conform with the ACHR); *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 286 (Nov. 25, 2003) (ordering the state to name a street or square after the victim and place a prominent plaque nearby referencing her activities).

I. INDIVIDUALS AS BENEFICIARIES OF REPARATION AWARDS

As a starting point, it is critical to examine the role of the individual victim in reparation decisions. Analyzing the role of the individual victim facilitates an understanding of the concept of "society as a whole" and its relation to the dissuasive purpose of measures granted by the court.

Article 63(1) of the ACHR entitles "the injured party" to the cessation of the violation, restoration of his or her rights, and reparations.¹³ In *Mack Chang v. Guatemala*, the Inter-American Court interpreted "injured party" to be coextensive with those who are considered victims of the violation.¹⁴ This correlation has been maintained throughout the years.¹⁵ Over time, however, the court's definition of "victims of a violation" has changed, resulting in a broader interpretation of the term "injured party."

A. THE INDIVIDUAL VICTIM

In its early jurisprudence, the Inter-American Court interpreted Article 63(1) of the ACHR as being exclusively victim-centered. In *Loayza-Tamayo v. Peru*, for instance, the court ordered the unconditional release of the victim to restore her right to freedom of movement.¹⁶ In the same spirit, the court held that reparations must be made "solely to those persons who suffer the immediate effects of its unlawful acts."¹⁷ The court adhered to the "traditional principles

13. ACHR, *supra* note 11, art. 63(1).

14. *Mack Chang*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 242.

15. See *Goiburú v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 145 (Sept. 22, 2006) (identifying the victims of the violation as the "injured party" and the appropriate beneficiary of reparations ordered by the court).

16. See *Loayza-Tamayo v. Peru*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 84 (Sept. 17, 1997) (ordering the release of a victim who was convicted in violation of the ACHR's prohibition against double jeopardy).

17. JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 237 (2003) (discussing the court's refusal to grant reparations to all individuals who claim to have been adversely affected by a state's human rights violations); see, e.g., *Aloeboetoe v. Suriname*, 1993 Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 49 (Sept. 10, 1993) (discussing how reparations should only be made to a party who has suffered from "the immediate effects" of a human rights violation and who has a "legally recognized" injury).

on causation” to argue in favor of the victim-centered view of reparations and obligations of non-recurrence.¹⁸ Therefore, in order for additional victims to benefit from the court’s ruling, the Inter-American Commission would have to join claims and refer cases to the Inter-American Court involving multiple victims.¹⁹ *Hilaire v. Trinidad & Tobago*, concerning thirty-two petitions on the death row phenomenon,²⁰ *Dismissed Congressional Employees v. Peru* and *Baena-Ricardo v. Panama*,²¹ addressing the joinder of petitions brought by members of trade unions,²² are examples of the Inter-American Commission’s attempt to join claims involving multiple victims.

Considering the court’s contentious jurisdiction over individual violations, it is not surprising that it can only award reparations to the victims of a violation.²³ Admissibility criteria,²⁴ as well as rules relating to the burden²⁵ and standard of proof,²⁶ are tailored to guarantee individual consideration of cases.²⁷ However, this does not

18. PASQUALUCCI, *supra* note 17, at 237.

19. *See id.* at 238-39 (noting that despite the Inter-American Commission’s efforts to increase fair treatment by referring multiple victim cases to the Inter-American Court, few victims actually receive reparations from the court’s judgments).

20. *Hilaire v. Trinidad & Tobago*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94, ¶¶ 1-3 (June 21, 2002) (resulting from the joinder of cases submitted separately to the Inter-American Court against Trinidad and Tobago).

21. *Baena-Ricardo v. Panama*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 72, ¶¶ 4, 6 (Feb. 2, 2001) (recognizing 270 public employees as victims in this case).

22. *Dismissed Congressional Employees v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 158, ¶ 132 (Nov. 24, 2006) (finding that Peru violated the rights of 257 victims).

23. ACHR, *supra* note 11, art. 63(1).

24. ACHR, *supra* note 11, arts. 46-47, 61-62 (requiring petitioners to pursue domestic remedies, where available, prior to applying to the Inter-American Commission); Inter-American Court of Human Rights, Rules of Procedure, arts. 33-34, Nov. 25, 2003, available at <http://www.corteidh.or.cr/reglamento.cfm> [hereinafter IACHR Rules of Procedure].

25. *Velásquez-Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 123 (July 29, 1988). *See generally* PASQUALUCCI, *supra* note 17, at 210 (noting that according to fundamental tenets of law, the burden of proof is initially and generally on the applicant).

26. *See* PASQUALUCCI, *supra* note 17, at 213 (explaining that international law generally avoids rigid standards of proof and the Inter-American Court has the ability to consider the evidence as it sees fit).

27. IACHR Rules of Procedure, *supra* note 24, arts. 44-50 (detailing the specific procedures by which evidence and witness testimony will be admitted).

prevent the court from defining the term "victim" in a broad sense, thus permitting the possibility for a *group* to be the victim of a violation and hence the beneficiary of reparation.

B. THE CONCEPT OF "NEXT OF KIN"—THE GROUP VIEW ON BENEFICIARIES OF REPARATIONS

Generally, "[t]he Court considers that the expression 'next of kin' of the victim should be interpreted in a broad sense to include all persons related by close kinship."²⁸ The Inter-American Court employs the expression "next of kin" in two different, but related contexts. In one context, the court refers to the next of kin when deciding who will inherit the compensation that a deceased victim would normally receive as a reparation award related to Article 4 of the ACHR.²⁹ Second, the concept of a victim's next of kin may also refer to those who suffered violations of their human rights protected under Articles 5, 8, and 25 of the ACHR in their own right if the original violation was under Articles 4, 5, or 7 of the ACHR.³⁰ However, in the latter context, the Inter-American Court has set several conditions that must be met, including the

existence of a relationship of regular and effective financial support between the victim and the claimant, the possibility of realistically presuming that this support would have continued if the victim had not died, and that the claimant would have had a financial need that was regularly satisfied by the support provided by the victim.³¹

28. *Loayza Tamayo v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 92 (Nov. 27, 1998) (including within this definition children, parents, and siblings).

29. *See Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 240-241 (Jan. 31, 2006) (awarding compensation in equal halves to the victim's children and wife or permanent companion, or in the absence of such individuals, in equal halves to parents and siblings); *Serrano Cruz Sisters v. El Salvador*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 210 (Mar. 1, 2005) (establishing a method whereby monetary reparations unclaimed by victims after more than ten years would be distributed equally among the victims' siblings). Also, children born outside of wedlock are considered potential heirs. *Cf. Garrido v. Argentina*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, ¶¶ 54, 56 (Aug. 27, 1998).

30. *Paniagua-Morales v. Guatemala*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 76, ¶ 85 (May 25, 2001).

31. *Id.*

The Inter-American Court has used the concept of “next of kin” in both meanings throughout its jurisprudence, and has thus consistently widened its scope. In *Velásquez-Rodríguez v. Honduras*, the court defined “next of kin” as the widow and children of a victim who disappeared.³² Soon after, the court adapted the concept to the special family structures of the Saramaka tribe in Suriname.³³ The court found Suriname’s argument unpersuasive that the first and second wives of the victims, as well as their children, had to be treated on an equal footing since polygamy is the normal form of family life within the tribe.³⁴ However, the court did not rule in favor of the Inter-American Commission’s request to broaden the concept of family to include the entire Saramaka tribe.³⁵ The court did not grant this request, arguing that the community is “redressed by the enforcement of the system of laws.”³⁶ Yet, as Shelton highlights, the order of reopening a school could nevertheless be seen as a measure of “‘just satisfaction’ to the community as a whole.”³⁷

The concept of “next of kin” has undergone further amplification throughout the years. In *El Amparo v. Venezuela*, the Inter-American Court for the first time recognized that an unmarried female companion has the same status as a wife in non-indigenous societies.³⁸ Furthermore, in *Gómez Palomino v. Peru*, the court

32. *Velásquez-Rodríguez v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 58 (July 21, 1989).

33. *Aloeboetoe v. Suriname*, 1993 Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 62 (Sept. 10, 1993) (interpreting the term “next of kin” based on tribal definitions instead of domestic provisions of family law unless the tribal understanding is contrary to the ACHR).

34. *Id.* ¶ 97(a) (granting one-third to multiple wives and two-thirds to their children of the reparations otherwise due to the deceased victims).

35. *Id.* ¶ 83 (holding that, although all individuals are part of both a family and community, “the obligation to pay moral compensation does not extend to such communities”). Compensation to the community may be in rare cases granted if it suffered direct damages.

36. *Id.* ¶ 83.

