# EXTRAORDINARY REPARATIONS, LEGITIMACY, AND THE INTER-AMERICAN COURT

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## 1. INTRODUCTION

The Inter-American Court of Human Rights—the highest authority dedicated to enforcing international human rights law in the Inter-American system—has received considerable praise for its influential and innovative reparations decisions.[1] Nonetheless, its more innovative reparations orders apparently suffer from a serious problem of legitimacy—in that the Court may not be legally authorized to issue them—because they do not seem to respond to the human rights violations that the Court identifies. In the vast majority of its reparations decisions since 2001, the Court has ordered what one might call extraordinary reparations: measures such as human rights training,[2] changes to law and policy,[3] improvements in the

[1] *See* PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 1009 (2012); Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim Centered Remedies and Restorative Justice*, 47 STAN. J. INT'L L. 279, 290 (2011) (describing the American system as tailored to the interests of human rights victims in receiving "recognition, restoration, and accountability"); Conference Report, *Reparations in the Inter-American System: A Comprehensive Approach*, 56 AM. U. L. REV. 1375, 1376 (2007); Gina Donaoso, *Inter-American Court of Human Rights' Reparations Judgments. Strengths and Challenges for a Comprehensive Approach*, 49 REVISTA IIDH 29, 29-30 (2009); Ruth Rubio-Marín & Clara Sandoval, *Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the* Cotton Field *Judgment*, 33 HUM. R. Q. 1062, 1077-89 (2011); Judith Schonsteiner, *Dissuasive Measures and the "Society as a Whole": A Working Theory of Reparations in the Inter-American Court of Human Rights*, 23 AM. U. INT'L L. REV. 127, 140-44 (2007); Clara Sandoval Villalba, *The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 243, 244-45 (Carla Ferstman et al eds., 2009) (referencing how the jurisprudence of the Inter-American Court of Human Rights has been favorably described as victim-centered because reparations measures are generally oriented around victim needs and interests, whereas the model of the European Court is cost-centered).

[2] *See, e.g.*, Gutiérrez v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 271, ¶ 168 (Nov. 25, 2013) (ordering the State to incorporate "training courses on the obligations of respect for and guarantee of human rights" into law enforcement training curricula).

[3] *See, e.g.*, Luna López v. Honduras, Merits, Reparations and Costs, Judgment, Inter-Am. Ct H.R. (ser. C) No. 269, ¶ 244 (Oct. 10, 2013) (ordering the State to implement the necessary rehabilitative policies "in an effective and permanent manner").

justice system,[4] and provision of education,[5] water,[6] food,[7] or public services.[8] These are typically ordered in addition to compensation payments and other measures explicitly designed to undo or eliminate the violation's consequences.[9] Although the Court has not adequately defended its practice of ordering extraordinary reparations, this Article will argue that these orders legitimately aim to repair or cease unacknowledged aspects of human rights violations and their resulting harms. Some are disguised orders to cease ongoing violations, others aim to repair victim trust in the state, and some seek to repair harm to communities.

Despite the importance of its innovations, the Inter-American Court has not explained in depth—even in response to state complaints—why it is legally authorized or empowered to order extraordinary reparations, especially when it has already ordered measures supposedly sufficient to eliminate the effects of past human rights violations. For example, following a forced disappearance, the Court ordered monetary compensation for the victim's family supposedly equivalent to the harm suffered, but went on to order, among other measures, a literacy program for the victim's

[4] *See, e.g.*, Pacheco Teruel v. Honduras, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 241, ¶ 100 (April 27, 2012) (noting arbitrary arrests of young men in the country).

[5] *See, e.g.*, Barrios Family v. Venezuela, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 237, ¶ 336 (Nov. 24, 2011) (ordering the State to provide scholarships so that victims may be educated in vocational or university programs).

[6] *See, e.g.*, Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 230 (March 29, 2006) (ordering the State to "supply sufficient drinking water for consumption and personal hygiene to the members of the Community").

[7] *See, e.g.*, Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 301 (Aug. 24, 2010) (ordering the State to assure the "delivery of food of sufficient quality and quantity to ensure an adequate diet").

[8] *See, e.g.*, Río Negro Massacres v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 284 (Sept. 4, 2012) (ordering the State to implement public rehabilitative programs for the Pacux settlement community).

[9] See Bridget Mayeux, Justin Mirabel, & Ariel Dulitzky, Collective and Moral Reparations in the Inter-American Court of Human Rights 22-24 (2009) (reporting on the relatively "new paradigm for reparations under international human rights law" of "ordering and enforcing collective moral reparations for mass human rights violations").

mother.[10] The American Convention on Human Rights legally empowers the Court to order reparations only for identified human rights violations, not to order any measure it thinks might make for a better state or for a more human rights-friendly social environment.[11] The Court is not an international legislature. As some states have complained,[12] extraordinary reparations do not seem to address the violation's effects or otherwise have a "causal nexus" with the violation, since other reparative measures, such as restitution or compensation, are supposedly sufficient for that objective. They appear to go beyond "the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well

[10] *See* Gomez Palomino v. Peru, Merits, Reparations and Costs. Judgment, Inter- Am. Ct. H.R. (ser. C) No. 136, ¶ 147 (Nov. 22, 2005) (ruling that "Mrs. Victoria Margarita Palomino-Buitrón . . . may participate in a literacy program implemented by the corresponding public education entities").

[11] *See* American Convention on Human Rights art. 63(1), Nov. 22, 1969 *available at* http://www.cartercenter.org/resources/pdfs/peace/democracy/des/amer_conv_human_rights.pdf [perma.cc/N86P-GY62] (last visited Jan. 16, 2016) [hereinafter Convention] (conditioning the awarding to an injured party the enjoyment of his violated right on a finding "that there has been a violation of a right or freedom protected by this Convention").

[12] States have argued that these measures of reparation are illegitimate because they are not proportional to the harm resulting from the human rights violation. For example, in *Gonzalez v. Mexico*, considering state indifference to the disappearance and murder of three young women, Mexico asserted that, "determining and granting these measures of reparation separately would involve a disproportionate burden for the State, because they would exceed the damage caused." González ("Cotton Field") v. Mexico, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 449 (Nov. 16, 2009). Relatedly, and importantly, Mexico also claimed, "[t]he State indicated that the reparations requested by the representatives 'are excessive, repetitive and constitute a request for double reparation, because many of them refer to the same violations.'" *Id.* The Court simply responded that the measures ordered would not make the victims richer or poorer. *Id.* ¶ 450. For further cases of states arguing against extensive reparations orders, *See Rosendo Cantú v. Mexico,* Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 205 (Aug. 31, 2010); *Fernández Ortega v. Mexico,* Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, ¶ 222 (Aug. 30, 2010); *Loayza Tamayo v. Peru*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 42 ¶ 145 (Nov. 27, 1998); *Compare* Rio Negro Massacres v. Guatemala, *supra* note 8, at ¶ 45. The Court itself requires that the reparations have a causal nexus with the human rights violation. *See, e.g.*, Nadege Dorzema v. Dominican Republic, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 251, ¶ 241 (Oct. 24, 2012) (recognizing that the Court's reparations must have a causal nexus with the facts, violations, harm, and damage of the case); Atala Riffo v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 242 (Feb. 24, 2012) (recognizing that the Court's reparations must have a causal nexus with the facts, violations, harm, and damage of the case).

as the payment of compensation for the damage caused."[13] The Court has failed to use explicit legal principles to sufficiently explain when and why extraordinary reparation orders might be legitimate.

The Court's aggressive use of extraordinary reparations orders, which has triggered state complaints concerning their legitimacy, is perhaps natural given the limited number of new contentious cases the Court resolves annually—between nine and nineteen in recent years.[14] It directly reviews only a small portion of all the alleged human rights violations that occur in the states subject to its jurisdiction, sharply limiting its direct control of state actions and omissions.[15] This fact provides a powerful incentive for the Court to address human rights violations in the Americas other than by imposing accountability in individual cases. One temptation is to promote deeper changes in the states and their societies through ostensible exercises of the reparations power that the American Convention concedes to the Court.[16] Although states do not fully comply with the reparations that the Court orders, they comply at sufficiently high rates that the use of these orders as a tool for social change may seem quite appealing.[17] To promote positive change, the Court has ordered human rights training for state officials, changes to certain institutional structures, and amendments to legislation as extraordinary reparations for the victims of human rights violations.[18] But, as desirable as these supposedly reparative

[13] González ("Cotton Field") v. Mexico, *supra* note 12, at ¶ 450.

[14] *See* Inter-American Court of Human Rights, Decisions and Judgments, http://www.corteidh.or.cr/index.php/en/decisions-and-judgments [http://perma.cc/V2HF-FSWR] (last visited Oct. 10, 2014) (demonstrating the limited number of cases tried annually before the Court).

[15] *Cf.* David L. Attanasio, *Militarized Criminal Organizations in Latin America and Human Rights Court Oversight of State Protection Efforts: Evidence from Colombia*, 41 FLA. ST. U. L. REV. 341, 375-81 (2014) (noting a jurisprudence principle that "allows the courts to use their limited judicial competence efficiently to promote compliance with the state human rights obligation to protect by focusing resources on those issues most in need of their intervention").

[16] *See* Convention, *supra* note 11, at art. 63(1) ("If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated.").

[17] *See* Antkowiak, *supra* note 1, at 304-16 (demonstrating "that states have complied with the Inter-American Court's reparations orders across a range of categories.").

[18] *See, e.g.*, Nadege Dorzema v. Dominican Republic, *supra* note 12, at ¶¶ 269-70, 272 (noting the efficacy and impact of the human rights education program for public officials); Río Negro Massacres v. Guatemala, *supra* note 8, at ¶ 285 (ordering

measures may be given the Court's limitations, the states might have a point when they complain about their illegitimacy, in particular, that the Court may not have the necessary legal authority to order these measures.

Nevertheless, this Article will argue that it is possible to provide an adequate response to state complaints about extraordinary reparations orders. By focusing on three unacknowledged aspects of human rights violations and their resulting harms, it is possible to show why the Inter-American Court's major extraordinary reparations orders are legally legitimate. First, many extraordinary reparations orders are not actually mandates to provide reparations, but rather legitimate orders to cease ongoing human rights violations. For example, in *Atala Riffo v. Chile*, the Court held that Chile violated the American Convention when it deprived a woman of child custody on the basis of her sexual orientation.[19] It then ordered, in addition to monetary compensation, changes to Chilean legal practice and non-discrimination training for public officials.[20] Reparations orders of this sort might be understood as orders to eliminate laws, practices, and states of affairs that, in themselves, constitute violations of the American Convention. The American Convention explicitly gives the Court the power to order that "the injured party be ensured the enjoyment of his right or freedom that was violated."[21] When existing laws, practices, and states of affairs continue to violate state obligations, ensuring enjoyment of rights may require such extraordinary measures. The Court may legitimately order cessation of such violations for the same reasons that a domestic court may legitimately invalidate an unconstitutional law or practice in a case where the law or practice was applied and generated a constitutional violation.

Second, the Court may legitimately order extraordinary reparations to repair victim trust in the state that the human rights violation damaged, an effort that will often require more than simply

the implementation of a public program to rescue, promote, disseminate, and conserve ancestral customs and practices of the Río Negro community); Atala Riffo v. Chile, *supra* note 12, at ¶¶ 271-72 (recognizing the State's advances in training programs for public officials); González ("Cotton Field") v. Mexico, *supra* note 12, at ¶¶ 541, 543 (ordering the continued implementation of training programs for public officials, including topics such as discrimination against women).

19 Atala Riffo v. Chile, *supra* note 12, at ¶¶ 146, 154-55.

20 *Id*. at ¶¶ 271, 284, 294, 299.

21 Convention, *supra* note 11, at art. 63(1).

eliminating the material effects of the violation.[22] Apologies, recognition of responsibility, construction of monuments or museums, and creation of commemorative days may serve this purpose, for example. However, the reparations that are appropriate means to rebuild trust and thereby promote reconciliation depend on the social context of the victim, such as whether the victim was subject to discrimination on the basis of some characteristic like ethnicity, gender, or sexual orientation. These factors affect what measures are sufficient to restore the victim's trust that the state will treat him or her appropriately and that it will not commit future human rights violations.[23] For victims that were subject to social marginalization, such as in the form of discrimination, repair may require additional measures, potentially with greater cost. Reparations that merely seek to eliminate the consequences of the human rights violations may be insufficient; restoring the victim's trust may require measures that attempt to change the social circumstances of the victim or otherwise improve his or her material situation.

Finally, extraordinary reparations' orders may legitimately seek to eliminate, repair, or compensate for the consequences of past human rights violations for a community, rather than for individuals. Even though the ordered measures may appear disconnected from the past violations because restitution, compensation, or rehabilitation (medical or psychological treatment) have already been awarded to individual victims, such extraordinary reparations orders may be legitimate nevertheless. For example, *Rio Negro Massacres v. Guatemala* concerned several villages subject to massacres and forced displacement, many of whose residents resettled in the town of Pacux.[24] The Court ordered that the state implement a number of measures to improve life in Pacux, including provision of medical personnel for a health center, food security programs, improved

[22] A human rights violation not only causes injury to the material interests of the victim, but also to the appropriate trust that should exist between an individual and his or her state. As a result, reparations need to respond not only to the material harm—economic losses, incurred expenses, pain and suffering, and the like—but also to the loss of trust.

[23] Human rights violations concretely demonstrate to individuals that the state is not to be trusted to treat them according to acceptable standards because it does not adequately respect them. *See infra* Part IV.

[24] Río Negro Massacres v. Guatemala, *supra* note 8, at ¶¶ 68-87.

streets, supply of water, drainage and sewers, and improved schooling facilities.[25] One way to understand the collective measures in this case is as an attempt to repair the damage to the social fabric of the community that the massacres and displacement caused. Even if the required reparations for individuals were sufficient to eliminate the individual effects of past human rights violations, the Court may legitimately order additional measures to restore (or to attempt to restore) community cohesion.

In responding to state complaints about extraordinary reparations orders, this Article uses the Inter-American Court's jurisprudence to develop a broad legal theory of reparations.[26] The Inter-American Court has expanded on traditional reparations in international law, identifying an extensive set of potential reparatory measures for human rights violations committed against individuals.[27] Demonstrating the legitimacy of the Inter-American Court's

[25] *Id.* at ¶ 284.

[26] This theoretical proposal may also be relevant to the design of reparations programs, such as for societies in transition to democracy. *See generally* RUTI G. TEITEL, TRANSITIONAL JUSTICE 1-11 (2002); NEIL J. KRITZ, TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, VOLUME I: GENERAL CONSIDERATIONS 1-55 (1995). For many such societies, a narrow focus on fully 'undoing' or eliminating the material consequences of past human rights violations simply is not reasonable. Such societies must use their limited resources to attend to reconstruction and reduction of social inequality, while at the same time redressing past human rights violations. *See* Christopher Kutz, *Justice in Reparations: The Cost of Memory and the Value of Talk*, 32 PHIL. & PUB. AFFAIRS 277, 278-79, 298 (2004). In this context, there is typically a dilemma between the reparations called for by corrective justice theories and the limited public resources available and other urgent social spending. *See* David Gray, *An Excuse-Centered Approach to Transitional Justice,* 74 FORDHAM L. REV. 2621, 2626; MARGARET URBAN WALKER, MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING 36 (2006) [hereafter MORAL REPAIR]; Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas,* 27 HASTINGS INT'L & COMP. L. REV. 157, 185-192 (2003); Pablo De Greiff, *International Courts and Transitions to Democracy,* 12 PUB. AFF. Q. 79, 79-80 (1998). A number of authors have considered how reparations ought to be designed in light of such tensions, a project that would benefit from an expanded understanding of reparations. *See* Kutz, *infra*, at 278-79, 298; Pablo Kalmanovitz, *Corrective Justice versus Social Justice in the Aftermath of War*, *in* DISTRIBUTIVE JUSTICE IN TRANSITIONS 71, 79-91 (Morton Bergsmo *et al.* eds., 2010); Rodrigo Uprimny Yepes, *Between Corrective and Distributive Justice: Reparations of Gross Human Rights Violations in Times of Transition* 19-21 (lecture delivered October 21, 2009); Christopher J. Colvin, *Overview of the Reparations Program in South Africa, in* THE HANDBOOK OF REPARATIONS 176, 191-92, 201–02 (Pablo De Greiff ed., 2006). Jon Elster observes that dilemmas of this sort are quite common in transitional contexts, not just currently but from a historical perspective as well. JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 208-15 (2004).

[27] There are potentially substantial differences between reparations for human

creative jurisprudence requires identifying an expansive theory of reparations for human rights violations. Having such a theory is especially valuable because both international jurisprudence from other tribunals[28] and international soft law take guidance from the Inter-American Court's novel and expansive approach to reparations.[29] Because the Court's perspective on reparations has become increasingly influential, it is important to have a clear understanding of when and why its extraordinary reparations orders are legally justified.

This Article will proceed in five additional substantive sections to defend a theory of the legitimacy of the Inter-American Court's extraordinary reparations' orders. The next section will present an overview of the Court's reparations decisions and identify certain recurring reparations orders that may appear illegitimate because they do not seem to constitute genuine reparations. The third section will explain why many Inter-American extraordinary reparations' orders, particularly guarantees of non-repetition, may in fact be disguised orders to cease ongoing human rights violations. The

rights violations and reparations for other international law violations. *See* Theo van Boven, *Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 19, 20-21 (Carla Ferstman et al eds., 2009).

[28] See, e.g., Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), 2012 I.C.J. 324, at ¶¶ 13, 18, 20, 40 (June 19, 2012); Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), 2012 I.C.J. 347, at ¶¶ 65-70 (June 19, 2012) (separate opinion of Judge Cançado Trindade); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, at ¶¶ 186-249 (Aug. 7, 2012); Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, at ¶ 82 (Jul. 12, 2010) (noting an individual's right to a remedy and reparations); Extraordinary Chambers in the Courts of Cambodia, Prosecutor v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment (Feb. 3 2012); Ethiopia's Damages Claims (Eth. v. Eri.), Final Award, Eri. Eth. Cl. Comm'n, at ¶ 62 (Aug. 17, 2009) (discussing the notion of comparative criminal responsibility in relation to the party "most responsible"); Srebrenica Cases, Case No. CH/01/8365, Decision on Admissibility and Merits, Human Rights Chamber for Bosnia and Herzegovina ¶¶ 205-210 (Mar. 7, 2003) (noting the difficulty in fashioning a remedy for particularly egregious human rights violations).

[29] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution 60/147, Annex, U.N. Doc. A/RES/60/147, at ¶¶ 15-23 (Dec. 16, 2005) *available at* http://www.hrc.ba/DATABASE/decisions/CH01-8365%20Selimovic%20Admissibility%20and%20Merits%20E.pd [perma.cc/RDS4-RTU9] (last visited Jan. 16, 2016).

fourth section will claim that many other typical extraordinary reparations orders, especially measures of satisfaction, may be viewed as legitimately aimed at repairing the victim's trust in the state harmed by the past human rights violation. It will explain why the victim's social context—specifically social marginalization—may justify orders to grant additional reparative measures that are symbolic but also provide material benefits to the victim. The fifth section will argue that orders to provide reparations aimed at communities may be legitimate because they seek to repair the harm from the human rights violation to the fabric and structure of the community.

## 2. INTER-AMERICAN REPARATIONS AND THE PROBLEM OF LEGITIMACY

The Inter-American Court's reparations jurisprudence includes several categories of orders that are relatively unproblematic, but others—which might be called extraordinary reparations—that are not obviously legitimate. Extraordinary reparations orders require states to, for example, change laws, provide human rights training, or improve infrastructure. These orders appear to be illegitimate because they do not seem to be orders to provide genuine reparations, which are measures that respond to the particular past human rights violation committed against the specific victim. The American Convention only authorizes the Court to order reparations and measures to ensure the victim's rights, not just set forth any measure that the Court thinks might make for improved human rights compliance or a better society. If a supposed reparations order does not require genuine reparations, or is not otherwise legally authorized by the Convention, it would constitute an illegitimate excess of authority. This section will first provide an overview of the Inter-American Court's reparations jurisprudence, then identify several requirements for genuine reparations, and finally explain why some principal categories of reparations orders appear illegitimate.

### *2.1. The Reparations Jurisprudence of the Inter-American Court*

The Inter-American Court's power to order reparations ultimately stems from article 63(1) of the American Convention:

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

> or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.[30]

According to the Court, this article embodies the customary international law of state responsibility, which requires a state to provide reparations for its internationally unlawful acts.[31] The Court has interpreted this provision to authorize and require a state to order integral reparations for human rights violations. Integral reparations consist of measures sufficient to undo the violation—restoring the situation prior to the violation—and eliminate its consequences to the extent feasible, as well as to provide complete compensation for whatever aspects cannot be undone or eliminated.[32] The integral reparation standard requires that all reparatory measures have a causal nexus with the human rights violation, in that they respond to it and undo, eliminate, or compensate for its effects.[33] It also implies that that the Court must not order double reparation, in that the reparations taken as a whole must be no more than integral.[34]

Nonetheless, the requirement that reparations be integral, according to the Court, allows not only for measures that restore the situation prior to a human rights violation, but also for measures that otherwise correct that situation. The Court explained in *Atala Riffo*, a case concerning a woman deprived of child custody because of her sexual orientation:

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[30] Convention, *supra* note 11, at art. 63(1).

[31] Cantoral Benavides v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 40 (Dec. 31, 2001); Castillo Páez v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 43, ¶ 50 (Nov. 27, 1998); Aloeboetoe v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 43 (Sept. 10, 1993).

[32] González ("Cotton Field") v. Mexico, *supra* note 12 ("The Court recalls that the concept of 'integral reparation' (restitutio in integrum) entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused."). *See also* Velásquez Rodríguez v. Honduras, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 26 (July 21, 1989) (awarding compensation, both monetary and moral, to the victim's next of kin in the amount intended to restore the situation prior to the violation).

[33] Mendoza v. Argentina, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260, ¶ 306 (May 14, 2013).

[34] González ("Cotton Field") v. Mexico, *supra* note 12, at ¶ 450.

> [S]ome discriminatory acts analyzed . . . relate to the perpetuation of stereotypes that are associated with the structural and historical discrimination suffered by sexual minorities . . . . Therefore, some reparations must have a transformative purpose, in order to produce both a restorative and corrective effect and promote structural changes . . . .[35]

Thus, while the Court limits integral reparations to those measures causally connected to the violation, the measures must repair or compensate for all damage resulting from all identified human rights violations—taking into account gender and other relevant social distinctions—as well as eliminate the structural causes of the human rights violations, thereby giving the reparations a transformative purpose.[36] The requirement that reparations have a transformative purpose does not authorize reparations that would make the victims richer or poorer than they otherwise would have been, but instead requires the Court to address the underlying causes of human rights violations.[37]

The Court distinguishes six categories of reparations. First, although not strictly reparations, it can order measures that require the *investigation* of ongoing human rights violations, including their prosecution and punishment.[38] Second, when appropriate and pos-

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[35] Atala Riffo v. Chile, *supra* note 12, at ¶ 267. *See also* González ("Cotton Field") v. Mexico, *supra* note 12 (ordering a new investigation of the victim's gender-related murder without the preexisting legal or factual obstacles and with a gender perspective in order to avoid a repetition of the result).

[36] González ("Cotton Field") v. Mexico, *supra* note 12, at ¶ 451 (ruling that the Court shall "assess the measures of reparation requested by the Commission and the representatives to ensure that they: (i) refer directly to the violations declared by the Tribunal; (ii) repair the pecuniary and non-pecuniary damage proportionately; (iii) do not make the beneficiaries richer or poorer; (iv) restore the victims to their situation prior to the violation insofar as possible, to the extent that this does not interfere with the obligation not to discriminate; (v) are designed to identify and eliminate the factors that cause discrimination; (vi) are adopted from a gender perspective, bearing in mind the different impact that violence has on men and on women, and (vii) take into account all the juridical acts and actions in the case file which, according to the State, tend to repair the damage caused.").

[37] *Id.* at ¶ 450.

[38] *See, e.g.*, *id.* § IX(3) (Nov. 16, 2009); García Cruz and Sánchez Silvestre v. Mexico, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 273, ¶ 70 (Nov. 26, 2013) (demonstrating approval of a friendly settlement); Mendoza v. Argentina, *supra* note 33, at ¶¶ 340-41 (deciding to investigate the death publically and with access by the family); Gudiel Álvarez ("Diario Militar") v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 253, ¶ 350

sible, the Court will require *restitution*, in the sense of the literal return to the situation prior to the human rights violation, usually in connection to the restoration of legal rights.[39] Third, *compensation* takes the form of monetary reparations for pecuniary and non-pecuniary losses as a result of the human rights violation.[40] Fourth, if the victim continues to suffer physical or psychological effects from the violation, the Court will often require the state to provide reparations, like medical or psychological care, as measures of *rehabilitation*.[41] Fifth, the category of *satisfaction* includes measures such as

(Nov. 20, 2012) (imposing the obligation to investigate the forced disappearances and the alleged detentions, torture, and presumed execution of victims); Fornerón and Daughter v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 242, ¶ 172 (April 27, 2012) (ordering an investigation and sanctioning officials as a means of non-repetition).

[39] *See, e.g.*, Fontevecchia and D'Amico v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 238, ¶ 105 (Nov. 29, 2011) (ordering reparations to compensate a victim whose right to freedom of expression was violated); Vélez Restrepo v. Colombia, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 248, ¶¶ 264-66 (Sept. 3, 2012) (awarding reparations to a victim who was attacked while filming a protest demonstration); García Cruz and Sánchez Silvestre v. Mexico, *supra* note 38, at ¶ 73 (awarding reparations to two men who were detained and tortured and sentenced to further terms of imprisonment without due process); Osorio Rivera v. Peru, Preliminary Objections, Merits, Reparations, Inter-Am. Ct. H.R. (ser. C) No. 274, ¶ 83 (Nov. 26, 2013) (ordering reparations to compensate a victim who was unlawfully detained and tortured).

[40] *See, e.g.*, J. v. Peru, Preliminary Objection, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 275, ¶ 415 (Nov. 27, 2013) (awarding monetary reparations to a victim who was illegally and arbitrarily detained, raped, and tortured and whose home was illegally searched); Mémoli v. Argentina, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 265, ¶¶ 213, 218 (Aug. 22, 2013) (awarding monetary reparations to compensate a victim whose right to freedom of expression was violated).

[41] The Inter-American Court orders these measures with some frequency, typically in the form of medical or psychological attention for the victim. It commonly requires the state to provide medical attention to victims with remaining health problems resulting from the human rights violation. Osorio Rivera v. Peru, *supra* note 39, at ¶ 256; Mendoza v. Argentina, *supra* note 33, at ¶ 311; Vélez Restrepo v. Colombia, *supra* note 39, at ¶¶ 270-71. It also requires the state to provide funds to victims, such as when direct provision of care was not feasible. Suárez Peralta v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 261, ¶ 183-84 (May 21, 2013); Vélez Restrepo v. Colombia, *supra* note 39, at ¶¶ 270-71 (requiring direct provision only if the victims return to Colombia and funds for health care otherwise). *But cf.* Pacheco Tineo Family v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 272, ¶ 260 (Nov. 25, 2013) (denying provision of funds because the harm was not causally connected to the human rights violation). Per-

public apologies or recognition of responsibility for the human rights violation. Sixth, *guarantees of non-repetition* are measures intended to preclude the recurrence of the human rights violation perpetrated.