37. SHELTON, *supra* note 9, at 286.

38. *El Amparo v. Venezuela*, 1996 Inter-Am. Ct. H.R. (ser. C) No. 28, ¶ 41(c) (Sept. 14, 1996). The court confirmed this view by granting beneficiary status equally to all biological children the victim had with different wives, and to his stepchildren. *López-Álvarez v. Honduras*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 141, ¶ 187 (Feb. 1, 2006).

granted reparations in the form of a scholarship with either the victim's siblings or their children being eligible for its receipt.³⁹

To summarize, granting reparation measures to the "next of kin" enlarges the concept of individual redress. The fact that the ACHR considers family the basic unit of society supports this view.⁴⁰ The court's readiness to include grandparents, companions, non-relative dependents, and, more recently, emotionally distant siblings,⁴¹ demonstrates the commitment of the court to redress damages incurred by "next of kin" who have suffered as a result of a violation. Recently, the court observed in *Pueblo Bello Massacre v. Colombia* that moral damages to siblings can be assumed.⁴²

C. DEVELOPMENT PROGRAMS AND MEASURES DIRECTED TO "MEMBERS OF THE COMMUNITY"

In *Plan de Sánchez Massacre v. Guatemala*, *Moiwana Community v. Suriname*, *Yakye Axá Indigenous Community v. Paraguay*, and *Sawhoyamaya Indigenous Community v. Paraguay*, the Inter-American Court identified a special need to grant reparation

39. *Gómez Palomino v. Peru*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 136, ¶ 146 (Nov. 22, 2005) (observing the impact of the violation on the family's "future generations").

40. ACHR, *supra* note 11, art. 17(1) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the state."); *cf.* SHELTON, *supra* note 9, at 245 (recognizing the court's difficulty in accurately valuing and calculating damages for members of the victim's family).

41. *See Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 245 (Nov. 25, 2003) (granting reparations to a woman proven to be the sister of the victim even though she had not participated in the court proceedings); *see also* *Bámaca Velásquez v. Guatemala*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 52 (Feb. 22, 2002) (giving considerable weight to the "Mayan custom that the elder son usually contributes to the sustenance" of his immediate family). *But see* *Castillo-Páez v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43, ¶ 89 (Nov. 27, 1998) (granting the sister of the victim moral compensation, but only after finding she suffered as a result of her brother's death); *Garrido v. Argentina*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, ¶¶ 63-64 (Aug. 27, 1998) (illustrating the court's more restrictive view of compensation for moral damages to family members who failed to supply sufficient evidence demonstrating an "affective relationship" with the victim).

42. *Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 257 (Jan. 31, 2006) ("[T]he Court has presumed that the suffering or death of a person causes their children, spouse or companion, mother, father, and siblings a non-pecuniary damage that need not be proved.").

measures to members of indigenous communities whose rights had been violated.⁴³ It is very interesting to note that in *Moiwana Community*, the court granted development measures directly to the community, although it did not consider the community a beneficiary in the relevant section of the judgment.⁴⁴ This contradiction would lead to the conclusion that a collective understanding of “the injured party” is not established jurisprudence; yet, in the recent case of an indigenous leader who was killed by military personnel, the court did not refer to the *individual members* of the community when awarding development measures, but to the community. The court granted a \$40,000 fund to the benefit of the community which should be used according to its customs, forms of consultation, and traditions.⁴⁵ In the light of the conception that indigenous communities have of their own social structure this interpretation should be regarded as the more adequate one.

However, it is important to remember that compensation for damages requires a higher standard of proof than general reparation measures.⁴⁶ Therefore, in order to be eligible for damages, an indigenous community might need to specify all of its members in the claim.⁴⁷

43. *Sawhoyamaya Indigenous Community v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 112 (Mar. 29, 2006); *Yakye Axa Indigenous Community v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 188 (June 17, 2005); *Moiwana Community v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 194 (June 15, 2005); *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 86 (Nov. 19, 2004).

44. *Moiwana Community*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 187 (granting material damages to members of the community, but not to the community itself).

45. *Escué Zapata v. Colombia*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 165, ¶ 168. (July 4, 2007). In this case, the representatives of the victims had requested several measures that would enable the indigenous community to reconstruct their customs and traditions. The claim requested measures related to jurisdictional autonomy and land rights of the Nasa people. The court rejected this request, as well as the commission's request for the establishment of a youth leadership program, arguing that the claims were not related to the facts of the case. *Id.* ¶¶ 180-185.

46. *Id.* ¶¶ 191-192.

47. *Yakye Axa Indigenous Community*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 189; *Plan de Sánchez Massacre*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶¶ 66-68.

However, in an earlier decision addressing the property and land rights of a Nicaraguan indigenous community, the Inter-American Court awarded \$50,000 to the Mayagna (Sumo) Awas Tingni Community, without specifying the individual members of the group.⁴⁸ The "collective interest for the benefit of the Awas Tingni Community" was decisive for the court's award.⁴⁹ But other reparation measures, such as the demarcation and legal ownership of the community's land, were awarded to "*members* of the Awas Tingni Community."⁵⁰

In *Plan de Sánchez Massacre*, the court again listed all the victims of the Maya Achí community individually,⁵¹ but later allowed for the aggregation of victims, including unidentified victims, if they could provide proof of identity.⁵² The court came to the same conclusion in *Moiwana Community v. Suriname*,⁵³ and *Mapiripán Massacre v. Colombia*.⁵⁴

In all of these cases, the Inter-American Court granted reparation measures in the form of development programs.⁵⁵ These programs included development funds;⁵⁶ more specific measures like housing,

48. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 167 (Aug. 31, 2001) (providing reparations in the form of investment in infrastructural works or services).

49. *Id.*

50. *Id.* ¶ 164 (emphasis added).

51. *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 105, ¶¶ 42(47)-42(48) (Apr. 29, 2004).

52. *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 62 (Nov. 19, 2004).

53. *Moiwana Community v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 178 (June 15, 2005).

54. *Mapiripán Massacre v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 247 (Sept. 15, 2005).

55. *See, e.g., Sawhoyamaya Indigenous Community v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 224 (Mar. 29, 2006) (ordering the State to establish a fund for educational, housing, agricultural, and health projects, and to provide potable water and sanitary infrastructure for the community); *Yakye Axa Indigenous Community v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 205 (June 17, 2005) (ordering that a community fund and program be developed to provide potable water, sanitary infrastructure, and the "implementation of education, housing, agricultural, and health programs"); *Moiwana Community*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 213-214 (creating a developmental fund for "health, housing, and educational programs for the . . . community").

56. *See, e.g., Sawhoyamaya Indigenous Community*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 224; *Yakye Axa Indigenous Community*, 2005 Inter-Am. Ct.

health, production, and infrastructure programs;⁵⁷ a program providing for subsistence needs;⁵⁸ or communication systems for health emergencies.⁵⁹ The court also granted resettlement measures in two cases where the communities concerned were displaced in the aftermath of violations that occurred in their villages.⁶⁰

Even though the concept of “next of kin,” in conjunction with the above mentioned interpretation of “community,” extends the number of beneficiaries of reparation, it does not fundamentally change the approach of the ACHR. The ACHR favors the individual that suffered a violation of his or her rights, rather than any form of collective redress that might be independent from the notion of the individual “injured party.”

The Inter-American Court is nevertheless ready to abandon its individual-centered doctrine in favor of a more encompassing approach, considering that cases frequently reveal a pattern, and not a single violation.⁶¹ The court does not expand the scope of the “victim” concept, but rather that of the beneficiary of reparations by chiefly referring to society’s role in pursuing the aim of non-recurrence of violations.⁶²

H.R. (ser. C) No. 125, ¶ 205; *Moiwana Community*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 213-214.

57. *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶¶ 109-110 (Nov. 19, 2004).

58. *Sawhoyamaya Indigenous Community*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 230 (ordering Paraguay to adopt measures necessary to supply the community with potable water, healthcare, food, sanitation facilities, and educational resources).

59. *Id.* ¶ 232.

60. *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 404 (July 1, 2006) (establishing that the State provide security and resettlement assistance to former inhabitants who decide to return to the community); *Mapiripán Massacre v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 311(v) (Sept. 15, 2005).

61. *See Goiburú v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 82 (Sept. 22, 2006) (stating that state responsibility is increased when the violation is part of a systematic pattern). *See generally* SHELTON, *supra* note 9, at 154 (commenting that many states have declared general amnesties for those officials involved in disappearances, torture, or arbitrary killings).

62. *See id.* at 99 (remarking that the “concern for victims not part of the litigation as well as for potential victims, must be among the factors taken into account in affording remedies”).

II. REPARATION ADDRESSED TO THE "SOCIETY AS A WHOLE"

At first glance, the term "society as a whole" recalls, in a phonetic analogy, the definition attributed to *erga omnes* obligations which refer to the "international community as a whole."⁶³ The problem with this parallel is that "society as a whole" has legal consequences different from that of "international community as a whole."⁶⁴ For instance, the Inter-American Court does not imply that all individuals in society (parallel to "all States" in the international arena) can *claim* to be victims if certain human rights violations occur in their society.⁶⁵ *Erga omnes* concerns state reaction to an internationally wrongful act,⁶⁶ while "society as a whole" is a sociological entity to whom certain reparation measures are addressed.⁶⁷ Society as a whole is not considered an "injured party," as proven in the court's rejection of the Inter-American Commission's argument in *Urrutia v. Guatemala* that forcing someone to broadcast false statements causes damage to an entire society.⁶⁸

However, the court suggests a wider understanding of *erga omnes* obligations than usually accepted in general international law, asserting:

[M]odern human rights treaties in general, and the [ACHR] in particular, are not multilateral treaties of the traditional type Their object and purpose is the protection of the basic rights of individual human beings irrespective of . . . all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various

63. *Barcelona Traction, Light & Power Company, Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

64. *See id.* (explaining that a state's obligations to the "international community as a whole" are inherently of international concern because every state has a legal stake in such obligations).