It is worth saying more about the two categories of reparations that typically include extraordinary measures, which do not appear aimed at undoing, repairing, or compensating for the harm suffered or at ceasing ongoing violations. These categories are guarantees of non-repetition and satisfaction. As guarantees of non-repetition, the Inter-American Court requires states to "adopt all the necessary legal, administrative and any other measures to make the exercise of these rights effective . . . ."[42] It claims that these reparations originate

haps even more common are requirements to provide psychological care for victims, again typically in the form of services, not funds. *See e.g.*, Osorio Rivera v. Peru, *supra* note 39, at ¶ 256 (ordering that the Peruvian government provide medical and psychological or psychiatric treatment to those victims who request it); Luna López v. Honduras, *supra* note 3, at ¶ 224 (ordering that the Honduran government provide free, immediate, appropriate and effective psychological or psychiatric care, as required to the victims); Atala Riffo v. Chile, *supra* note 12, at ¶ 254 (ordering that the government of Chile provide medical and psychological or psychiatric care, free of charge and in an immediate, appropriate and effective manner to those victims who so request it); Barrios Family v. Venezuela, *supra* note 5, at ¶ 330 (deciding that the state of Venezuala must provide medical and psychological care, free of charge and immediately, to the victims who request it). In cases where the issue was raised or problems were likely, the Court has also required the state to take into account special circumstances of victims. Gudiel Álvarez ("Diario Militar") v. Guatemala, *supra* note 38, at ¶ 339. *See also* Río Negro Massacres v. Guatemala, *supra* note 8, at ¶ 289 (instituting psychological care to be provided to the affected community). Finally, the Court has also occasionally ordered educational services for victims in cases where the human rights violation interfered with the victim's pursuit of education, and affected his or her life project more generally, understood as opportunities for personal development. Mendoza v. Argentina, *supra* note 33, at ¶¶ 314-17; Loayza Tamayo v. Peru, *supra* note 12, at ¶¶ 147-52.

[42] Gutiérrez v. Argentina, *supra* note 2, at ¶ 165. *See also* Luna López v. Honduras, *supra* note 3, at ¶ 234; Suárez Peralta v. Ecuador, *supra* note 41, at ¶ 195 (ordering several legal and administrative measures in order to prevent repletion of the violation); Artavia Murillo (in vitro fertilization) v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 334 (Nov. 28, 2013) (ordering the state of Costa Rica to adopt appropriate legal and practical measures to annul to the prohibition to practice in vitro fertilization); Mendoza v. Argentina, *supra* note 33, at ¶ 323 (ordering the state of Argentina to adapt its legal framework to the international standards for juvenile criminal justice and design and implement public policies with clear goals and timetables for the prevention of juvenile delinquency through effective programs and services); Furlan v. Argentina, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 246, ¶ 300 (Aug. 31, 2012) (ordering the state of Argentina to adopt the measures necessary to ensure that as soon as a person is diagnosed with serious problems or consequences related to a disability, that

in the state's obligation to prevent and guarantee human rights as established by the American Convention.[43] The measures necessary to make rights effective as guarantees of non-repetition are often limited to those that respond to a situation that actually generated the violations in the case.[44] When proposed measures involve changing laws, the Court has often taken into account whether the law complies with international standards when deciding whether to grant the measures.[45] The Court considers it particularly important to provide guarantees of non-repetition when the human rights violations at issue are part of a recurring pattern.[46]

The Inter-American Court has ordered a range of reparation measures as guarantees of non-repetition for the human rights violations suffered. First, it has required that the state provide human rights training for different groups, including the armed forces,[47] the police,[48] prison officials,[49] executive and judicial officials,[50] and even the general public.[51] The training may be on the general topic of respect for human rights or humanitarian law,[52] or on more specific

person or his family shall be provided with a charter of rights that summarizes the benefits provided under Argentine legislation).

[43] Osorio Rivera v. Peru, *supra* note 39 at, ¶ 268; Gutiérrez v. Argentina, *supra* note 2, at ¶ 165; Luna López v. Honduras, *supra* note 3, at ¶ 234; Suárez Peralta v. Ecuador, *supra* note 41, at ¶ 195; Artavia Murillo (in vitro fertilization) v. Costa Rica, *supra* note 42, at ¶ 334; Mendoza v. Argentina, *supra* note 33, at ¶ 323; Furlan v. Argentina, *supra* note 42, at ¶ 300.

[44] Furlan v. Argentina, *supra* note 42, at ¶ 301 ("the representatives did not provide sufficient evidence to allow the Court to infer that the violations declared in this case stem from a problem in the laws themselves.").

[45] *Id.* at ¶ 301; Pacheco Tineo Family v. Bolivia, *supra* note 41, at ¶ 266; Luna López v. Honduras, *supra* note 3, at ¶ 238; Constitutional Tribunal (Camba Campos) v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 268, ¶ 276 (Aug. 28, 2013); Atala Riffo v. Chile, *supra* note 12, at ¶ 280.

[46] Pacheco Teruel v. Honduras, *supra* note 4, at ¶ 92.

[47] Osorio Rivera v. Peru, *supra* note 39, at ¶ 274; Gomes Lund ("Guerrilha do Araguaia") v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 283 (Nov. 24, 2010).

[48] Gutiérrez v. Argentina, *supra* note 2, at ¶ 168; Barrios Family v. Venezuela, *supra* note 5, at ¶ 341.

[49] Mendoza v. Argentina, *supra* note 33, at ¶ 337.

[50] Furlan v. Argentina, *supra* note 42, at ¶ 308; Fornerón and Daughter v. Argentina, *supra* note 38, at ¶ 182.

[51] González ("Cotton Field") v. Mexico, *supra* note 12, at ¶ 541, 543.

[52] Osorio Rivera v. Peru, *supra* note 39, at ¶ 274; Gutiérrez v. Argentina, *supra* note 2, at ¶ 168.

topics, such as non-discrimination or forced disappearance.[53] Second, the Court has often ordered the state to change different aspects of its law and public policy, including the creation of laws concerning protections for criminal defendants,[54] the addition of crimes to penal codes,[55] the amendment of other laws,[56] and the development of new public policy.[57] Third, the Court has required prison reforms, such as improvement of general prison conditions,[58] elimination of specific hazards to prisoners,[59] separation of different populations,[60] and expanding the availability of health services.[61]

Measures of satisfaction, in the Inter-American Court's jurisprudence, "seek to repair non-pecuniary" or non-material damage[62] and are "public acts or works that seek, *inter alia*, to commemorate and

[53] Osorio Rivera v. Peru, *supra* note 39, at ¶ 274; Furlan v. Argentina, *supra* note 42, at ¶ 803; Atala Riffo v. Chile, *supra* note 12, at ¶¶ 271-72; González ("Cotton Field") v. Mexico, *supra* note 12, at ¶¶ 541, 543.

[54] *See* Pacheco Teruel v. Honduras, *supra* note 4**,** at ¶ 100 (limiting preliminary detention); Mendoza v. Argentina, *supra* note 33, at ¶ 327 (prohibiting life imprisonment).

[55] For example, several cases have required states to criminalize forced disappearances as such. Osorio Rivera v. Peru, *supra* note 39, at ¶ 271; Gutiérrez v. Argentina, *supra* note 2, at ¶ 231; Gomes Lund ("Guerrilha do Araguaia") v. Brazil, *supra* note 47, at ¶ 287.

[56] Mendoza v. Argentina, *supra* note 33, at ¶ 332 (ordering conventionality control by judges).

[57] Luna López v. Honduras, *supra* note 3, at ¶ 244 (providing a comprehensive policy for protection for human rights and environment advocates); Gomes Lund ("Guerrilha do Araguaia") v. Brazil, *supra* note 47, at ¶ 297 (commending, but not explicitly ordering, the creation of truth commission); Gomes Lund ("Guerrilha do Araguaia") v. Brazil, *supra* note 47, at ¶ 292 (noting reforms necessary for access to information).

[58] Díaz-Peña v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 244, ¶ 154 (Jun. 26, 2012) (ordering, at a minimum, well ventilated cells, access to bathrooms and clean showers, and decent quality food); Pacheco Teruel v. Honduras, *supra* note 4, at ¶ 96.

[59] Pacheco Teruel v. Honduras, *supra* note 4, at ¶ 96 (ordering that the risk of fire in a prison be mitigated).

[60] *Id.* ¶ 97.

[61] Díaz-Peña v. Venezuela, *supra* note 58, at ¶ 154; Pacheco Teruel v. Honduras, *supra* note 4, at ¶ 96.

[62] Goiburú v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 163 (Sept. 26, 2013). *Accord* Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 270, ¶ 441 (Nov. 20, 2013); Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 264 (Jan. 31, 2006).

dignify victims . . . ." [63] The most commonly ordered measures of satisfaction require the state to distribute and publicize the Inter-American Court's judgment[64] and perform public acts of recognition of international responsibility.[65] Judgments may also include a requirement to apologize publically.[66] Beyond these standard measures of satisfaction, there are a number of others that the Court has ordered on occasion. For example, it has ordered the state to name schools in commemoration of children who suffered serious human rights violations.[67] It has approved of the state's willingness

[63] Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 191 (June 15, 2005); Serrano Cruz Sisters v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 156 (March 1, 2005); Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 80 (Nov. 19, 2004). *See also* Gutiérrez Soler v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct, H.R. (ser. C) No. 132, ¶ 105 (Sept. 12, 2005) (ordering one such public act: the State publishing the Court's judgment in an official gazette and national newspaper).

[64] *See, e.g.*, Osorio Rivera v. Peru, *supra* note 39, at ¶ 260 (providing instructions on how the judgment should be published); *see also* Díaz-Peña v. Venezuela, *supra* note 58, at ¶ 153 (detailing dissemination and publishing requirements to be in compliance with the court order); Escher v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 200, ¶ 239 (July 6, 2009); Raxcacó Reyes v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 133, ¶ 136 (Sept. 15, 2005); Bulacio v. Argentina, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 100, ¶ 145 (Sept. 18, 2013).

[65] *See, e.g.*, Gutiérrez v. Argentina, *supra* note 2, at ¶ 158 (encouraging Argentina to organize it's public act of recognition for responsibility with the guidance of affected victims); Pacheco Teruel v. Honduras, supra note 4, at ¶ 122 (insisting that the victims' next of kin should attend the public acknowledgment of responsibility); Montero Aranguren (Detention Center of Catia) v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 150 (July 5, 2006) (finding Venezuela's acceptance of liability at the hearing insufficient for a public acknowledgment and ordering new act of public acknowledgement in front of victims' next of kin). *But see* Escher v. Brazil, *supra* note 64, at ¶ 243 (finding that a public act of acknowledgment was not necessary within the context of the case).

[66] *See* Artavia Murillo (in vitro fertilization) v. Costa Rica, *supra* note 42, at ¶ 85 (demonstrating a court-approved settlement including a requirement to apologize); Nogueira de Carvalho v. Brazil, Preliminary Objections and Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 161, ¶ 189 (Nov. 28, 2006).

[67] *E.g.*, Contreras v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 232, ¶ 208 (Aug. 31, 2011) (ordering the state to name schools for forced disappearance victims); *see also* "Street Children" (Villagrán-Morales) v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 77, ¶ 457 (May 26, 2001) (acknowledging state's efforts prior to the judgment to improve educational assistance to communities). *Cf.* Gutiérrez v. Argentina, *supra*

to construct a museum dedicated to an armed conflict and its victims[68] and to preserve the site of the violations.[69] In one case, it required the state to distribute a documentary that the state acquiesced to producing.[70]

The Court also frequently classifies as measures of satisfaction a number of reparations that are not purely symbolic in nature, in that they have substantial material components as well. Perhaps the most notable orders in this category require the state to provide infrastructure for displaced communities, including health care, access to food, improvement of streets, improved sewers, better access to water, and better schools.[71] Similarly, on a number of occasions, the Court has ordered the state to provide educational support for the children of victims whose studies were affected by the human rights violation.[72] In at least one decision, it also ordered the provi-

note 2, at ¶ 164 (approving of the establishment of a "National Day to Combat Drug-trafficking"). *But see* Gomes Lund ("Guerrilha do Araguaia") v. Brazil, *supra* note 47, at ¶ 280 (denying request for a commemorative day).

[68] *E.g.*, Río Negro Massacres v. Guatemala, *supra* note 8, at ¶ 280 (acknowledging state's acquiescence to initiatives to construct a museum in memory of victims of the internal conflict).

[69] *See* Gutiérrez v. Argentina, *supra* note 2, at ¶ 162 (approving of settlement, including agreements to take efforts to preserve "the warehouse and precinct where the events occurred").

[70] *See* Contreras v. El Salvador, *supra* note 67, at ¶ 210 (ordering the state to cover the preparation and expenses of a documentary on forced disappearance of children). *But see* Afro-descendant Communities (Operation Genesis) v. Colombia, *supra* note 62, at ¶ 450 (denying reparations in the form of a documentary).

[71] *See* Río Negro Massacres v. Guatemala, *supra* note 8, at ¶ 284 (recognizing the instability of displaced victims by ordering public works such as a improvements to a health center, food security and nutrition programs, reconstruction of schools, establishment of a bilingual high school, and other construction efforts). The court has replicated nearly the same order on other occasions where it did not specify whether it was a measure of satisfaction or a guarantee of non-repetition and on one occasion where the Court categorized the order as a measure of rehabilitation. *Compare* Xákmok Kásek Indigenous Community v. Paraguay, *supra* note 7, at ¶ 301 (classifying the order as rehabilitation); Sawhoyamaxa Indigenous Community v. Paraguay, *supra* note 6, at ¶ 230 (classifying the order as satisfaction or guarantees); Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 221 (June 17, 2005) (classified as satisfaction or guarantees).

[72] *See* Osorio Rivera v. Peru, *supra* note 39, at ¶ 267 (requiring the state to establish schools); *see also,* Barrios Family v. Venezuela, *supra* note 5, at ¶ 336 (Nov. 24, 2011) (ordering that the State provide scholarships to members to enumerated victims for their university education); Gómez Palomino v. Peru, *supra* note 10, at ¶¶ 145-48.

sion of education for the mother of the victim, whose search for justice was impeded by her illiteracy.[73] In another case, the Court endorsed various material measures of satisfaction that would "contribute to establish[ing] the conditions and means to enable the victims to restore their dignity" following fifteen years in prison.[74] These measures included the provision of housing and educational support.[75] Finally, it is worth noting that the Court has on occasion ordered measures like human rights training or medical and psychological care as measures of satisfaction rather than as guarantees of non-repetition or measures of rehabilitation.[76]

### *2.2. Traditional Corrective Justice and Requirements for Genuine Reparations*

Before analyzing the extent to which the Inter-American Court's reparations—most importantly, extraordinary measures—can be understood as genuine reparations, it is worth saying more about the traditional conception of corrective justice and what it indicates about the nature of reparations in general. Corrective justice in the reparations context requires a state to correct past wrongs, classically understood as an attempt to undo, eliminate, or compensate for the material consequences of a past wrong.[77] In that sense, it is a backwards-looking ideal of justice,[78] in contrast to distributive justice, which focuses on the just distribution of economic and other resources in the present.[79] Some conception of corrective justice is

[73] *See* Gómez Palomino v. Peru, *supra* note 10, at ¶ 147 (ordering that the State provide any resources necessary to improve victim's literacy skills).

[74] García Cruz and Sánchez Silvestre v. Mexico, *supra* note 38, at ¶ 80.

[75] *Id.* at ¶¶ 80, 83.

[76] *See, e.g.*, Montero Aranguren (Detention Center of Catia) v. Venezuela, *supra* note 65, at ¶ 148 (directing Venezuela to design training programs for its police and penitentiary officials); *see also* Gómez Palomino v. Peru, *supra* note 10, at ¶ 143 (ordering that the State provide mental and psychological help to those who are mourning the loss of their disappeared family member).

[77] ERNEST WEINRIB, THE IDEA OF PRIVATE LAW 142-44 (1995); JULES L. COLEMAN, RISKS AND WRONGS 322 (1992); ARTHUR RIPSTEIN, EQUALITY RESPONSIBILITY, AND THE LAW 24, 30, 35 (1999). For a critical discussion of the corrective justice perspective, see Margaret Urban Walker, *Restorative Justice and Reparations*, 37 J. SOC. PHIL. 377, 379-82, 385 (2006) [hereinafter *Restorative Justice and Reparations*].

[78] Kalmanovitz, *supra* note 26, at 75.

[79] Distributive justice in turn requires either that social institutions appropriately distribute or that society achieve an appropriate distribution of material resources among its members. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 76-77 (2d

often thought to underlie the law of torts, which generally seeks to have the tortfeasor compensate the injured party for the harm wrongfully caused.[80] A corrective justice perspective often assumes that there is a secondary duty to correct the harm done to others as a result of a breach of the primary duties owed to them, such as the duty not to injure wrongfully.[81] This secondary duty to correct is not solely based on responsibility for the breach itself but on a notion of responsibility for certain outcomes or results of the breach.[82]

The secondary duty to correct may potentially take different forms, including a duty to undo the violation and eliminate its effects to the degree possible, or a duty to compensate for the wrong and its consequences. The distinction between these duties is important because, in general, a duty to undo or eliminate the violation and its consequences and a duty to compensate make sense in different circumstances. A duty to undo or eliminate the violation and its consequences makes sense only in those circumstances where it is possible to do so.[83] For example, if the wrong involved the state

ed., 1999). Concerns of distributive justice regarding material resources may motivate various social programs, such as those related to the reduction or elimination of poverty and those that attempt to provide members of society with food and housing. *See, e.g.*, Maria Paula Saffon & Rodrigo Uprimny, *Distributive Justice and the Restitution of Dispossessed Land in Colombia*, *in* DISTRIBUTIVE JUSTICE IN TRANSITIONS 399-403 (Morten Bergsmo *et al.* eds., 2010) (explaining the differences between reparations, a state's social policy, and humanitarian assistance and the unique legal sources of these three state acts); Uprimny Yepes, *supra* note 26, at 15-18. Because distributive justice is concerned with the existing distribution of material and other resources and altering that distribution in the future, it may be understood to constitute either a present- or future-oriented notion of justice. Kalmanovitz, *supra* note 26, at 76-77.

[80] Of course, the economic analysis of tort law would provide a different analysis. *See generally* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (8th ed., 2010).

[81] *See, e.g,* WEINRIB, *supra* note 77, at 143; COLEMAN, *supra* note 77, at 324 (explaining that the law generally takes harm caused into account). However, while corrective justice requires that the responsible party correct the harm if no one else steps in to do so, it is compatible with payments by third parties. *See, e.g,* COLEMAN, *supra* note 77, at 324; *see also* Stephen Perry, Responsibility for Outcome, Risk, and the Law of Torts, *in* PHILOSOPHY AND THE LAW OF TORTS 72, 72-74 (Gerald Postema ed., 2001) (explaining the crux of corrective justice is making the harmed party whole, not punishing the wrongdoer).

[82] This feature is required, in part, to explain why strict tort liability—liability for harm without fault—is coherent.

[83] Repair in general does not imply an attempt to roll back the clock, returning to how things were prior to the violation, but instead requires actions that depend on the context of repair. *See Restorative Justice and Reparations*, *supra* note 77, at 384; *see also* Barbara Herman, *Morality Unbounded*, 36 PHIL. & PUB. AFF. 323, 354-55 (2008) (distinguishing material repair, which is not always possible, from moral repair).

removing the right to custody of a child, its effects can be partly eliminated by restoring the right to custody. The psychological effects of torture might be partly eliminated or combated though psychological care. However, in some circumstances, it is not possible to undo or eliminate the consequences of a wrong. For example, it is not possible to eliminate lost time together resulting from the deprivation of child custody and it is not possible to eliminate the actual suffering and humiliation endured during torture. In such circumstances, the most that can be done is to provide some form of compensation, whether monetary or otherwise, for the effects of the past wrong that cannot be eliminated. Compensation attempts to shift the harm resulting from the wrong, in that the wrongdoer assumes the costs imposed on the victim while providing the victim with resources nominally equivalent to the loss.[84]

[84] Compensation may also be symbolically important following serious wrongdoing. The fact that compensation is a concrete payment, with a real cost to the wrongdoer equivalent to the benefit for the victim, and not mere words makes the demonstration particularly meaningful. If compensation is monetary, as Kutz observes, "the very fungibility of money means that giving it up hurts, for there are always alternative uses to which it could be put by its donors." Kutz, *supra* note 26, at 279. Admittedly, in many cases there may be no quantity of money that is a meaningful equivalent to the harm suffered as a result of the human rights violations. *Cf. Restorative Justice and Reparations*, *supra* note 77, at 385 (explaining that the goals of restorative justice do not always demand material reparation, especially when accepting responsibility and atonement may be more productive); Thomas McCarthy, *Coming to Terms with Our Past, Part II: On the Morality and Politics of Reparations for Slavery,* 32 POL. THEORY 750, 755 (2004) (stating that for "collectively accumulated, generalized disadvantages" a tort model for individualized damages will not be adequate to remedy the harm); Anthony Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two,* 58 N.Y.U. ANN. SURV. AM. L. 651, 656–57 (2003) (explaining that when reparations for racial or ethnic oppression are based on replevin concepts, the moral significance of the reparations remedy is lessened); Naomi Roht-Arriaza, *Reparations in the Aftermath of Repression and Mass Violence*, *in* MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 121, 122 *(*Eric Stover & Harvey M. Weinstein eds., 2004) (stating that historically, moral reparations have greater significant to victims than material reparations, especially when the harms are intangible); CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 1057 (University of Notre Dame Press ed. & trans., 1993) [hereinafter RETTIG COMMISSION REPORT], *available at* http://www.usip.org/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf [perma.cc/ZT6P-XRRM] (posted Feb. 22, 2002). *See also* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 102-5 (Beacon Press ed.,1998) (advocating emphasis on the symbolic dimension of reparations, given that money is often insufficient to meet the harm faced). But even if a monetary payment is incommensurable with the harm suffered, the attempt to compensate may continue to be

Such a traditional theory of corrective justice, focused on responding to concrete material harms—economic loss, physical harm, suffering, and the like—may not exhaust the category of genuine reparations, in that there may be genuine reparations that do not fit strictly into the analytical categories of traditional corrective justice. Nonetheless, the corrective justice theory illustrates a number of features that any genuine reparations must have, even according to the Inter-American Court. First, genuine reparations must relate present obligations to past violations, in that the past violation must be the central factor justifying the present reparatory obligation. The Inter-American Court has said:

> Given that the Court has established that the reparations should have a causal nexus with the facts of the case, the violations declared, the damages proven, and the measures requested to redress the respective damage, it must observe that the co-existence of these factors in order to rule appropriately and in accordance to the law.[85]

Genuine reparations cannot be present- or future-oriented, making the past human rights violations irrelevant to the reparatory obligation.[86] This does not necessarily mean that the reparations must simply address the material harm from the violation. A past wrong perhaps can require a response—such as recognition of wrongdoing or an apology—even when it is impossible to eliminate the material harm from the violation.[87] The Inter-American Court has accepted that it is often impossible to undo a human rights violation, even

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an important part of moving forward, as it still shows seriousness of purpose and depth of commitment.

[85] Liakat Ali Alibux v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 276, ¶ 139 (Jan. 30, 2014). *Accord* García Lucero v. Chile, Preliminary Objection, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 267, ¶ 212 (Aug. 28, 2013); Suárez Peralta v. Ecuador, *supra* note 41, at ¶ 163; Ticona Estrada v. Bolivia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct, H.R. (ser. C) No. 191, ¶ 110 (Nov. 27, 2008).

[86] To contrast, some people have advanced conceptions of an adequate response to wrongdoing that broadly eliminates its backward-looking element. For example, according to Pablo Kalmanovitz, following severe armed conflicts, a state ought to prioritize distributive justice, generally ignoring considerations of corrective justice, which he views as largely irrelevant in such circumstances. *See* Kalmanovitz, *supra* note 26, at 79-91.

[87] *See* Herman, *supra* note 83, at 354-55 (explaining that a past wrong is not always fixed by a repair or replacement, but through alternative modes of moral repair such as an apology).

though it is committed to eliminating or compensating for the consequences to the extent possible.[88] Nonetheless, the very structural and doctrinal commitments of reparations in the Inter-American system assume that a past wrong done by the state must be a central reason justifying present payments or other remedial actions.[89]

Second, genuine reparations ought to justify a present obligation *to the victim* in terms of the past violation. Reparations are fundamentally about repair and the *victims* are those persons who were wrongfully affected by the past human rights violation. The Inter-American Court comments:

> The State's obligation to make reparation arises as a result of its responsibility for the facts of the case and the victims affected by these facts. Consequently, the Court cannot order the State to make reparation to individuals who, although they are victims of other situations, have not been declared victims in this specific case.[90]

The Inter-American Court narrowly circumscribes the category of victims to natural persons who suffered a human rights violation, which may include indirect victims.[91] So, for example, a theory of reparations where there are measures to eliminate the abusive paradigms that made possible or were otherwise "at the core of" the systematic violations of human rights is not actually a theory of reparations at all.[92] Such a view lacks a sufficient connection to what the victim suffered and its consequences, and instead simply uses

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[88] *See* González ("Cotton Field") v. Mexico, *supra* note 12, at ¶ 579, n.547 (identifying the difficulty in assigning a monetary amount to make up for non-pecuniary damage to victims of human rights violations).

[89] Velásquez Rodríguez v. Honduras, *supra* note 32, at ¶ 26 (explaining that reparations in the Inter-American system rest on principles of *restitutio in integrum* which factors in reparation tied to the consequences of the state's violation).

[90] Afro-descendant Communities (Operation Genesis) v. Colombia, *supra* note 62, at ¶ 430.

[91] Rule of Procedure of the Inter-American Court of Human Rights arts. 2(25), (33) (2009) *available at* https://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm [perma.cc/WM62-LNBU]; Villalba, *supra* note 1, at 243, 257. The Court also allows reparations for injured persons not recognized as victims, who are persons affected by the human rights violation but who did not suffer a direct violation of their rights. *Id.* at 276-77.

[92] David Gray, *No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043, 1096 (2010) (citing VICTOR TURNER, DRAMAS, FIELDS, AND METAPHORS 17 (1974)).

the opportunity to order reparations to improve problematic aspects of a society, where the victim (and the past violation) are largely irrelevant. Reparations must not only be backward-looking but also victim-centered.

Finally, genuine reparations ought to be non-duplicative, in that they should not respond multiple times to the same aspect or consequence of the past human rights violation. Mexico, in the *Cotton Field* case, complained that the requested reparations were "excessive, repetitive and constitute[d] a request for double reparation, because many of them refer[red] to the same violations."[93] The complaint seems reasonable in the abstract and the Court seems to accept a prohibition on double reparations, saying "reparations should not make the victims or their next of kin either richer or poorer and they should be directly proportionate to the violations that have been declared." It went on observe that "[o]ne or more measures can repair a specific damage, without this being considered double reparation."[94] Once reparations constitute a sufficient response to the past human rights violation, further reparations are illegitimate. Double reparations render the set of reparations illegitimate as a whole because some measures that are part of the set do not undo, repair, or compensate for the past human rights violation or its consequences. When there are double reparations, some other measure in the total set of reparations already nominally accomplishes the goal, so the initial measure lacks an appropriate connection to the past. If the Court, for example, were to order complete compensation for the effects of a past human rights violation twice, the second order would lack an appropriate connection to the past human rights violation because the effects would have already been addressed.

### *2.3. Requirements for Genuine Reparations and the Problem of Legitimacy*

Three categories of Inter-American Court orders in contentious cases—restitution, compensation, and rehabilitation—can readily

[93] González ("Cotton Field") v. Mexico, *supra* note 12, at ¶ 449; *See also* Rio Negro Massacres v. Guatemala, *supra* note 8, at ¶ 45 (depicting Guatemala's argument that duplication of victim names could lead to double reparation); Rosendo Cantú v. Mexico, *supra* note 12, at ¶ 205; Fernández Ortega v. Mexico, *supra* note 12, at ¶ 222.