65. *See* IACHR Rules of Procedure, *supra* note 24, art. 2 (defining a victim as a "person whose rights have been violated, according to a judgment pronounced by the Court").

66. *Barcelona Traction, Light & Power Company, Ltd.*, 1970 I.C.J. at 32.

67. *See* SHELTON, *supra* note 9, at 100 ("If society as a whole is injured by human rights violations, so also may society as a whole benefit from public remedies.").

68. *Urrutia v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 103, ¶¶ 99(c), 168 (Nov. 27, 2003).

obligations, not in relation to other States, but towards all individuals within their jurisdiction.⁶⁹

While the Inter-American Court has not explicitly interpreted society as being “all individuals within [a] jurisdiction,” it can be reasonably claimed that there is a link between the court’s reading of *erga omnes* and “society as a whole.” Shelton asserts that *erga omnes* obligations require a deterrent element in corresponding reparation awards;⁷⁰ it seems further possible to claim that the use of “society as a whole” can be interpreted as an indication for the award of dissuasive measures.

A. THE INTER-AMERICAN COURT’S EXPLICIT USE OF THE CONCEPT

The term “society as a whole” was introduced by the Inter-American Commission in *Aloeboetoe v. Suriname* when it argued that because the Saramaka tribe interprets family in a broad sense, the State should be required to compensate the “whole society” for the emotional damage incurred.⁷¹ The term “whole society” in this case meant the Saramaka tribe, not the whole society of Suriname.⁷²

The current use of the concept “society as a whole” emanated from the Inter-American Commission’s request in *Caballero-Delgado v. Colombia*. The commission sought a public

69. The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Advisory Opinion), 1982 Inter-Am. Ct. H.R. (ser. A) No. 2, ¶ 29 (Sept. 24, 1982). It is important to note that there is no explicit reference to *erga omnes* obligations in the document. See U.N. Comm’n on Human Rights, Sub-Comm. on Prevention of Discrimination & Prot. Of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, ¶ 45, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993) (submitted by Theo van Boven) (providing a similar interpretation of *erga omnes*). The concept has not been included in the final version of the document. See generally U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World*, U.N. Doc. E/CN.4/2005/35 (Mar. 8, 2005) (submitted by Adrian Severin).

70. SHELTON, *supra* note 9, at 49.

71. *Aloeboetoe v. Suriname*, 1993 Inter-Am. Ct. H.R. (ser. C) No. 15, ¶¶ 19, 83 (Sept. 10, 1993).

72. *Id.* ¶ 19. See *supra* Part I.C (discussing the line of jurisprudence following this decision).

acknowledgment of state responsibility and public apology to the relatives of the victim and "society as a whole."⁷³ For the first time, the commission meant for the term "society as a whole" to refer to society at the national level.⁷⁴ The Inter-American Court approved this interpretation of the concept in *Trujillo-Oroza v. Bolivia*, and set a precedent for its use in respect to Article 1(1): "Finally, according to the general obligation established in Article 1(1) of the [ACHR], the State has the obligation to take all necessary steps to ensure that these grave violations are not repeated, an obligation whose fulfillment benefits society as a whole."⁷⁵ The concept is mentioned in a second context of disappearance cases, this time referring explicitly to reparations according to Article 63(1): "[T]he right of the victim's next of kin to know what has happened to the him [sic] and, when appropriate, where the mortal remains are, constitute a measure of reparation and, therefore, an expectation that the State should satisfy for the next of kin and society as a whole."⁷⁶

To date, ample use of the concept can be observed in connection with the right to the truth⁷⁷ as established in *Almonacid Arellano*,⁷⁸ *Ituango Massacres v. Colombia*,⁷⁹ *Pueblo Bello Massacre*,⁸⁰ and

73. *Caballero-Delgado v. Colombia*, 1997 Inter-Am. Ct. H.R. (ser. C) No. 31, ¶ 21 (Jan. 21, 1997).

74. *Id.* (requesting the State publicly acknowledge its responsibility both to "the victims' relatives and to Colombian society as a whole") (emphasis added).

75. *Trujillo-Oroza v. Bolivia*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 110 (Feb. 27, 2002).

76. *Id.* ¶ 114 (emphasis added) (footnotes omitted); see *La Cantuta v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 231-232 (Nov. 29, 2006) (placing responsibility on Peru to search for the remains of the victims and provide burial services as a form of reparation to the victims' families).

77. See SHELTON, *supra* note 9, at 276 (citing the Chilean Truth Commission's observation that "only the knowledge of the truth will restore the dignity of the victims in the public mind [and] allow their relatives and mourners to honor them fittingly"). *Baldeón García v. Peru* represents an exception; the right to the truth has only been linked to the family of the victim, although the Commission requested a more encompassing understanding. *Baldeón García v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 147, ¶¶ 131(n), 167 (Apr. 6, 2006).

78. *Almonacid-Arellano v. Chile*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 157 (Sept. 26, 2006) (ordering Chile to make public the results of the investigation "so that the Chilean society may know the truth" about the case).

79. *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 300 (July 1, 2006) (discussing how Colombia's failure to investigate and punish human rights violations prevents society from learning the truth).

80. *Pueblo Bello Massacre v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No.

Huilca-Tecse v. Peru.⁸¹ In *19 Merchants*, the Inter-American Court argued that knowing the truth helps a society to prevent the recurrence of such violations.⁸² The judges thus established an explicit link to the obligation to prevent repetition of the violation.⁸³ In *Vargas-Areco v. Paraguay*⁸⁴ and *Goiburú*,⁸⁵ “society as a whole” benefited from the right to the truth. In *Mack Chang*, the court stated more specifically that society has a right to know about domestic judicial processes and their outcomes.⁸⁶

The Inter-American Court also uses the concept in the context of impunity, and states in *Ituango Massacres*, *Pueblo Bello*, and *Maritza Urrutia* that it is a detriment to “society as a whole” if impunity is not brought to an end in cases of serious human rights violations.⁸⁷ Therefore, it can be said that the trial and punishment of

140, ¶ 267 (Jan. 31, 2006) (ordering Colombia to publicize the results of criminal proceedings concerning a massacre “so that Colombian society may know the truth”). This case also provides a doctrinal analysis of the right to truth. *Id.* ¶ 219.

81. *Huilca-Tecse v. Peru*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 121, ¶ 107 (Mar. 3, 2005) (ordering Peru to publicize results of an extrajudicial execution trial so that “Peruvian society may know the truth”).

82. *19 Merchants v. Colombia*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109, ¶¶ 259, 263 (July 5, 2004) (noting that investigating, identifying, and punishing the responsible parties reveals the truth about such crimes and thus prevents future occurrences).

83. *Id.* ¶ 259; see *Ituango Massacres*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 300 (explaining that the failure of a state to meet such an obligation results in society’s continuing ignorance of the truth).

84. *Vargas-Areco v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 155, ¶ 81 (Sept. 26, 2006) (“[T]he imperious need to avoid repetition can only be satisfied by fighting impunity and by respecting the right of victims and society as a whole to know the truth”); *Servellón-García v. Honduras*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 152, ¶ 196 (Sept. 21, 2006).

85. *Goiburú v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶¶ 164-165 (Sept. 22, 2006) (requiring Paraguay to conduct an investigation to identify and prosecute those responsible and then publicize the results so that the people of Paraguay can learn the truth).

86. *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 275 (Nov. 25, 2003) (“The outcome of the proceeding must be made known to the public, for Guatemalan society to know the truth.”); see *Montero-Aranguren v. Venezuela*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 150 (July 5, 2006) (praising Venezuela’s acknowledgement of responsibility for violations during a public hearing); *Ituango Massacres*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 399 (ordering that the results of criminal proceedings be published by the state “so that Colombian society may know the truth”).

87. *Ituango Massacres*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 300;

a perpetrator according to the standards of justice help strengthen society's trust in the judicial institutions and the rule of law.

Finally, the concept appears in the context of the obligation to investigate, try, and punish the perpetrators, and the right to judicial remedy: "[A]ny person who considers himself or herself to be a victim of such violations has the right to resort to the system of justice to attain compliance with this duty by the State, for his or her benefit and that of society as a whole."⁸⁸

The Inter-American Court points out that individuals exist within the fabric of society, and reinforces a view taken in *"Street Children" v. Guatemala* when it refers to the role each individual plays in society.⁸⁹ The court states that a child should live a

Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 146 (Jan. 31, 2006) (expressing the idea that by failing to inform society of the whole truth, a state "reproduces the conditions of impunity" that may lead to a repetition of the violations); *Urrutia v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 176 (Nov. 27, 2003) (stating that impunity "constitutes a violation of the state's obligation that harms . . . the whole of society, and encourages chronic repetition of . . . human rights violations"); see *Humberto Sánchez v. Honduras*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 185 (June 7, 2003) (explaining that impunity violates a state's duty to "society as a whole" and "fosters chronic recidivism" of violations); *Bulacio v. Argentina*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 100, ¶¶ 120-121 (Sept. 18, 2003) (stating that combatting impunity demands that society knows the truth about past violations). Cf. *Las Palmeras v. Colombia*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 96, ¶ 53(a) (Nov. 26, 2002) (noting that conditions of impunity such as tampering with and destroying evidence obstruct access to the truth, making it impossible to punish human rights violations).