[94] González ("Cotton Field") v. Mexico, *supra* note 12, at ¶ 450.

be understood as genuine reparations. They aim to eliminate (as far as possible) the material consequences of the human rights violation, albeit with an expansive understanding of the material consequences. In this sense, the Court's orders are relatively unproblematic, as they can be understood in terms of the traditional backward-looking corrective justice conception of reparation.[95] Restitution seeks to literally undo, partially or completely, the past human rights violation, such as by restoring to the victim lost property or the custody of a child. Where restitution is impossible, compensation attempts to eliminate or compensate for the consequences of the wrong through monetary means. Finally, rehabilitation requires measures that reduce or eliminate the physical and psychological effects of the human rights violation. All of these measures sit relatively comfortably within the corrective justice commitment to undoing or eliminating the harmful consequences of the human rights violation as far as possible or to shifting the costs of the violation to the wrongdoer. Even orders to investigate are relatively unproblematic, not because they require genuine reparations but because an investigation is plausibly seen as a measure to ensure rights, which the Inter-American Convention authorizes the Court to order.[96] An order to investigate simply requires the state to cease the ongoing human rights violation constituted by a failure to investigate adequately.

The remaining categories—satisfaction and guarantees of non-repetition—do not sit so easily with the corrective justice idea of attempting to undo, eliminate, or compensate for the consequences of a past wrong. Orders to provide satisfaction, such as apologies, admissions of responsibility, and the like, are occasioned by and respond to the past human rights violation itself, but relate to the wrong done, not the consequences of the wrong. For example, the Court often requires that the state publish the judgment, hold a public event accepting responsibility, and construct monuments to the victims,[97] none of which necessarily have anything to do with whether the human rights violation had further consequences or

[95] Specifically, they can be understood as the result of a classical corrective justice principle. *See supra* notes 76-81 and accompanying text.

[96] Convention, *supra* note 11, at art. 63(1).

[97] *See, e.g.*, Nadege Dorzema v. Dominican Republic, *supra* note 12, at ¶¶ 263, 265 (detailing the reparations ordered by the Inter-American Court to the Dominican Republic for the state's excessive use of force against a group of Haitians); Río Negro Massacres v. Guatemala, *supra* note 8, at ¶¶ 274, 277, 280.

even caused harm. Guarantees of non-repetition in most cases seem to have little to do with the past human rights violation or its consequences,[98] as they are designed to prevent future violations of a similar sort, and not always for the direct victim. For example, the state is frequently required to change laws, provide training, or establish educational programs, all of which tend to prevent future human rights violations.[99] When the victim would not otherwise be expected to suffer a repetition of the same sort of violation, it is unclear why these measures are directed at the victim.

Still more troubling is the fact that these extraordinary measures may seem to be redundant or duplicative, constituting double reparations. These measures pose an important puzzle because the Inter-American Court frequently grants compensation and rehabilitation theoretically sufficient to undo or eliminate the consequences of the human rights violation prior to assigning additional measures of satisfaction or guarantees of non-repetition. The Court has stated, "this non-pecuniary damage may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well as other sufferings that cannot be assessed in financial terms."[100] When compensation has already been ordered for non-pecuniary damage as well as the economically-assessable pecuniary damage,[101] it is not obvious why there would be additional features of the past human rights violations sufficient to justify further genuine reparations.[102]

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[98] *Cf.* Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833, 844 (2002) (explaining the many theories of reparations that can be employed).

[99] *See, e.g.*, Nadege Dorzema v. Dominican Republic, *supra* note 12, at ¶¶ 269-70, 272, 275 (identifying reparations that apparently do not affect the victim but instead serve to prevent future human rights violations); Atala Riffo v. Chile, *supra* note 12, at ¶¶ 271-72, 284; González ("Cotton Field") v. Mexico, *supra* note 12, at ¶¶ 502, 541, 543.

[100] "Street Children" (Villagrán-Morales) v. Guatemala, *supra* note 67, at ¶ 103. *See also, e.g.*, Liakat Ali Alibux v. Suriname, *supra* note 85, at ¶ 156 (stating an equivalent view of non-pecuniary damages' relation to the suffering and distress of direct victims and next of kin); J. v. Peru, *supra* note 40, at ¶ 415.

[101] *See, e.g.*, Liakat Ali Alibux v. Suriname, *supra* note 85, at ¶ 153; J. v. Peru , *supra* note 40, at ¶ 415; "Street Children" (Villagrán-Morales) v. Guatemala, *supra* note 67, at ¶¶ 78-80.

[102] This problem is accentuated by the fact that the Court frequently claims that guarantees of non-repetition or measures of satisfaction respond to non-pecuniary effects of the human rights violation. Afro-descendant Communities (Operation Genesis) v. Colombia, *supra* note 62, at ¶ 441; Pueblo Bello Massacre v. Colombia,

For the extraordinary reparative measures ordered as satisfaction or guarantees of non-repetition to be genuine and the orders legitimate, they must respond to some aspect of how the past human rights violation affected the victims that was not addressed by other measures of restitution, compensation, or rehabilitation.

### 3. CESSATION OF HUMAN RIGHTS VIOLATIONS

While guarantees of non-repetition may appear somewhat mysterious as a category of reparations—seemingly neither backwards-looking nor victim-centric—many or most of these measures may be understood as legitimate orders to cease ongoing human rights violations. Such an order would be equivalent to a domestic court invalidating an unconstitutional law or practice in a concrete case where the law or practice was applied and generated a constitutional violation. Perhaps echoing this interpretation, the Inter-American Court has said, "when exercising its contentious jurisdiction, the Court may order States, among other satisfaction and non-repetition measures, to adapt their domestic law to conform to the American Convention, therefore as to amend or remove any provisions that unjustifiably curtail such rights."[103] Whether or not we understand such measures in a strict sense as reparations, or simply a related remedy for human rights violations, orders to stop an ongoing violation are often legitimate because the Inter-American Court must "rule that the injured party be ensured the enjoyment of his right or freedom that was violated."[104] This section will explain why orders to provide guarantees of non-repetition may not appear legitimate, argue that they may be understood as legitimate orders to cease ongoing human rights violations, and suggest that they are legitimate only if the ongoing violation is connected to a concrete human rights violation.

#### *3.1. Legitimacy, Reparations, and Guarantees of Non-Repetition*

The problem for the legitimacy of guarantees of non-repetition is that they are apparently neither backwards-looking, justified in

*supra* note 62, at ¶ 264; Goiburú v. Paraguay, *supra* note 62, at ¶ 163.

[103] Tristán Donoso v. Panama, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193 ¶ 176 (Jan. 27, 2009).

[104] Convention, *supra* note 11, at art. 63(1).

terms of the past human rights violation, nor victim-centered, benefiting the victim in some sense. Guarantees of non-repetition in the jurisprudence of the Inter-American Court have included orders to change laws or public policy,[105] to provide human rights training for officials,[106] and to reform prison conditions.[107] These measures are not obviously backwards-looking because they seemingly aim to prevent future recurrences of the same sort of human rights violations that occurred in the past. The Court's decisions require states to "adopt all the necessary . . . measures to make the exercise of these rights effective . . ."[108] as guarantees of non-repetition. For example, human rights training for the military or police seeks to ensure that they respect human rights in the execution of their duties and functions in the future.[109] They are also not obviously aimed at the victim because the victim will often not be expected to benefit from the measures, so they do not really ensure the rights or freedoms of the victim in particular. The reason is simple: in many, but not all, cases, there is no reason to think the particular victim is likely to be a victim of a future human rights violation of the same sort. For example, it may not be very likely that the survivor of a massacre will be subject to another massacre.[110]

Of course, in some cases it is likely that an individual will be subject to the same human rights violation again in the future, such as a prisoner who experienced abuse at the hands of guards or fellow prisoners[111] or an indigenous community whose traditional

105 Osorio Rivera v. Peru, *supra* note 39, at ¶ 271; Mendoza v. Argentina, *supra* note 33, at ¶ 332; Pacheco Teruel v. Honduras, *supra* note 4, at ¶ 100.

106 Furlan v. Argentina, *supra* note 42 at ¶ 308; Barrios Family v. Venezuela, *supra* note 5, at ¶ 341; Gomes Lund ("Guerrilha do Araguaia") v. Brazil, *supra* note 47, at ¶ 283.

107 Díaz-Peña v. Venezuela, *supra* note 58, at ¶ 154; Pacheco Teruel v. Honduras, *supra* note 4, at ¶ 96.

108 Gutiérrez v. Argentina, *supra* note 2, at ¶ 165. *See also* Luna López v. Honduras, *supra* note 3, at ¶ 234 (explaining that these measures to guarantee non-repetition can be legal, administrative, or distinct from these two approaches); Suárez Peralta v. Ecuador, *supra* note 41, at ¶ 195; Artavia Murillo (in vitro fertilization) v. Costa Rica, *supra* note 42, at ¶ 334; Mendoza v. Argentina, *supra* note 33, at ¶ 323; Furlan v. Argentina, *supra* note 42, at ¶ 300.

109 Osorio Rivera v. Peru, *supra* note 39, at ¶ 274; Gutiérrez v. Argentina, *supra* note 2, at ¶ 168.

110 *See* Pueblo Bello Massacre v. Colombia, *supra* note 62 (detailing the Pueblo Bello Massacre and its victims).

111 *Cf.* Mendoza v. Argentina, *supra* note 33, at ¶ 103 (demonstrating that certain victims of human rights abuses, like prisoners, are susceptible to similar future

lands have not been adequately delimited and titled, generating repeated violations of their right to use the land.[112] In such cases, it might be possible to argue that guarantees of non-repetition constitute genuine reparations because they are focused on the particular victim and because the likely future violations have direct connections to the past violation. The connection might be that they are the manifestation of an ongoing pattern of violations against the victim or that the series of violations against the victim share a common immediate cause. But, whether or not such an approach is successful in explaining why such guarantees of non-repetition are genuine reparations and why the orders to provide them are legitimate in the case of repeating human rights violations, they cannot explain why Inter-American Court orders to provide guarantees of non-repetition are legitimate in general. In far too many cases, the Court orders guarantees of non-repetition even when the identified victims are unlikely to benefit from the required measures.

*3.2. Guarantees of Non-Repetition as Cessation Orders*

Instead, the Court's orders to provide guarantees of non-repetition are often legitimate because they simply require the cessation of ongoing human rights violations. The specific guarantees of non-repetition ordered typically correspond to ongoing violations of state human rights obligations. In fact, the Inter-American Court has connected guarantees of non-repetition to articles 1(1) and 2 of the American Convention, which establish a state obligation to guarantee human rights, including by adopting legislative and other necessary measures.[113] According to the Court, "the State must prevent the reoccurrence of the human rights violations . . . and adopt all legal, administrative and other measures necessary to protect . . . the exercise of . . . human rights, in compliance with the obligations to respect and guarantee rights enshrined in Article 1(1) and 2 of the Convention."[114] Even if cessation based on the obligation to guarantee human rights may not theoretically be a form of reparation,

violations).

[112] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153 (Aug. 31, 2001).

[113] Convention, *supra* note 11, at arts. 1(1), 2.

[114] Luna López v. Honduras, *supra* note 3, at ¶ 234. *See also* Gutiérrez v. Argentina, *supra* note 2, at ¶ 165 (employing similar operative language to demonstrate the importance of preventing the reoccurrence of human rights violation);

ordering cessation undoubtedly is a legitimate power of the Inter-American Court.[115] Article 63(1) of the American Convention requires the Court to order the state to ensure the enjoyment of the violated rights, which entails orders to cease ongoing violations. As the Court has explained, "[w]hen an unlawful act occurs, . . . this gives rise immediately to its international responsibility, with the consequent obligation to cause the consequences of the violation to cease . . . ." [116]

Although such cessation orders are often legitimate, they are not orders to provide reparations. Cessation orders are not orders to respond to a past violation but orders to stop ongoing violations. They are not reparations because a cessation order does not reflect a state legal obligation that is independent from its primary human rights obligations, including taking measures to protect and guarantee human rights. A cessation order simply requires the state to comply with its primary human rights obligations that exist independently of any specific past violation. In contrast, reparations reflect a secondary obligation of the state to respond to the aftermath of a concrete human rights violation, removing, if possible, all vestiges of the violation, and compensating for those consequences that

Suárez Peralta v. Ecuador, *supra* note 41, at ¶ 195; Artavia Murillo (in vitro fertilization) v. Costa Rica, *supra* note 42, at ¶ 334.

[115] The precise problem that guarantees of non-repetition commonly have in the context of the Inter-American Court jurisprudence is that circumstances often do not seem to require assurances or guarantees of non-repetition. In those circumstances where there is genuinely a risk of repetition, the analysis in Part IV may provide a supplementary basis for state obligations.

[116] Yatama v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct, H.R. (ser. C) No. 127, ¶ 231 (June 23, 2005); *See also* Gutiérrez Soler v. Colombia, *supra* note 63, at ¶ 62 (explaining how this responsibility arises from a principle of customary international law); Acosta Calderón v. Ecuador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct, H.R. (ser. C) No. 129, ¶ 146 (June 24, 2005); Caesar v. Trinidad and Tobago, Merits, Reparations and Costs, Judgment, Inter-Am. Ct, H.R. (ser. C) No. 123, ¶ 121 (Mar. 11, 2005); Serrano Cruz Sisters v. El Salvador, *supra* note 63, at ¶ 134. In effect, the American Convention lets the Inter-American Court enforce a more general obligation of international law, requiring states to cease commission of wrongful acts or omissions that generate international responsibility. *See* Draft Articles of State Responsibility art. 30 ("The State responsible for the internationally wrongful act is under an obligation: . . . (a) to cease that act, if it is continuing; . . . (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.") *available at* http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [perma.cc/FDD7-BDTZ].

cannot be eliminated. Reparations seek to correct for the consequences of a violation, while cessation simply seeks to stop the violation itself. Thus, orders to guarantee human rights are often legitimate because they require the cessation of a human rights violation, not because they require the state to provide reparations.

The measures the Inter-American Court orders as guarantees of non-repetition are exactly the sort of measures that the American Convention independently requires to fulfill the state obligation to guarantee human rights. The state must proactively ensure that public officials have sufficient human rights training so as to respect human rights, it must implement laws when required to guarantee human rights, and it must eliminate laws that fail to respect human rights.[117] For example, the Inter-American Court has ordered on various occasions the elimination of laws granting amnesty for serious human rights abuses, which interfere with the state obligation to investigate, prosecute, and punish.[118] When prison conditions are incompatible with the human rights of an individual, the state must change those conditions.[119] In this sense, the major guarantees of non-repetition that the Court orders simply eliminate ongoing violations of the state's human rights obligations. Similarly, although the Court does not generally categorize them as a guarantee of non-repetition, it frequently gives states orders to investigate, prosecute, and punish those responsible for certain human rights violations. Like guarantees of non-repetition, these are cessation orders: in the absence of an adequate investigation, the state commits an ongoing human rights violation against the victim. The state has a primary human rights obligation to investigate, prosecute, and punish serious human rights violations.[120] The Court's order to investigate,

[117] Mendoza v. Argentina, *supra* note 33, at ¶ 332; Gutiérrez v. Argentina, supra note 2, at 165-71.

[118] Gomes Lund ("Guerrilha do Araguaia") v. Brazil, *supra* note 47, at ¶ 30; Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶¶ 114, 119, 122 (Sept. 26, 2006); La Cantuta v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 152 (Nov. 29, 2006) (in dicta); Barrios Altos v. Peru, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 83, ¶ 18 (Sept. 3, 2001); *Id.* at ¶ 41.

[119] Díaz-Peña v. Venezuela, *supra* note 58, at ¶ 154; Pacheco Teruel v. Honduras, *supra* note 4, at ¶ 96.

[120] Massacres of El Mozote v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 242 (Oct. 25, 2012); Gomes Lund ("Guerrilha do Araguaia") v. Brazil, *supra* note 47, at ¶ 137; Velásquez Rodríguez v. Honduras, *supra* note 32, at ¶ 166.

prosecute, and punish is simply an order to cease committing the ongoing violation via omitting to fulfill this obligation.

This sort of explanation makes sense of some otherwise puzzling connections the Court draws between guarantees of non-repetition and violations of the American Convention. On several occasions, the Court has declined to order guarantees of non-repetition consisting of changes to domestic law partly on the grounds that it had not considered whether domestic law was compatible with international law. For this reason, the Court has decided not "to order the adoption, amendment or adaptation of specific provisions of domestic law,"[121] such as "creation of investigation protocols,"[122] changes to refugee and immigration law,[123] legal reforms to eliminate discriminatory practices,[124] or adjustments to laws on the selection of judges.[125] It has decided not to order human rights training on the same grounds, when it was unproven that a general problem of conduct contrary to the American Convention existed.[126] The repeated reference to the American Convention as the standard to determine whether a particular guarantee of non-repetition should be ordered is significant. If a guarantee of non-repetition were simply any measure that would be effective to prevent future human rights violations, it is irrelevant whether the current law or practice was compatible with the American Convention. The potential effectiveness of a change to the law or practice would be sufficient. But if guarantees of non-repetition are really designed to eliminate conditions that are contrary to state obligations under the American Convention, the relevance is obvious and immediate.

*3.3. Cessation Orders and Causation*

If guarantees of non-repetition are simply cessation orders for violations of the obligation to guarantee human rights, is the Inter-American Court legally empowered to issue any order requiring

[121] Constitutional Tribunal (Camba Campos) v. Ecuador, *supra* note 45, at ¶ 276. *See generally* Luna López v. Honduras, *supra* note 3, at ¶ 238; Atala Riffo v. Chile, *supra* note 12, at ¶ 280; Salvador-Chiriboga v. Ecuador, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 222, ¶ 131 (Mar. 3, 2011).

[122] Luna López v. Honduras, *supra* note 3, at ¶ 238.

[123] Pacheco Tineo Family v. Bolivia, *supra* note 41, at ¶ 266.

[124] Atala Riffo v. Chile, *supra* note 12, at ¶ 280.

[125] Constitutional Tribunal (Camba Campos) v. Ecuador, *supra* note 45, at ¶ 276.

[126] Salvador-Chiriboga v. Ecuador, *supra* note 121, at ¶ 131.

compliance with that obligation? One account suggests that it may. Judith Schonsteiner correctly concludes that many of the measures the Court orders as guarantees of non-repetition are also measures that the obligation to guarantee human rights plausibly requires of states.[127] However, her account emphasizes the state's obligation to guarantee human rights without explaining why the Inter-American Court is authorized to order measures that fulfill the obligation.[128] The Court is not authorized to order the state to take just any measure that one of its human rights obligations requires; article 63(1) of the American Convention does not grant such a general power but instead ties the power to past identified human rights violations.[129] Consequently, Schonsteiner's account does not fully explain the connection between article 63 and cessation of article 1(1) and 2 violations, which the Inter-American Court emphasizes as both the source of and a limitation on its power to order cessation of human rights violations.[130]

It is more plausible that the Inter-American Court may not order just any measure required by the substantive state obligation to guarantee human rights. Despite the fact that orders to provide guarantees of non-repetition are justified as cessation orders and not as reparation orders, the Court typically limits its orders to measures that are closely connected to the human rights violations at issue in a given case.[131] One reason has to do with the text of the American

[127] Judith Schonsteiner, *Dissuasive Measures and the "Society as a Whole": A Working Theory of Reparations in the Inter-American Court of Human Rights*, 23 AM. U. INT'L L. REV. 127, 145-47 (2011).

[128] *Id.* at 145-46.

[129] Convention, *supra* note 11, at art. 63(1).

[130] Luna López,v. Honduras, *supra* note 3, at ¶ 234. *See also* Gutiérrez v. Argentina, *supra* note 2, at ¶ 165 (holding that "in the exercise of its powers concerning the international judicial protection of human rights, a matter that goes beyond the will of the parties, it is incumbent on the Court to ensure that acts of acquiescence are acceptable for the objectives that the inter-American system for the protection of human rights seeks to achieve."); Suárez Peralta v. Ecuador, *supra* note 41, at ¶ 195 (detailing the state's obligations to do all "legal administrative, and other measures that are necessary to ensure that the exercise of the rights is effective"); Artavia Murillo ("in vitro fertilization") v. Costa Rica, *supra* note 43, at ¶ 334 ("[b]ased on the provisions of Article 63(1)…. The Court has indicated that every violation on an international obligation that causes damage entails the obligation to provide adequate reparation").

[131] Constitutional Tribunal (Camba Campos) v. Ecuador, *supra* note 45, at ¶ 276; Gudiel Álvarez ("Diario Militar") v. Guatemala, *supra* note 38, at ¶ 353; Atala Riffo v. Chile, *supra* note 12, at ¶ 280; Furlan v. Argentina, *supra* note 42, at ¶ 301.

Convention, which requires that "the injured party be ensured the enjoyment of his right or freedom that was violated."[132] The principal apparent limitation from this cessation clause is that a permissible cessation order must require a measure necessary to ensure against the actual past human rights violation that the victim suffered.[133] A second reason, necessary to understand the Court's surprisingly restrictive interpretation of the cessation clause, has to do with the limited institutional competencies of the Inter-American Court in the system.

The text of the cessation clause itself does not seem to require more than a weak connection between the past violation and the measures that the Court orders. In fact, on a narrow, purely textual reading, it does not even seem to require that the ordered measure be aimed at avoiding future violations of the *same sort* so long as it is aimed at avoiding future violations of the *same right*. But the limitation makes sense only if it limits cessation orders to those concerning future violations of the *same sort*, because the same right may be violated in ways that have nothing to do with the events under consideration in a given case. Even taking this point into account, the limitation could be quite weak. It could simply require that the Court had found that the state violated its obligation to guarantee the victim's right, and take that to be sufficient for cessation orders, whether or not connected to any further injury. More stringently, it could require that the measures ordered, even when otherwise required by the American Convention, had some bearing on the identified, concrete human rights violations, such as by making them more likely. On this interpretation, for example, it would be permissible to order human rights training for state officials only if the lack of human rights training had some bearing on the commission of a

[132] Convention, *supra* note 11, at art. 63(1).

[133] The argument here is neutral between three different interpretations of the apparent injury requirement. First, the injury requirement might constitute a standing requirement, meaning that the Court has the power to order cessation of an act or omission only when it has caused a concrete injury to the victim. That is, a person may be able to suffer actual human rights violations at the hands of general laws, practices, or policies, or their omissions for which the Court cannot order cessation. Second, the injury requirement might amount to a substantive claim that a person has not suffered a human rights violation *at all* until the state failure to ensure actually results in an infringement of the "the free and full exercise of those rights and freedoms." American Convention on Human Rights art. 1(1), Nov. 22, 1969. Third, the injury requirement may be purely procedural in that the Court may only order the cessation of a law, practice, or policy, or its omission when it has identified that it constitutes a violation of state obligations.

concrete human rights violation. Both of these expansive interpretations of the cessation clause seem compatible with the text and purpose of the American Convention.

Nonetheless, the Inter-American Court has implicitly interpreted this requirement in a more stringent way, requiring a causal connection between the general violation of the state's obligation to guarantee human rights and the concrete injury that the victim suffered. On a number of occasions, the Court has indicated that it will order as guarantees of non-repetition the cessation of a law, practice, or policy, or its omission only when it is proven that there was a causal connection between the law, practice, or policy (or omission thereof) and the concrete human rights violation.[134] It did so in cases of laws "access to health care, rehabilitation and social security services,"[135] potentially discriminatory laws,[136] and procedures for selecting judges.[137] In effect, this condition requires that the state violate its general obligation to guarantee human rights *and* that the violation contributed causally to a more concrete violation, such as an actual denial of health care or an act of discrimination. It would also require, of course, that a law, practice, or state of affairs contrary to state human rights obligations continues to exist so that the Court may order its cessation.[138]

Although there may be alternatives to the Inter-American Court's narrow interpretation of the cessation clause, it is reasonable given the Court's status as a secondary mechanism for upholding

[134] Constitutional Tribunal (Camba Campos) v. Ecuador, *supra* note 45 at ¶ 276; Gudiel Álvarez ("Diario Militar") v. Guatemala, *supra* note 38, at ¶ 353; Atala Riffo v. Chile, *supra* note 12, at ¶ 280; Furlan v. Argentina, *supra* note 42, at ¶ 301.

[135] Vélez Restrepo v. Colombia, *supra* note 39, at ¶ 301.

[136] Atala Riffo v. Chile, *supra* note 12, at ¶ 280.

[137] Constitutional Tribunal (Camba Campos) v. Ecuador, *supra* note 45, at ¶ 276.

[138] Many guarantees of non-repetition cannot be fully justified as cessation orders, because they require changes to laws or practices that the Court did not find on the merits to constitute human rights violations. Care is required here, as there are extensive positive human rights obligations, such as the creation of laws to make human rights effective, and so many guarantees are potentially justifiable as cessation orders even if the Court fails to provide adequate justification in the actual decision. Convention, *supra* note 11, at art. 63(1). *See also* Supreme Court of Justice (Quintana Coello) v. Ecuador, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 266, ¶ 221 (Aug. 23, 2013) (expanding a state's positive obligations to enact laws to further respect for human rights to include the obligation to avoid passing legislation that would conflict with this positive obligation).

human rights. States are assigned the primary responsibility for guaranteeing that individuals may fully exercise and enjoy their human rights, with the Inter-American system acting as a secondary mechanism to ensure that states fulfill that responsibility.[139] Initial decisions on how best to guarantee the human rights of individuals through law and public policy are often best left to the states. States, possibly subject to democratic accountability, may be better positioned to weigh costs and benefits of different policies, including the monetary and other resources required, opportunity costs, potential effectiveness of different uses of those resources, and tradeoffs between different rights, among many others factors.[140] At the same time, the Inter-American Court does have the responsibility of ensuring that the state fulfills its obligation to guarantee human rights. When a concrete human rights violation arises as a result of a failure of law or policy, the Court is better positioned to evaluate whether the decisions the state has made to guarantee rights are adequate. The competing considerations will be more fully fleshed out, the ways in which the law or policy functions in practice will be clearer, and more of the relevant information will be available. When the Court orders changes to comply with the obligation to guarantee human rights, it is acting in this more limited context, more appropriate for judicial decision-making.

*3.4. The Scope and Limits of Guarantees of Non-Repetition*

If orders to provide guarantees of non-repetition are legitimate because they require the cessation of failures to guarantee human rights that causally contributed to violations, then the Inter-American Court could be more aggressive with these measures. Many, if not most, concrete human rights abuses are the product of system-

139 *See* Convention, *supra* note 11, at arts. 1, 2, 46 (clarifying that domestic remedies are to be exhausted first); *See also* David L. Attanasio, *Militarized Criminal Organizations*, *supra* note 15, at 376 (explaining the secondary role of the Inter-American system).

140 David L. Attanasio, *Militarized Criminal Organizations*, *supra* note 15, at 389.

atic social problems, such as discrimination or social marginalization of certain persons,[141] ideologies that support human rights violations,[142] or lack of state presence and capacity.[143] The Inter-American Court could find that the failure of state action to ameliorate these systematic problems constitutes a general failure to protect or guarantee human rights because these problems can be expected to generate, more or less directly, many concrete human rights violations.[144] For example, popular values, customs, and beliefs that treat women as less socially valuable and subordinate to men might be expected not only to generate extreme crimes like the murders in *Cotton Field* but also more frequent wrongful acts of domestic violence and official indifference. The state, as guarantor of human rights, could combat such systematic problems through, for example, programs that change public attitudes, such as changes to public school curricula, broadcasting television programs or commercials, or mandatory training for workers. It could also do so through law, public policy, and institutions that target the effects of violations, such as prohibitions on official or private discrimination.