88. *Caracazo v. Venezuela*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 95, ¶ 115 (Aug. 29, 2002); see *Humberto Sánchez*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 184 (stating that providing judicial process to establish investigation and punishment of violations fulfils a state duty not only to the next of kin, but also to "society as a whole"); *Trujillo-Oroza v. Bolivia*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 99 (Feb. 27, 2002) (noting that because the ACHR "guarantees access to justice," Bolivia should investigate and punish human rights violations); *Bámaca-Velásquez v. Guatemala*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 91, ¶¶ 75, 77 (Feb. 22, 2002) (extending the victims' and next of kin's right to the truth to Guatemalan society as a means of preventing further human rights violations); *Cantoral-Benavides v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, ¶¶ 69-70 (Dec. 3, 2001) (explaining that by allowing violations to go unpunished, a state fails to meet its obligations to victims and next of kin and its "general duty to guarantee" the rights of all persons within its jurisdiction).

89. *"Street Children" v. Guatemala*, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 197 (Nov. 19, 1999) (stating that the rehabilitation of street children is vital to ensuring that they "play a constructive and productive role in society").

“dignified life” and that “every child has the right to harbor a project of life that should be tended and encouraged by the public authorities so that it may develop this project for its personal benefit and that of the society to which it belongs.”⁹⁰

After reviewing the contexts in which the court has used the term “society as a whole,” it can be inferred that the court intends for these awards to repair more than the harm to an individual victim. Combating impunity—for example, through the dissemination of the truth about past violations—attacks the roots of many violations and does not simply solve the case *sub judice*. The court’s broad interpretation of “society as a whole” is evidence of the dissuasive intent of certain measures awarded by the court.

B. MEASURES PURSUANT TO ARTICLES 1(1) AND 2 WITH EFFECTS ON THE “SOCIETY AS A WHOLE”

Explicit reference to the concept of “society as a whole” is the ideal means to prove the intentions of the Inter-American Court and its understanding of the concept. However, there is further evidence for an underlying working theory that assumes that some measures ordered by the court, pursuant to Articles 1(1) and 2 of the ACHR, are equally and implicitly directed to the “society as a whole.”

It is true that the treaty regime in itself has the most relevant aim of *preventing* violations, and thus fulfils a dissuasive, deterrent function. Nevertheless, it is suggested that these measures, inferred from Article 2 of the ACHR, cannot be regarded as punitive without falling prey to an inherent contradiction.⁹¹ If the distinction is made between punitive measures (relating to punishment in criminal law)

90. *Id.* ¶ 191.

91. Article 2, like the treaty regime itself, has as its goal the protection of rights rather than punishment of violations. *See* ACHR, *supra* note 11, art. 2 (requiring states to take “legislative or other measures . . . to give effect to those rights” protected by the ACHR). The Inter-American Court’s compensatory powers, derived from Article 63(1), are intended to be used only for reparatory purposes, not punitive ones. *See, e.g.,* Masacre de la Rochela v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 163, ¶¶ 6-7 (Concurrent Opinion of Judge García Ramírez) (May 11, 2007); Garrido v. Argentina, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, ¶¶ 43-44 (Aug. 27, 1998) (explaining that “the Inter-American Court is not a penal court,” rather its role is to repair the effects of human rights violations); Godínez Cruz v. Honduras, 1989 Inter-Am. Ct. H.R. (ser. C) No. 8, ¶ 36, (July 21, 1989).

and dissuasive measures (relating to the concept of deterrence), Article 2 of the ACHR can be labeled dissuasive in the latter sense, but in no instance punitive in the former: compliance with basic treaty obligations cannot be regarded as punishment.⁹²

1. Non-repetition Guarantees

When non-repetition guarantees are concerned, the Inter-American Court takes a different position than when addressing reparations to individual victims.⁹³ This position shall be explained in detail because it reveals that the court understands redress as a more encompassing concept. Redress can also be directed to society and has an implicit, exemplary component. The same is not true for measures of cessation which are directed to restoring the individual victim's rights, and which sometimes are considered to be a form of

92. Judge Cançado Trindade has taken into account this difficulty, preferring the terms "dissuasive" or "exemplary" measures in his separate opinions to the *Plan de Sánchez Massacre* and *Mack Chang* judgments. *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 25 (Nov. 19, 2004) (Reasoned Vote of Judge Cançado Trindade); *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶¶ 37, 45, 47, 50 (Nov. 25, 2003) (Reasoned Vote of Judge Cançado Trindade). In his separate vote on state crimes in the recent *Ituango Massacres* decision, he refers to punitive damages as a form of reparation. *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶¶ 27, 42 (July 1, 2006) (Reasoned Vote of Judge Cançado Trindade). See SHELTON, *supra* note 9, at 363 for an argument that non-repetition guarantees could be seen as containing elements of punishment as well as reparation.

93. See Brian D. Tittmore, *Ending Impunity in the Americas: The Role of the Inter-American System in Advancing Accountability for Serious Crimes Under International Law*, 12 SW. J.L. & TRADE AM. 429, 444-45 (2006) (distinguishing between the Inter-American Court's use of individual reparations, premised on the right of the victim to be restored to the "status quo ante," and non-repetition guarantees, which may be a subset of reparations but are preventative in nature). It should be noted, though, that the Inter-American Court considers that it should take into account the loss of opportunities that the violation of the right meant for the person's "life plan." *Loayza Tamayo v Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶¶ 117, 144 (Nov. 27, 1998) (pointing out that the victim's claims with respect to her career plans did not fall under the concept of restitution). See generally SHELTON, *supra* note 9, at 293, 304-06 (explaining circumstances in which non-monetary remedies are necessary); Daniel Bodansky, John R. Crook & Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833, 847 (2002) (explaining that, in general, non-repetition guarantees differ from reparations in being forward-looking and preventative in nature).

reparation despite the fact that they stem from obligations under Articles 1 and 2 of the ACHR.⁹⁴

In *Trujillo-Oroza*, the court explicitly recognized that non-repetition guarantees are granted based on the general obligation to respect, protect, and fulfill Article 1(1) of the ACHR.⁹⁵ The judges state: "Finally, according to the general obligation established in Article 1(1) of the [ACHR], the State has the obligation to take all necessary steps to ensure that these grave violations are not repeated, an obligation whose fulfillment benefits society as a whole."⁹⁶ In two earlier cases, non-repetition guarantees were granted in reparation decisions pursuant to Article 63(1) of the ACHR, but are explicitly linked to the general obligations arising from Article 2 of the ACHR.⁹⁷ It is also interesting to note that the International Law Commission considers that non-repetition guarantees point to "reinforcement of a continuing legal relationship and the focus is on the future, not the past."⁹⁸

The court explained in *Garrido*: "*reparation* may also be in the form of measures intended to prevent a recurrence of the offending acts."⁹⁹ The question in the present argument is whether the court considers recurrence as being related only to the individual victim, or to any recurrence of the same acts without reference to the victim, as

94. Victor Madrigal-Borloz, *Damage and Redress in the Jurisprudence of the Inter-American Court of Human Rights (1979-2001)*, in HUMAN RIGHTS IN DEVELOPMENT YEARBOOK 2001, REPARATIONS: REDRESSING PAST WRONGS 211, 241-52 (George Ulrich & Louise Krabbe Boserup eds., 2003).

95. *Trujillo-Oroza v. Bolivia*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 92, ¶¶ 102, 110 (Feb. 27, 2002).

96. *Id.* ¶ 110. See also *Masacre de la Rochela v. Colombia*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 163, ¶ 277 (May 11, 2007) (mentioning the state's commitment to comply with the obligations of non-repetition with regard to the victims, their next of kin, and society as a whole).

97. *Durand v. Peru*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 68, ¶ 143 (Aug. 16, 2000) (discussing state obligations to prevent future violations in conjunction with a discussion of compensation for victims' relatives); *Paniagua-Morales v. Guatemala*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 37, ¶ 174 (Mar. 8, 1998).

98. International Law Commission, *Report of the International Law Commission*, at 221, Supp. No. 10, U.N. Doc. A/56/10 (Aug. 2001).

99. *Garrido v. Argentina*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, ¶ 41 (Aug. 27, 1998) (emphasis added); see *Castillo-Páez v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43, ¶ 48 (Nov. 27, 1998) (labeling reparations a "generic term" for measures of redress, including non-repetition guarantees).

would stem from the general obligations under Articles 1(1) and 2 of the ACHR.

In *Castillo-Páez v. Peru*, the victims requested a general non-repetition guarantee,¹⁰⁰ but the court failed to address the matter. Two years later in *Durand v. Peru*, the judges stated that, in addition to "the obligation to investigate, there is another obligation to prevent *any possible commission* of involuntary disappearance and punish the liable parties."¹⁰¹ It is suggested that non-repetition guarantees stem from Articles 1(1) and 2 of the ACHR, but also fulfill the function of a reparation pursuant to Article 63(1) of the ACHR.