However, ordering such guarantees of non-repetition is legally legitimate only if they actually require the cessation of ongoing human rights violations, which in turn depends on the ongoing violation being *proven*. It is not sufficient for the Court to simply mention a connection between a proposed guarantee of non-repetition and the past concrete violation; the Court must identify *proven* state actions or omissions that are incompatible with the American Convention. If the ongoing violation of the state obligation to protect or guarantee is not legally proven, it cannot be the basis for a legal order, due to fundamental considerations of due process that demand an explicit and motivated decision. Such formalities ensure that the

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[141] *See, e.g.*, "Street Children" (Villagrán-Morales) v. Guatemala, *supra* note 67, at ¶¶ 139, 191 (discussing reparations for human rights violations against children in Guatemala).

[142] *See, e.g.*, David Pion-Berlin, *National Security Doctrine, Military Threat Perception, and the "Dirty War" in Argentina*, 21 COMP. POL. STUD. 382 (1988) (discussing the political ideologies in Argentina that fuel human rights violations).

[143] See, e.g., MAURICIO GARCÍA VILLEGAS & JOSE RAFAEL ESPINOSA R., EL DERECHO AL ESTADO: LOS EFECTOS LEGALES DEL APARTHEID INSTITUCIONAL EN COLOMBIA 40-121 (2014) (discussing the lack of state control and its contribution to human rights violations in Colombia).

[144] *See, e.g.*, "Street Children" (Villagrán-Morales), *supra* note 67, at ¶ 144 (holding that the failures of the government and police force amounted to the harms citizens faced).

Court fully considers its decisions and guards against carelessness, overreach, or abuse, which is particularly important in light of the sensitive nature of the orders and their potential expansiveness. Perhaps incorporating these values, article 63 of the American Convention only grants the power to order cessation of violations that the Court has found.[145] These considerations are relevant not only to the actual legal legitimacy of the orders but also to perceived legitimacy and likely state compliance: if the underlying violation is identified and legally justified, a state will have a harder time dismissing the orders as unwarranted judicial meddling.

#### 4. REPAIR OF SOCIAL BONDS BETWEEN STATE AND VICTIM

Although many measures of satisfaction appear to constitute genuine reparations—for example, state apologies or recognition of responsibility—it is not clear why they constitute reparations. They do not seem to be applications of traditional corrective justice because they do not seek to eliminate, repair, or compensate for the material effects of the past wrong. Instead, in the Inter-American Court's words, they are "public acts or works that seek, inter alia, to commemorate and dignify victims . . . ."[146] This problem may seem largely theoretical. Nonetheless, understanding why measures of satisfaction are reparations will clarify whether some of the more exotic measures of satisfaction, such as education, community infrastructure, or housing,[147] constitute genuine reparations. In short, it will allow us to determine whether Inter-American Court orders to provide such reparations are legitimate and are within the Court's legal powers. This section will propose that material harm to victims is not the only consequence of a human rights violation that supports genuine reparations, but that other dimensions of its effects may also require reparations. Specifically, it will argue that

[145] Convention, *supra* note 11, at art. 63(1).

[146] Moiwana Community v. Suriname, *supra* note 63, at ¶ 191. *See also* Serrano Cruz Sisters v. El Salvador, *supra* note 63, at ¶ 156 (seeking to address the human rights violations to dignify the victims); Plan de Sánchez Massacre v. Guatemala, *supra* note 63, at ¶ 80 (stating "[t]he survivors of the Plan de Sanchez massacre can now fully reconstruct or reconstitute their relations with their dead, vindicated by this judgment").

[147] Rio Negro Massacres v. Guatemala, *supra* note 8, at ¶ 284; Osorio Rivera v. Peru, *supra* note 39, at ¶ 267; Barrios Family v. Venezuela, *supra* note 5, at ¶ 226; Gómez Palomino v. Peru, *supra* note 10, at ¶¶ 145-48; García Cruz and Sánchez Silvestre v. Mexico, *supra* note 38, at ¶¶ 80, 83.

harm to trust—resulting from the disrespect for the victim demonstrated through a human rights violation—can justify a form of genuine reparations.

*4.1. Trust, Respect, and Social Repair*

There is substantial divergence of opinion regarding the theoretical foundations for measures of satisfaction. Nonetheless, Dinah Shelton helpfully suggests at least two distinct functions that measures of satisfaction may play in a human rights context. First, she proposes that we can understand measures of satisfaction as outgrowths of the right to truth about past human rights violation.[148] This idea fits well with certain reparations that the Inter-American Court has ordered as measures of satisfaction, such as "a full and public disclosure of the truth; the identification of a deceased or disappeared person's remains; . . . as well as the issuance of official statements accepting responsibility and apologizing."[149] But it does not fit as well with a number of other measures the Court has required, such as the construction of monuments or museums, the provision of academic scholarships, and the construction of community education centers.[150] Second, Shelton also proposes that measures of satisfaction may respond to dignitary harm.[151] However, she does not provide much explanation as to the nature of dignitary harm, what sort of measures might repair it, how they might repair it, and whether the measures would vary depending on the human rights violation at issue.

One way to understand reparations for dignitary harms is in terms of reparations that seek to repair victim trust in the state harmed by the disrespect shown though a past human rights violation,[152] requiring, in the terms of the Inter-American Court, efforts

[148] DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 276 (2d ed., 2005).

[149] *Id.* at 277.

[150] *See generally supra* notes 61-75 and surrounding text (demonstrating the range of remedies the Court has imposed based on the context of the human rights violation).

[151] SHELTON, *supra* note 148, at 277.

[152] The theory proposed here draws from one school of philosophical thought on reparations and reconciliation. JANNA THOMPSON, TAKING RESPONSIBILITY FOR THE PAST: REPARATION AND HISTORICAL INJUSTICE 50 (2002); *Restorative Justice and Reparations*, *supra* note 77, at 384; MORAL REPAIR, *supra* note 26, at 23, 209-10. Linda Radzik and Colleen Murphy have also recently published excellent books relevant to this issue. *See generally* LINDA RADZIK, MAKING AMENDS: ATONEMENT IN MORALITY, LAW,

to recognize and dignify the victims as well as to commemorate what they suffered.[153] Trust is a belief or attitude toward another that involves a certain degree of optimism about his or her future behavior.[154] The optimism must involve a belief that the other has the right motives and is committed to acting well, as well as limited suspicion as to whether those motives and commitments exist.[155] While writers differ on the appropriate motives, these might include a commitment to obeying appropriate moral or legal norms, sharing the interests of the trusting person, or having good will towards him or her.[156] Suffering a serious human rights violation at the hands of one's state will create significant and appropriate doubt or disbelief that the state has the right motives and is committed to acting well. Repairing victim trust would then require measures that appropriately demonstrate that the state genuinely cares about the victim and what he or she suffered.[157] Consider a case where state agents torture a person. In such a situation, the state demonstrates an insufficient degree of respect for the victim because it deviates from the standard of conduct that the state owes the victim. Such a demonstration interferes with the victim's appropriate optimism that the state is motivated and committed to treating him or her according to that standard.[158] To overcome such a barrier, the state (or

AND POLITICS (2009); COLLEEN MURPHY, A MORAL THEORY OF POLITICAL RECONCILIATION (2010).

153 *See supra* note 148, and surrounding text.

154 *See* Annette C. Baier, *Trust*, *in* 11 TANNER LECTURES ON HUMAN VALUE 107, 111 (1991) (describing the feeling of trust as an "impression of reflexion"); Karen Jones, *Trust as an Affective Attitude*, 107 ETHICS 4, 6 (1996); Lawrence C. Becker, *Trust as Noncognitive Security about Motives*, 107 ETHICS 43, 44-45, 53 (1996); Trudy Govier, *Self-Trust, Autonomy, and Self-Esteem*, 8 HYPATIA 99, 104 (1993) (all explaining how trust is critical for humans and how it is processed by humans).

155 This optimism cannot arise from careful monitoring, protection against misbehavior, and control of person, as pursuing those forms of assurance suggests distrust, not trust. *See* Baier, *supra* note 154, at 111-13; Govier, *supra* note 154, at 104-05 (explaining that trust is a reflexive feeling, rather than one produced by a careful survey of one's circumstances). For a noncognitivist equivalent, see generally Becker, *supra* note 154.

156 *See* Baier, *supra* note 154, at 111-12; Govier *supra* note 154, at 104; Jones, *supra* note 154, at 6 (all explaining generally the phenomenon of trust).

157 This idea is possibly just another application of the corrective justice principle, requiring that the wrongdoer undo, eliminate the effects of, or compensate for the past wrong and its harm. The difference from an orthodox corrective justice is that the harm is understood very broadly, to include harm to the important relationship between the state and the victim.

158 For human rights violations, the demonstrated degree of deviation from

society) must make it reasonable for the victim to believe that the state cares about the victim to an adequate degree that the state will not deviate from the acceptable standard of treatment.

Eliminating such appropriate barriers to victim trust in the state is important for a number of reasons. Such trust is essential for the victim to participate once again in the social and political community as an equal member.[159] Without reasonable trust in the state, the victim cannot reasonably expect that his or her participation will be taken seriously, or that it would even be safe to assert herself as part of the community.[160] But even from the perspective of the state, restoring victim trust is important in achieving social stability and legitimacy.[161] If the victims do not redevelop trust, they will have reason to take those measures within their power to control, monitor, and protect themselves against the state. The motivation to take such measures is intrinsically destabilizing because it places individuals in opposition to the state. Even when victims cannot take effective measures to monitor and protect themselves, the reasonable motivation to do so speaks to the legitimacy of the state in their eyes. A state that can reasonably be seen as a potential predator lacks an important aspect of legitimacy in front of these citizens.

Reparative measures must be sufficient to remove appropriate barriers to the victim's trust arising from the human rights violation.

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appropriate level of caring is closely connected to the harm suffered. According to Linda Radzik, wrongdoing both expresses a message that the victim does not require better treatment and subjects the victim to harm incompatible with the treatment he or she deserves. *See* RADZIK, *supra* note 155, at 76 (differentiating harm caused by wrongdoing from other injuries).

159 *See* Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 501 (1989) (although discussing quite a different problem, suggesting a notion of a morally appropriate relationship that makes sense as the goal of social repair following serious human rights violations by stating, "[a]n integrated citizen accepts that the value of his own life depends on the success of his community in treating everyone with equal concern").

160 *See* RADZIK, *supra* note 152, at 77 (describing a victim's fear by stating that "[t]he wrongful act functions as a kind of testimony that this sort of treatment is acceptable. . . . The severity of the wrong committed . . . generally correlates with the severity of the future harms that the victim may reasonably fear").

161 *See* Dworkin, *supra* note 159, at 501-02 ("An integrated citizen accepts that the value of his own life depends on the success of his community in treating everyone with equal concern. Suppose this sense is public and transparent: everyone understands that everyone else shares that attitude. Then the community will have an important source of stability and legitimacy even though its members disagree greatly about what justice is.").

The reparative measures must be sufficient enough so that the victim trusts that the state will treat him or her according to appropriate standards necessary for equal participation in the community.[162] In this sense, an individual's trust in his state can be understood as the expectation that the society or state will treat him or her with equal consideration. From this perspective, non-pecuniary or non-material damage—which the Inter-American Court mentions in connection with measures of satisfaction[163]— actually consists of harm to the victim's trust in the state. For such trust in the state to be appropriate, the state must establish its respect for the individual. Respect for an individual could be understood as an attitude towards the other that the person is worthy of equal consideration, a form of respect appropriate to the context of social and political community. Thus, repair of social bonds focuses on establishing the reasonable trust of the individual in the state based in the respect of state for the individual, as is appropriate following a human rights violation. To accomplish this end, the state that committed human rights violations against its members or citizens must take positive actions to rebuild trust. These positive actions—those necessary to eliminate barriers to trust between a society or state and its victims—can be understood to constitute reparations.

The requirement to eliminate appropriate barriers to victim trust

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162 This thought combines aspects of Janna Thompson and Margaret Urban Walker's ideas about reparations. Walker suggests that the reparations are to promote confidence, trust, and hope in the existence of shared standards of treatment and behavior, not trust and respect among persons, as Thompson suggests. MORAL REPAIR, *supra* note 26, at 24, 210; *Restorative Justice and Reparations*, *supra* note 77, at 384; THOMPSON, *supra* note 152, at 50. Of course, for state reparations, the standards of behavior cannot be same for the individual and the state because individuals and states do not occupy equivalent or parallel positions with respect to the other that would make appropriate a symmetrical relationship. A state is much more powerful than an individual and also is commonly thought to be able to establish authoritative rules for individuals in the form of law under some conditions. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 133-72 (1996) (describing the source of a state's sovereignty over its subjects); JOSEPH RAZ, THE MORALITY OF FREEDOM 23-109 (1986); RONALD DWORKIN, LAW'S EMPIRE 176-275 (1986). *But see* MURPHY, *supra* note 152, at 25-38 (insisting on the importance of a reciprocal relationship between state officials and individuals).

163 *See* Afro-descendant Communities (Operation Genesis) v. Colombia, *supra* note 62, at ¶ 441 (holding that the court will keep pecuniary and non-pecuniary damages in mind); Pueblo Bello Massacre v. Colombia, *supra* note 62, at ¶ 264 ("seeking to repair non-pecuniary damages, which have a special relevance due to the extreme gravity of the facts).

in the state arising from past human rights violations is a backwards-looking reparative obligation, contrary to what de Greiff suggests when commenting on social reconciliation.[164] Of course, the value of building trust (or reconciliation more generally) might sometimes support measures to eliminate general distrust that exists in a society even when it did not result from a specific past event like a human rights violation.[165] But past human rights violations create highly specific and personal reasons for victims to distrust the state and call for a specific and personal response.[166] It is not merely the lack of trust, which would be a problem in any society, but the fact that it is made reasonable by the past human rights violation. So the requirement is backwards-looking in that the past human rights violation directly contributes to the need for present action to restore trust.[167] Of course, the requirement does have a forward-looking aspect, in that it aims to establish trust in the present by removing reasons for distrust. But even traditional corrective justice aims at a particular result in the present: the erasure of the consequences of a past wrong.