2. *The Obligation to Investigate, Prosecute, and Punish*

A similar interplay between Article 63(1) and Articles 1(1) and 2 can be found with regard to the obligation to investigate, prosecute, and punish perpetrators of human rights violations.¹⁰² This obligation can be interpreted as a *de facto* non-repetition guarantee because punishing a perpetrator deters future violations.

In *Velásquez-Rodríguez*, the Inter-American Court ordered the investigation, prosecution, and punishment of the perpetrators in the merits' stage of the case, referring to the general obligation under Article 2.¹⁰³ The court also established a general duty to prevent disappearances.¹⁰⁴ This duty stems exclusively from the obligation to prevent violations that any state party incurs under operative Article 2 of the ACHR, not under the first division of Article 63.¹⁰⁵

However, the obligation has also been considered a form of reparation under Article 63(1). It was in *Caballero-Delgado* that the court for the first time ordered investigation of the facts and

100. *Castillo-Páez*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43, ¶ 94.

101. *Durand*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 68, ¶ 143 (emphasis added).

102. See ACHR, *supra* note 11, arts. 1, 2, 63(1).

103. See *Velásquez-Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988).

104. *Id.* ¶ 188 (explaining that party states have a duty to protect the rights identified in the ACHR, including the right to life).

105. See *International Responsibility for the Promulgation & Enforcement of Laws in Violation of the Convention* (Advisory Opinion), 1994 Inter-Am. Ct. H.R. (ser. A) No. 14, ¶ 33 (Dec. 9, 1994) (explaining that after ratification of the ACHR, states should "refrain from adopting measures that conflict with the object and purpose of the Convention").

punishment of the perpetrators as a form of reparation.¹⁰⁶ This view is explicitly confirmed in *Las Palmeras v. Colombia*, where the court stated that “pursuant to Article 63(1) of the [ACHR] . . . the State has an obligation to investigate the facts that caused these violations.”¹⁰⁷ Also, in recent cases, the court ordered investigations, prosecutions, and sanctions of perpetrators in the context of reparation provisions.¹⁰⁸

At this point, it is apparent that a single order may fulfill several purposes and, consequently, cannot clearly be subsumed under one category of measures. This line of reasoning can eventually explain why the court has hesitated in clearly attributing the orders to one type of reparation or to a general obligation. Still, the conceptual difficulty does not weaken the dissuasive effect that non-repetition guarantees directed to the “society as a whole” are intended to have. Judge Cançado Trindade explicitly states that non-monetary forms of reparation “have exemplary or dissuasive purposes, in the sense of preserving remembrance of the violations occurred, of providing satisfaction (a feeling of realization of justice) to the next of kin of the victim, and of *contributing to ensure non-recidivism of said violations* (even through human rights training and education).”¹⁰⁹

3. Granting of Legislative Measures

Non-repetition guarantees frequently take the form of legislative measures.¹¹⁰ Whereas explicit non-repetition guarantees are mostly

106. *Caballero-Delgado v. Colombia*, 1995 Inter-Am. Ct. H.R. (ser. C) No. 22, ¶ 69 (Dec. 8, 1995) (reasoning that reparation decisions do allow for the consideration of other ACHR provisions, but their primary *raison d'être* and foundation stone is to restore the victim's rights and freedoms).

107. *Las Palmeras v. Colombia*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 90, ¶ 69 (Dec. 6, 2001).

108. See, e.g., *Almonacid-Arellano v. Chile*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 154, ¶¶ 144-145 (Sept. 26, 2006); *Servellón-García v. Honduras*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 152, ¶¶ 192-195 (Sept. 21, 2006) (recognizing truth as an “important means of reparation” in ordering Honduras to identify, prosecute, and punish those responsible for the human rights violations in question).

109. *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 50 (Nov. 25, 2003) (Reasoned Vote of Judge Cançado Trindade) (emphasis added).

110. See SHELTON, *supra* note 9, at 279 (noting that the Inter-American Court frequently requires states to amend their laws or policies in order to prevent further human rights violations).

general in terms and scope, legislative measures identify and attempt to remedy a structural wrong that the court has recognized in its examination of a case and are *de facto* non-repetition guarantees.¹¹¹ Thus, in September 2003, the court in *Bulacio v. Argentina* ordered that the guarantee of non-repetition involve the adoption of legislative measures.¹¹² Therefore, while the victim may be only one individual, all individuals in similar situations are also beneficiaries of the reparation measures.

For example, Guatemala was ordered to reform both Article 132 of the Criminal Code, which refers to the treatment of prisoners who allegedly represent a danger to the society,¹¹³ and Article 201 of the Criminal Code, which defines the crime of abduction and its penalties.¹¹⁴ All persons affected by these regulations would benefit from a change in the Criminal Code. The court also ordered in other cases that all necessary legislative and administrative measures be taken to ensure that a person sentenced to death can ask for penalty commutation.¹¹⁵ Due to the fact that there were thirty-five prisoners on death row who stood to benefit from the court's order at the time, amending the law to allow for the commutation of a death sentence affected individuals other than the named victims in those cases.¹¹⁶

111. See, e.g., *Loayza-Tamayo v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶¶ 159-164 (Nov. 27, 1998) (ordering Peru to bring laws on terrorism and treason into conformity with Article 2 of the ACHR); *Montero-Aranguren v. Venezuela*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 145 (July 5, 2006) (ordering a non-repetition guarantee that requires Venezuela to adopt standards for the circumstances of confinement that adhere to international principles); *Fermin Ramírez v. Guatemala*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 126, ¶ 130 (June 20, 2005) (calling on the government of Guatemala to bring Article 132 of the Guatemalan Penal Code in conformity with Article 2 of the ACHR).

112. *Bulacio v. Argentina*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 162.5 (Sept. 18, 2003).

113. *Fermin Ramírez*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 126, ¶ 130.

114. *Raxcacó Reyes v. Guatemala*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 133, ¶ 132 (Sept. 15, 2005).

115. *Hilaire v. Trinidad and Tobago*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 212; *Raxcacó Reyes*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 133, ¶ 132.

116. See Lorena Seijo, *CIDH Pide Regular Indulto [Inter-American Commission on Human Rights Requests Regulation of Pardons]*, PRENSA LIBRE, <http://www.prensalibre.com/pl/2005/julio/06/118166.html> (last visited Aug. 16, 2007) (discussing three proposed means of amending the Criminal Code of Guatemala in order to comply with the ACHR).

Since the *Garrido* decision, where it approved a friendly settlement including the adoption of legislation that makes disappearance a crime, the court has developed the concept of legislative measures.¹¹⁷ In a decision just two years earlier, the Inter-American Commission requested and was denied legislative measures which would have required that the Military Code of Justice of Venezuela conform to the ACHR.¹¹⁸ In another disappearance case, the court observed that Peruvian amnesty laws were an obstacle to justice.¹¹⁹ There was, however, no consequence of that finding in the operative paragraphs of the judgment. Legislative change was revisited in *Loayza Tamayo* where the parties reached a friendly settlement of the case requiring the state to amend certain laws to redefine the crimes of terrorism and treason.¹²⁰

But only in *Barrios Altos v. Peru* did the Inter-American Court for the first time oblige a state to change an existing national law pursuant to a violation of the ACHR in a disappearance case.¹²¹ In that decision, the court ordered the redefinition of the crime of extrajudicial execution as well as the ratification of the International Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity.¹²² This decision established an

117. See *Garrido v. Argentina*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 39, ¶ 66 (Aug. 27, 1998) (explaining that the Argentine government introduced legislation criminalizing forced disappearances in an attempt to conform to the Inter-American Convention on Forced Disappearance of Persons); see also *Trujillo-Oroza v. Bolivia*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 98 (Feb. 27, 2002) (holding Bolivia responsible for violating the ACHR and noting that the Inter-American Court's reparations order will only be satisfied when the bill identifying forced disappearance as a crime becomes law).

118. *El Amparo v. Venezuela*, 1996 Inter-Am. Ct. H.R. (ser. C) No. 28, ¶¶ 52, 60 (Sept. 14, 1996) (refusing to instruct the Venezuelan government to amend the Code of Military Justice to conform to the ACHR because the purpose of the Inter-American Court is to protect the rights of specific individuals).

119. *Castillo Páez v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 43, ¶ 105 (Nov. 27, 1998) (noting that the Peruvian Amnesty Law hinders investigations and prevents the victim's next of kin from accessing the courts in order to discover the truth and obtain reparations).

120. *Loayza-Tamayo v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 192.5 (Nov. 27, 1998) (requiring Peru to redefine such crimes so that they are in conformity with the ACHR).

121. *Barrios Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 87, ¶ 44 (Nov. 30, 2001).

122. See *id.* (obliging Peru to accomplish the reparations within thirty days of

important precedent in the development of the court's use of legislative measures.

Since 2002, the court has granted legislative measures more often than in earlier years, including measures such as the establishment of a detainee register,¹²³ the creation of a speedy mechanism to declare a person missing and presumably dead in the case of disappearances, and the establishment of necessary legislation for a genetic database to identify disappeared children.¹²⁴ In *Hilaire*, the court ordered Trinidad & Tobago to conduct new criminal trials for certain persons and required changes to the Offences Against the Person Act.¹²⁵ In *Blanco Romero v. Venezuela*, the State was ordered to take legislative measures to make the recourse of habeas corpus effective in cases of disappearances.¹²⁶ The Inter-American Court did not suggest concrete legal arrangements, but added certain precise aims that the legislation should conform to international standards.¹²⁷

In a case against the Dominican Republic, the court ordered the government to adopt the legislative reforms necessary for a late birth registration procedure, including the availability of effective recourse to administrative decisions.¹²⁸ In *Moiwana Community* and *Yakye Axá Indigenous Community*, the court granted changes in the regulations on indigenous land titles.¹²⁹ In *Vargas-Areco*, legislation

the agreement).

123. *Humberto Sánchez v. Honduras*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 189 (June 7, 2003) (explaining that these records will help ensure that detainees are being held legally).

124. *Molina-Theissen v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 108, ¶ 91 (July 3, 2004).

125. *Hilaire v. Trinidad & Tobago*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94, ¶¶ 108, 214 (June 21, 2002) (compelling the removal of the obligatory language in the Act requiring the imposition of the death penalty in successfully prosecuted murder cases).

126. *Blanco Romero v. Venezuela*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 138, ¶ 104 (Nov. 28, 2005).

127. *See id.* (clarifying that such international standards include the guarantee of freedom and respect for life, as well as the prevention of forced disappearances and doubts as to a person's place of detention).

128. *See Girls Yean & Bosico v. Dominican Republic*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 239 (Sept. 8, 2005) (emphasizing that such procedures are necessary to prevent individuals from continuing to live in the Dominican Republic as stateless persons).

129. *See Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 209-211 (June 15, 2005) (guaranteeing members of the Moiwana

had to be amended in order to prevent the recruitment of children into the armed forces.¹³⁰

There are also decisions in which the court ordered measures implying legislative action on the national level without mentioning that the measures necessarily have to take the form of an amendment or adoption of legislation. In *Bámaca Velásquez*, the court ordered the implementation of a national exhumation program if one did not yet exist,¹³¹ and in *Plan de Sánchez Massacre*, the court stated that amnesties and similar measures of reprieve are not allowed to preclude the ability of Guatemala to “investigate, prosecute and punish those responsible.”¹³² In the Guatemalan context, this may require a legislative change: The *Ley de Amparo* may need to be amended to make amnesties effectively inapplicable in the case of gross human rights violations.¹³³ Finally, in *Palamara Iribarne v. Chile*, the court held that Chile had to take “all measures necessary to derogate or modify internal norms that are contrary to international law on freedom of thought and expression.”¹³⁴

When linking legislative measures and the concept of “society as a whole,” it is necessary to clarify that the court never put the two terms in context; they operate separately from each other. However, pursuant to the foregoing, it is argued that there is an underlying relationship between “society as a whole” and legislative measures

community that Suriname will return land once occupied by the community); *Yakye Axa Indigenous Community v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 225 (June 17, 2005) (requiring Paraguay to adopt domestic measures that would allow indigenous people to effectively pursue claims to traditional territories).

130. See *Vargas-Areco v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 155, ¶¶ 163-164 (Sept. 26, 2006) (requiring that Paraguay increase the minimum age for military recruitment to eighteen years of age in accordance with international standards).

131. *Bámaca Velásquez v. Guatemala*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 83 (Feb. 22, 2002).

132. *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 99 (Nov. 19, 2004).

133. See generally *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 270 (Nov. 25, 2003) (calling for the legislation to be adjusted to conform to the ACHR and thus provide “an effective judicial recourse for the victims”).

134. *Palamara Iribarne v. Chile*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 254 (Nov. 22, 2005) [translation by author].

that aims to reduce recidivism of violations in the entire Inter-American system.

Thus, “society as a whole” benefits when laws are amended in a way that reduces the probability of a recurrence of the facts and reduces the probability that members of vulnerable groups or “society as a whole” will fall victim to a serious human rights violation. It is difficult to imagine that such measures would not positively impact society, especially because laws are applicable to all persons under a state’s jurisdiction.

C. REPARATION MEASURES BENEFITING THE “SOCIETY AS A WHOLE”

While the placement of legislative orders in the section on reparations of the court’s decisions confirms that they also enjoy a reparative nature, the court awards measures that are exclusively based on Article 63(1) of the ACHR.¹³⁵ These too are arguably intended to have certain dissuasive effects.

1. Public Apology and Institutionalized Remembrance

Society benefits from court orders requiring public apologies, the erection of monuments or memorial plaques, and the naming of streets or schools. Since 2001 when the court for the first time took the initiative to order the publication of the judgment and a public apology,¹³⁶ it has consistently granted this measure “in order to prevent a repetition of these events.”¹³⁷

In *Plan de Sánchez Massacre*, the court ordered a public apology and required that it occur in the community concerned and be

135. See, e.g., *Mack Chang*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 286 (requiring Guatemala to name a street after the victim and place a plaque in her memory where she died to promote public awareness and avoid recidivism); *Serrano-Cruz Sisters v. El Salvador*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 196 (Mar. 1, 2005) (obligating the State to dedicate a day to children who disappeared during an internal conflict); *Caracazo v. Venezuela*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 95, ¶ 127 (Aug. 29, 2002) (requiring Venezuela to train law enforcement officials to protect human rights and limit the use of weapons).

136. *Cantoral-Benavides v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, ¶¶ 79, 81 (Dec. 3, 2001).

137. *Id.* ¶ 99.

pronounced in or translated into Maya-Achí, the victims' language.¹³⁸ In addition to providing moral satisfaction to the victims, a public apology serves to publicize an official account of human rights violations, and particularly state involvement therein.

With the growing frequency of acknowledgment of state responsibility, the Inter-American Court no longer orders public apologies systematically. Judge García-Ramírez notes that a public apology cannot be more than a formal one, as it is detached from a feeling of moral regret by the individual perpetrator.¹³⁹ However, when a victim requests a public apology, the court will grant the measure as a form of satisfaction,¹⁴⁰ even if there has been partial acknowledgment of state responsibility.¹⁴¹

The Inter-American Court has ordered the naming of streets in several cases,¹⁴² with the idea originating from a friendly settlement between the victims and the State of Ecuador in *Benavides-Cevallos*.¹⁴³ Often times, the court will order the naming of a school, especially when the victims were still relatively young. The court directed states to carry out such measures in *Trujillo Oroza*,¹⁴⁴ "*Street Children*,"¹⁴⁵ *Gómez Paquiyauri Bros. v. Peru*¹⁴⁶ and

138. *Plan de Sánchez Massacre v. Guatemala*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 126, ¶ 100 (Nov. 19, 2004). Furthermore, the Inter-American Court ordered that the ACHR and the judgment of the case be translated into Maya-Achí. *Id.* ¶ 102.

139. *See La Cantuta v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 26-27 (Nov. 29, 2006) (Reasoned Vote of Judge García-Ramírez) (outlining the various aspects of an apology to include "condemnations of the violations, offers to pass measures favorable to the victims, and preventing new violations").

140. *See, e.g., Goiburú v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 173 (Sept. 22, 2006) (requiring that senior state authorities participate in the apology for forced disappearances).

141. *See Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶¶ 403-407 (July 1, 2006) (ordering the State to also provide appropriate treatment for the next of kin of the victims, safe conditions for displaced inhabitants, and a housing program for survivors who lost their homes).

142. *See, e.g., Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 286 (Nov. 25, 2003) (ordering Guatemala to rename a commonly used street to honor the victim).

143. *Benavides-Cevallos v. Ecuador*, 1998 Inter-Am. Ct. H.R. (ser. C) No. 38, ¶ 48(5) (June 19, 1998).

144. *Trujillo Oroza v. Bolivia*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 122 (Feb. 27, 2002).

145. "*Street Children*" v. Guatemala, 2001 Inter-Am. Ct. H.R. (ser. C) No. 77,

Servellón García v. Honduras.¹⁴⁷ The court has confirmed that it believes that memorial activities have an important and viable effect on the society.¹⁴⁸ It stated in "*Street Children*" that naming an educational center after murdered street children would "contribute to raising awareness in order to avoid the repetition of harmful acts such as those that occurred in the instant case and will keep the memory of the victims alive."¹⁴⁹ This statement by the court signifies that remembering the victims is considered to be a society-related, encompassing concept. Another example of the court implementing this concept occurred in *Serrano-Cruz Sisters v. El Salvador* where the order included the introduction of a day honoring children who have disappeared in El Salvador.¹⁵⁰ Additionally, reading the names of victims in a public forum and ensuring their lasting "presence" in public spaces by naming a street or square in their honor helps to inform the public about their cases.

Much like publication of the judgment, these measures raise awareness of the state's human rights violations in the society and how the state has dealt with past violations. Without being able to prove such an assertion empirically in the context of this article, the publicity of a case and its victims arguably encourages people to remember past violations and contributes to social reconciliation. This process should thus lead to democratic stabilization.

The effectiveness of these measures for the "society as a whole," however, depends largely on the role the media assumes in a given country.¹⁵¹ Without the media disseminating reparation measures,

¶ 103 (May 26, 2001).

146. See *Gómez Paquiyauri Bros. v. Peru*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 236 (July 8, 2004) (explaining that naming the school after the victim will help prevent similar violations in the future).

147. *Servellón García v. Honduras*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 152, 199 (Sept. 21, 2006).

148. See *Trujillo Oroza*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 122 (reasoning that such a reparation would raise "public awareness about the need to avoid the repetition of harmful acts").

149. "*Street Children*", 2001 Inter-Am. Ct. H.R. (ser. C) No. 77, ¶ 103.

150. *Serrano-Cruz Sisters v. El Salvador*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 196 (Mar. 1, 2005).

151. See James Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 AM. J. INT'L L. 404, 407 n.19 (1995) (discussing the fact that less is done to remedy human rights violations when they are less visible through the media).

only a small number of people with a vested interest would learn about the court's judgments and understand their implications. As mentioned above, the court has consistently ordered the publication of its judgments since *Cantoral-Benavides*.¹⁵² For example, the court required publication of the judgment in a state's official gazette and a newspaper of national dissemination.¹⁵³ In *Palamara Iribarne*, a freedom of expression case resulting in the publication of a previously censored book, the court ordered the publication of the proven facts in the official gazette and the entire judgment on the official website of the Chilean government.¹⁵⁴ Pursuant to the decision in *Miguel Castro Castro Prison v. Peru*, the government of Peru had to broadcast the judgment several times on Peruvian radio and television.¹⁵⁵

2. Training of Public Officials, Improvement of Prison Conditions and Protection for Judicial Officials

Finally, the Inter-American Court grants three additional types of measures that are implicitly directed to the "society as a whole." In *Caracazo v. Venezuela*, the court required human rights training programs for public officials, which theoretically would benefit every person who comes into contact with public officials.¹⁵⁶ The second measure, the reformation of the detention system, would

152. See *Cantoral-Benavides v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 79 (Dec. 3, 2001) (requiring Peru to publish important parts of the judgment in two newspapers that have a national circulation). Publication of a court judgment occurred for the first time in *Barrios Altos* as part of a settlement agreement between the parties. *Barrios Altos v. Peru*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 87, ¶ 44(e) (Nov. 30, 2001).

153. See, e.g., *La Cantuta v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 237 (Nov. 29, 2006); *Vargas-Areco v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 155, ¶ 162 (Sept. 26, 2006); *Ituango Massacres v. Colombia*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 410 (July 1, 2006).

154. *Palamara Iribarne v. Chile*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 252 (Nov. 22, 2005).

155. *Miguel Castro Castro Prison v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 445 (Nov. 25, 2006).

156. See, e.g., *La Cantuta*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 240-241 (ordering ongoing trainings for law enforcement on the use of weapons in all situations, as well as trainings for judicial servants on international human rights standards); *Caracazo v. Venezuela*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 95, ¶ 127 (Aug. 29, 2002) (observing that Venezuela should instruct its police officers on the proper use of force even in emergency situations).

directly benefit prisoners, but would also benefit "society as a whole" by facilitating the reintegration of prisoners into society.¹⁵⁷ In *Tibi v. Ecuador*, the court held that Ecuadorian judicial and prosecution personnel, law enforcement and penitentiary officers, including medical, psychiatric, and psychological personnel, had to attend training programs in human rights standards relevant to detention facilities.¹⁵⁸ The court specifically mentioned the importance of civil participation in the program.¹⁵⁹

Furthermore, in *Caracazo*, the court linked the training of public officials to the general obligation of non-repetition:

It is necessary to avoid by all means any repetition of the circumstances described. The State must adopt all necessary provision [sic] to this end, and specifically those for education and training of all members of its armed forces and its security agencies on principles and provisions of human rights protection and regarding the limits to which the use of weapons by law enforcement officials is subject, even in a state of emergency.¹⁶⁰

In *Huilca-Tecse*, the court endorsed an agreement between the parties and ordered the creation of a human rights and labor law course without designating a specific audience.¹⁶¹ In contrast, in *Mack Chang*, the court specified that public officials must attend professional human rights training.¹⁶²

Pursuant to *Gutiérrez-Soler v. Colombia*, human rights training has to be provided for public officials in the military justice system due to the ill-treatment and torture the victim suffered while illegally

157. See *Tibi v. Ecuador*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 142(6) (Sept. 7, 2004) (noting that Article 5 of the ACHR references the rehabilitation of prisoners so that they can later rejoin society as one purpose of detention).

158. *Id.* ¶ 263.

159. *Id.* ¶ 264.

160. *Caracazo v. Venezuela*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 95, ¶ 127 (Aug. 29, 2002).

161. See *Huilca-Tecse v. Peru*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 121, ¶ 113 (Mar. 3, 2005) (establishing a yearly course on human rights and labor law at a public university in Peru to honor the victim).

162. See *Mack Chang v. Guatemala*, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 282 (Nov. 25, 2003) (ordering the Guatemalan government to instruct military, law enforcement, and security personnel on how to prevent human rights violations).

detained.¹⁶³ Additionally, the court mandated that medical personnel in detention centers, as well as judges and prosecution officers, receive training on the Istanbul Protocol, a set of international guidelines that describes how officials should document and assess accusations of torture alleged by detainees.¹⁶⁴ In *Mapiripán Massacre*, the court ordered that all-rank members of the Colombian armed forces participate in permanently established educational programs in human rights.¹⁶⁵ In a case concerning prolonged illegal detention, poor detention conditions, and ill-treatment in custody, the court ordered Honduras to establish a training program for detention center employees.¹⁶⁶ Additionally, prison conditions, especially alimentation and hygiene, had to be improved according to international standards.¹⁶⁷ The court has granted similar measures in *Montero-Aranguren v. Venezuela* where it specifically mentioned that the conditions had to be improved for all prisoners.¹⁶⁸

163. *Gutiérrez-Soler v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶ 106 (Sept. 12, 2005).

164. *See id.* ¶¶ 109-110 (noting that these trainings should provide staff with the technical and scientific knowledge necessary to evaluate the bases of claims of torture or cruel, inhuman, or degrading punishment or treatment).

165. *Mapiripán Massacre v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 316 (Sept. 15, 2005); *see La Cantuta v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 240-242 (Nov. 29, 2006) (mandating that Peru establish programs to train members of the armed forces on the appropriate use of force and judicial officers on international human rights instruments).

166. *López-Álvarez v. Honduras*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 141, ¶ 210 (Feb. 1, 2006); *see Ximenes-Lopes v. Brazil*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 250 (July 4, 2006) (requiring Brazil to establish educational programs for staff working in mental health institutions); *Montero-Aranguren v. Venezuela*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 146 (July 5, 2006) (ordering the improvement of prisoner accommodations by requiring Venezuela to increase air flow and sunlight to cells, ensure hygienic conditions and privacy in bathrooms, and provide prisoners with the resources necessary to educate themselves while incarcerated); *Miguel Castro-Castro Prison v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 452 (Nov. 25, 2006) (requiring Peru to educate law enforcement officers on the international standards applicable to the treatment of prisoners during periods of social unrest in prisons).

167. *See López-Álvarez*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 141, ¶ 209; *see also Lori Berenson-Mejía v. Peru*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 119, ¶ 241 (Nov. 25, 2004) (requiring Peru to alter conditions at Yanamayo Prison to conform to international standards and transfer prisoners suffering from altitude sickness due to the facility's elevation of almost 3,800 meters above sea level).

168. *See Montero-Aranguren*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 146 (requiring that living conditions respect prisoners' "dignity as human beings").

Very recently, the court has for the first time ordered that the state has to guarantee an adequate security and protection system in order for judicial officials, prosecutors, and investigators to be able to carry out their work of ensuring the non-repetition of massacres. The court has also ordered the protection of witnesses, victims, and their next of kin in cases of serious violations of human rights.¹⁶⁹

It is very clear in these cases that it is not the individual victim or the next of kin who benefit from the reparation measure granted, but a much larger section of society, and arguably the "society as a whole." Moreover, often the victim is not the beneficiary of measures requiring officer training and better prison conditions because he or she will likely be unconditionally released from the prison as a consequence of an order for cessation of the violation.¹⁷⁰ This can be considered compelling evidence that the court awards measures of reparation clearly beyond the individual victim of a case, supporting the characterization of the court's measures as dissuasive.

III. DEMOCRACY, PARTICIPATION AND "SOCIETY AS A WHOLE"

"Society as a whole," as a working theory, underlies not only reparation awards and measures related to cessation. The Inter-American Court's jurisprudence on democracy and the rule of law is inspired by the same working theory as well. Although only one case has addressed an alleged violation of Article 23 of the ACHR, providing little textual evidence for such a relationship,¹⁷¹ the rationale of "society as a whole" can be understood to be linked to democracy, participation, and the rule of law.

The rule of law in a democratic society requires access to justice. The court confirmed this link in *Claude-Reyes v. Chile*,¹⁷² and has

169. *Masacre de la Rochela v. Colombia*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 163, ¶ 297 (May 11, 2007).

170. *See, e.g., Gutiérrez-Soler v. Colombia*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 132, ¶ 106 (ordering human rights training for public officials in the military justice system).

171. *Yatama v. Nicaragua*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127 (June 23, 2005).

172. *See Claude-Reyes v. Chile*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 131

indicated that it may interpret access to justice in collective terms when granting a measure that shall provide non-discriminatory access to justice for the victim's community.¹⁷³ While the rule of law and access to justice are based on the provisions in Articles 1(1), 2, 8, and especially 25 of the ACHR,¹⁷⁴ the reference to democracy is rooted in several separate treaty provisions and Article 23 of the ACHR.¹⁷⁵

In a 1986 advisory opinion, the court observed: "Representative democracy is the determining factor throughout the system of which the Convention is a part."¹⁷⁶ This is an intrinsic element of the purpose of the Organization of American States, as expressed in the Charter: "Representative democracy is an indispensable condition for the stability, peace and development of the region."¹⁷⁷ The idea is a central principle of the ACHR¹⁷⁸ and was explained more fully in the Democratic Charter which stresses the intrinsic link between representative democracy, participation, and the rule of law.¹⁷⁹ Article 2 of the Democratic Charter states:

(Sept. 19, 2006); *Baldeón García v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 144 (Apr. 6, 2006); *see also Ximenes-Lopes*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 192 (recognizing that states have a duty to guarantee that individuals have access to judicial remedies if their human rights are violated).

173. *See Baldeón García*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 203.

174. *See ACHR*, *supra* note 11, arts. 1(1), 2, 8, 25 (providing judicial protection of fundamental rights, freedom to exercise fundamental rights, the right to a fair trial, and access to judicial recourse to ensure those rights).

175. *See id.* art. 23 (guarding the right, *inter alia*, to participate in government, vote, and freely choose representatives).

176. The Word "Laws" in Article 30 of the American Convention on Human Rights (Advisory Opinion), 1986 Inter-Am. Ct. H.R. (ser. A) No. 14, ¶ 34 (May 9, 1986).

177. Charter of Organization of American States, Apr. 30, 1948, Preamble, 2 U.S.T. 2394, 119 U.N.T.S. 48, *amended by* Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324, *amended by* Protocol of Cartagena, Dec. 5, 1985 25 I.L.M. 527, *amended by* Protocol of Washington, Dec. 14, 1992, 33 I.L.M. 1009.

178. *See ACHR*, *supra* note 11, Preamble, art. 1 (recognizing that creating "within the framework of democratic institutions, a system of personal liberty and social justice" is one of the convention's purposes).

179. *See Organization of American States, Inter-American Democratic Charter*, arts. 2, 3, 6, Sept. 11, 2001, 40 I.L.M. 1289, *available at* http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm (emphasizing the importance of representative democracy, free and fair elections, separation of powers, and citizen participation in decisions pertaining to their own development).

The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States. Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.¹⁸⁰

Article 8 acknowledges the fundamental importance of human rights for consolidation of representative democracy.¹⁸¹ Similar reasoning can be found in the European Council, where the European Court of Human Rights refers to the "public legal order," and especially democracy, as the common form of political organization of the state.¹⁸²

The first contentious case concerning a violation of Article 23 of the ACHR is *Yatama v. Nicaragua*.¹⁸³ The court decided that the requirement to run for office through a political party does not conform to Article 23 of the ACHR.¹⁸⁴ In particular, the concept of a political party was found to be unfamiliar to the customs of the indigenous community concerned, effectively barring access to the passive right to vote and political participation.¹⁸⁵

In *Yatama*, the court established an indirect link between Article 23 of the ACHR, the idea of representative democracy, and "society as a whole."¹⁸⁶ The judges argued that the devices for political

180. *Id.* art. 2.

181. *Id.* art. 8.

182. *Zdanoka v. Latvia*, App. No. 58278/00, ¶ 98 (2006), <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database> (follow "HUDOC" hyperlink; then enter "58278/00" in application number field); *Refah Partisi v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98, 41344/98, ¶ 91 (2003), <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database> (follow "HUDOC" hyperlink; then enter one of the application numbers into the application number field). *See generally* *Loizidou v. Turkey*, App. 15318/89 (1995), <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database> (follow "HUDOC" hyperlink; then enter "15318/89" in application number field). I appreciate Dinah Shelton's most valuable recommendation to draw this parallel, and to link the concept to cessation measures.

183. *Yatama v. Nicaragua*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127 (June 23, 2005).

184. *Id.* ¶¶ 218-219, 229.

185. *Id.* ¶ 218.

186. *Id.* ¶ 259.

representation must permit the communities concerned to be able to intervene in the decision-making process, regarding both issues of “society as a whole” and their specific concerns.¹⁸⁷ Taking into account that the Inter-American system values representative democracy, and therefore the contribution that each citizen may make to the democratic life of the countries, it seems not too far-fetched to claim that the “society as a whole” is benefiting when participation is ever more inclusive. Although the textual link between the two concepts is rather implicit, future development might shed light as to how the court understands the relationship between participation and “society as a whole.” Nevertheless, society will benefit from the reparation measure ordered in *Yatama*: the electoral laws of Nicaragua have to be changed in order to allow candidates from all groups of society to run for office.¹⁸⁸ This measure will clearly have an effect on “society as a whole.”

CONCLUSIVE REMARKS

As has been shown, the Inter-American Court consistently orders measures that are either explicitly directed to “society as a whole,” or have important beneficiary effects on the society or vulnerable groups within the society. The court links the concept to the right to the truth and to impunity. Concern for “society as a whole” is an underlying working theory of the court.

As argued, “other forms of reparation” and, especially non-repetition guarantees, are awarded in relation to Articles 1(1) and 2 of the ACHR, and are ordered with a view towards the dissuasive effect regarding the repetition of similar violations. Such effects are most important in states where systematic and gross violations have occurred and where the past may constitute a significant obstacle to reconciliation and transition to democracy.¹⁸⁹

187. *Id.* (stating in the Spanish original: “[U]na representación adecuada que les permita intervenir en los procesos de decisión sobre las cuestiones nacionales, *que conciernen a la sociedad en su conjunto*, y los asuntos particulares que atañen a dichas comunidades” (emphasis added)).

188. *Id.* ¶¶ 258-259.

189. See generally Arturo Carrillo, *Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past*, in THE HANDBOOK OF REPARATIONS 504, 504-38 (Pablo de Greiff ed., 2006).

Up to now, the court has not considered itself competent to order the establishment of a general reparation program.¹⁹⁰ While such a consideration might be desirable for the future, even more importance should be assigned to non-monetary reparation measures directed to "society as a whole." Although the court does not consider society as the injured party in human rights violations, it awards measures with effects beyond the individual victim under Articles 1(1) and 2 of ACHR. The non-monetary benefits of the reparation measures are explicitly assigned to all members of society. As seen throughout this article, the importance of non-monetary measures is especially apparent when examining cases concerning the right to the truth. Beyond what has been shown, Judges Abreu Burelli and Garcia Ramírez assert in *The Peace Community of San Jose de Apartadó* that provisional measures may also reach "a plurality of persons."¹⁹¹

While this Article has explored the intent and legal argument related to the "society as a whole," juridical studies cannot provide the necessary methods to establish whether the measures granted will have the intended effects. It is important to note that a legal argument cannot empirically test the causal relationship and intensity between suggested measures and dissuasive effects. The court makes social assumptions that cannot and shall not be tested here. The intent of the court can, however, be clearly established. By awarding non-monetary, structural measures instead of ordering extensive programs for monetary compensation, the court can address the root of violations and aim to prevent the possible "buying-off" of human rights violations.¹⁹² By enlarging the group of beneficiaries of non-monetary measures through a consistent and effective interpretation

190. See *Vargas-Areco v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 155, ¶¶ 136(d)(xi), 144 (Sept. 26, 2006) (denying the representatives' request for a law offering "reparation to all victims of death, torture, abuse, and mistreatment while in compulsory military service in Paraguay" and instead naming those found to be injured parties).

191. *Peace Community of San José de Apartadó Regarding Colombia* (Provisional Measure), 2006 Inter-Am. Ct. H.R. ¶ 8 (Considerations) (Feb. 2, 2006).

192. See *La Cantuta v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 162, ¶¶ 219-222, 239 (Nov. 29, 2006) (awarding monetary compensation to victims' families, while emphasizing Peru's non-monetary obligations such as the duty to train prosecutors and judges).

of Articles 1(1), 2, and 63(1) of the ACHR, the court can pay tribute to the need to give systemic answers to systemic problems. By intending to solve these systemic problems, reparation measures and non-repetition guarantees granted in individual cases fulfill a dissuasive and exemplary function with regard to future violations.

The Inter-American Court's reparation jurisprudence is unique in international law, understanding both the individual and the "society as a whole" as beneficiaries of the measures it orders. The court attaches great importance to non-repetition guarantees. Such rulings are oriented toward the future and are not strictly concerned with repairing the past. In this sense, society is paramount, not as the injured party, but as the fundamental entity where respectful and peaceful life of all individuals can take place in the future, despite the past violations.