This focus on rebuilding trust between state and individual immediately explains the standard reparations measures that the Court has repeatedly ordered as measures of satisfaction. The state must, to overcome barriers to trust from past human rights violations, establish its respect for the victim and its commitment to ap-

[164] *See generally* Pablo De Greiff, *Justice and Reparations*, *in* THE HANDBOOK OF REPARATIONS 465 (Pablo De Greiff ed., 2006).

[165] A period of armed conflict or authoritarian rule may create reasonable barriers to trust even among those who were never subject to serious human rights violations. This lack of trust, even if not well founded, may require the state to respond.

[166] Of course, restoring trust serves objectives other than social legitimacy, such as maintaining social stability. And for social stability, it might be more important to ensure that trust exists, regardless of why it was imperiled. But legitimacy and political participation are important reasons to respond to those barriers to trust that arose specifically from the past human rights violation.

[167] The relevant obligation is not a general one to repair any reasonable lack of trust in the state but only that which the state caused via its past human rights violation. Thus, repair is an appropriate present response to a past wrong, and so it has a backwards-looking element of a response to the past but also a present- or forward-looking element of reconstructing relationships. Compare this view with that of Brooks, who suggests that the past is relevant because we seek reconciliation in response to a broken relationship in the present. Roy L. Brooks, *Getting Reparations for Slavery Right – A Response to Posner and Vermeule,* 80 NOTRE DAME L. REV. 251, 275-76 (2004).

propriate norms of conduct. Actions like publically recognizing international responsibility[168] and publicizing the Court's judgment[169] acknowledge that the state's past conduct was unacceptable and that the victim was entitled to better treatment. These means of communicating the state's views on the victim's status and appropriate norms are an initial step in overcoming the barriers to trust in the state resulting from the past human rights violation. Other actions, including commemorative naming of schools or other institutions, establishing museums, or building monuments can have much the same communicative or symbolic effect.[170]

*4.2. Social Repair, Social Context, and Satisfaction*

Although repair of social bonds between victim and state may require measures of satisfaction like recognition of responsibility to restore trust, it is less obvious why it could require the more exotic measures that the Inter-American Court has ordered, such as provision of infrastructure for displaced communities, educational or housing support, or even human rights training.[171] On some occasions, these measures might be understood as reparations for various material aspects of the harm from human rights violations, regardless of the Court's classification. But it bears thinking about why the Court could classify them as measures of satisfaction in order to determine the scope and limits of measures of satisfaction as a distinct category of genuine reparations. Fundamentally, the rea-

168 *See, e.g.*, Gutiérrez v. Argentina, *supra* note 2, at ¶ 158; Pacheco Teruel v. Honduras, *supra* note 4, at ¶ 122; Escher v. Brazil, *supra* note 64, at ¶ 243; Montero Aranguren (Detention Center of Catia) v. Venezuela, *supra* note 65, at ¶ 150 (demonstrating examples of nations taking responsibility for prior harms before the Inter-American Court of Human Rights).

169 *See, e.g.*, Osorio Rivera v. Peru, *supra* note 39, at ¶ 260; Díaz-Peña v. Venezuela, *supra* note 58, at ¶ 153; Escher v. Brazil, *supra* note 64, at ¶ 239; Raxcacó Reyes v. Guatemala, *supra* note 64, at ¶ 136; Bulacio v. Argentina, *supra* note 64, at ¶ 145 (all demonstrating the various mechanisms through which the Inter-American Court of Human Rights may require states to publicize its judgments).

170 Contreras v. El Salvador, *supra* note 67, at ¶¶ 208, 210; "Street Children" (Villagrán-Morales) v. Guatemala, *supra* note 67, at ¶ 103; Gutiérrez v. Argentina, *supra* note 2, at ¶¶ 162, 164; Río Negro Massacres v. Guatemala, *supra* note 8, at ¶ 280.

171 Osorio Rivera v. Peru, *supra* note 39, at ¶ 267; Barrios Family v. Venezuela, *supra* note 5, at ¶ 226; Gómez Palomino v. Peru, *supra* note 10, at ¶¶ 145-48; García Cruz and Sánchez Silvestre v. Mexico, *supra* note 38, at ¶ 80; Montero Aranguren (Detention Center of Catia) v. Venezuela, *supra* note 65, at ¶ 148.

son why the repair of social bonds may require more than inexpensive symbolic measures is that a person's status and other contextual factors may negatively affect the depth of harm to the victim's trust resulting from a given human rights violation, the ease of repairing trust, and the significance of concrete measures themselves.[172]

The repair of social bonds requires that acceptable reparations be sufficient to overcome the appropriate barriers to a relationship of trust between an individual and his state that resulted from a human rights violation. However, aspects of the relationship beyond the particular human rights violation will affect how easy or difficult it is to overcome the appropriate barriers to trust that the violation occasioned. For example, a bully who regularly verbally demeans another and one day punches him or her will have a much more difficult time repairing the trust appropriately lost from the punch than she would absent the history of verbal attacks. In this sense,

[172] There are several countervailing factors that may make reparations measures more effective in repairing social trust than they would otherwise be in some circumstances. First, the circumstances of a resource-limited state make pecuniary reparations beyond full material reparation more demonstrative of respect than they would otherwise be because of the burden that providing reparations places on the state. The state must make trade-offs among different funding priorities, some of which will be extremely pressing in the circumstances typical of many states. Although money is fungible, its significance to a resource-limited state depends at least in part on other spending needs, which may include various forms of pressing social programs. Since even a relatively small payment may require important sacrifices or tradeoffs on the part of the state, making this payment may demonstrate the same degree of caring about the victim as a larger payment would for a state with fewer constraints on resources.

Second, a similar point applies to non-material reparations, regardless of their costs. Consider the *Cotton Field* or *Atala Riffo* decisions, where the victims' social marginalization took the form of widely held attitudes concerning their lack of worth, accompanied by discrimination on that basis. *See* Atala Riffo v. Chile, *supra* note 12, at ¶¶ 96-98, 146 (holding that the harms done to the victim, which were condoned by the state, were largely products of the social stigmatization of the victim's sexual orientation in Chile); González ("Cotton Field") v. Mexico, *supra* note 12, at ¶¶ 132-35, 154, 163. An attempt to repair by changing those attitudes is a difficult undertaking, given the relative intransigence of such social attitudes. Achieving social change of this sort likely requires perseverance and continuous effort over a long period of time, not a quick and easy legislative or political change. Certainly the state ought to change these deeply problematic attitudes, but it is not obvious that reparations for a single or small number of victims can by itself require this effort. Specifically, the difficulty of even a partially successful effort to change the underlying culture may be sufficient to restore trust in the state's respect for the victim. In this sense, social repair may not require the complete removal of underlying factors in the human rights violation when a partial removal requires great effort and commitment by the state.

we might say that other aspects of the relationship may affect the reparatory gap that reparations must span in order to make the lost trust once again appropriate.

The social position of a victim subject to social discrimination or vulnerability should make it more difficult to overcome the appropriate barriers to trust from a past human rights violation. A socially marginalized victim may reasonably consider that the state inadequately respected her because of its participation in the discriminatory social practice. The normal treatment that a socially marginalized person receives in a discriminatory society indicates that the state does not respect her, a fact that can be cruelly confirmed via a specific human rights violation. An act confirming the general lack of respect demonstrated by normal conditions should appropriately lead the victim to doubt the state more than she otherwise would on the basis of that particular violation. As a result, social marginalization accentuates the gap that the reparations must cover in order to eliminate appropriate barriers to trust, so the state may have to make additional efforts and provide additional measures of satisfaction.[173]

Relatedly, various forms of social marginalization may affect the ease of repairing trust when they were closely connected to the human rights violations themselves. Often, the perpetrators of human rights violations do not target the victims despite their social marginalization but because of it, or at least take advantage of their increased vulnerability due to the marginalization.[174] For example, in *Cotton Field* the fact that society in Ciudad Juarez did not value poor,

[173] In contrast, the social position of a privileged person in itself normally makes the task of overcoming barriers to trust easier, making reparations beyond full material reparations less necessary. A wealthy person, for example, has a privileged position in her society by virtue of the abundant resources she is allowed to command, reducing any appropriate sense that the state does not adequately care about her. Similarly, other forms of privilege may have similar effects, such as the respect that comes with being an editor of a prominent news magazine or a magistrate on a high court. *See* Constitutional Tribunal (Camba Campos) v. Ecuador, *supra* note 45, at ¶ 305; Fontevecchia and D'Amico v. Argentina, *supra* note 39, at ¶ 123. The effect of the respect communicated by such social positions makes it easier to demonstrate that the state cares, since lack of caring indicated by the particular human rights violation suffered is an outlier from that indicated by the treatment the victim normally receives. For this reason, the resulting appropriate barriers to trust may be less severe in these circumstances, and reparations that extend beyond full material reparation and apologies may be unnecessary.

[174] *See, e.g.*, Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, *Guiding Principles on Extreme Poverty and Human Rights*, U.N. Doc. A/HRC/21/39 (July 18, 2012) (demonstrating the correlation between extreme poverty and victimization in the region).

young women may have both explained why the victims were targeted by the non-state actors, but also why state authorities did little to respond to their disappearances and faced few domestic consequences for the failure.[175] When such forms of social marginalization are implicated in a human rights violation, it may be harder or impossible to overcome the appropriate barriers to trust without responding to the role that social marginalization played in the wrong. A victim who suffered a human rights violation like forced displacement because of her poverty probably should not begin to trust her state once again if it in no way responds to that underlying cause of the violation.[176] The state has not shown that it is committed to treating the victim according to appropriate standards regardless of the characteristic of the victim subject to marginalization.

The Inter-American Court has made comments on several occasions that directly indicate the relevance of social vulnerability in determining the appropriate reparations: "The Court recalls that the victim in the present case is an indigenous woman, in a particularly vulnerable situation, and this will be taken into account in the reparations awarded in this Judgment."[177]

Features of the victim's context, like vulnerability, may plausibly explain why some measures of satisfaction seek to repair social bonds between state and individual despite having substantial material components in addition to their symbolic dimensions. For example, in the case of *Fernández Ortega*, quoted above, the Court ordered the state to provide financially for a center on women's rights, which both supported a project the victim had and was symbolically relevant to the human rights violation suffered, a rape by soldiers.[178] This measure may plausibly contribute to establishing that the state has appropriate respect for the victim in order to rebuild trust. Similarly, orders to provide education for victims, even when educational deficiencies were not themselves connected to the human

[175] González ("Cotton Field") v. Mexico, *supra* note 12, at ¶¶ 132-35, 154, 163.

[176] For an example of such victims, consider forced displacement and dispossession in the context of the Colombian armed conflict. David L. Attanasio & N. Camilo Sánchez, *Return within the Bounds of the Pinheiro Principles: The Colombian Land Restitution Experience*, 11 WASH. U. GLOBAL STUD. L. REV. 1, 13-19 (2012).

[177] Fernández Ortega v. Mexico, *supra* note 12, at ¶ 223. *See also* Rosendo Cantú v. Mexico, *supra* note 12, at ¶ 206 ("The Court reiterates that Mrs. Rosendo Cantu is an indigenous woman, a girl at the time when the violations occurred, whose situation of particular vulnerability will be taken into account in the reparations awarded in this Judgment.").

[178] Fernández Ortega v. Mexico, *supra* note 12, at ¶¶ 265-70.

rights violation,[179] could show respect for the victim and rebuild trust following human rights violations that reasonably cause an exceptional loss of trust.[180] Other measures that might be justified in this way in some cases include housing for former prisoners,[181] human rights training for officials,[182] infrastructure for communities,[183] and many others.

*4.3. The Limits of Repair of Social Bonds*

Although many orders of the Inter-American Court may be legitimate because they seek to repair social bonds, not just any such order is. Such orders would be entirely legitimate only if the Court *explicitly* finds that the human rights violation harmed the victim's appropriate trust in the state and concludes that the proposed measures would reasonably repair that trust. An explicit justification of the orders is necessary to guarantee due process against judicial carelessness, overreach, or abuse.[184] This justification, particularly for the repair of social bonds, requires judicial modesty and, concomitantly, a reasonable level of support because the problem of determining what measures would reasonably repair victim trust is difficult. Following a severe human rights violation, it is hard to say what measures would remove the barriers to trust confronting a reasonable victim. However, this is not a fatal problem for making legitimate orders to repair social bonds, as the Court regularly overcomes similar problems in other areas. For example, the Court

179 *See* Gómez Palomino v. Peru, *supra* note 10, at ¶ 147 (ordering educational support for the direct victim's mother because her illiteracy made it difficult to obtain justice).

180 Osorio Rivera v. Peru, *supra* note 39, at ¶ 267; Barrios Family v. Venezuela, *supra* note 5, at ¶ 226; Gómez Palomino v. Peru, *supra* note 10, at ¶ 145-48.

181 García Cruz and Sánchez Silvestre v. Mexico, *supra* note 38, at ¶¶ 80, 83.

182 *See, e.g.*, Montero Aranguren (Detention Center of Catia) v. Venezuela, *supra* note 65, at ¶ 148 (ordering training for officials for preventative reasons).

183 *See, e.g.*, Río Negro Massacres v. Guatemala, *supra* note 8, at ¶ 284 (ordering infrastructure measures such as building a hospital, improving streets, and implementation of a water drainage system); Xákmok Kásek Indigenous Community v. Paraguay, *supra* note 7, at ¶ 301 (ordering the provision of basic goods and services); Sawhoyamaxa Indigenous Community v. Paraguay, *supra* note 6, at ¶ 230 (ordering the provision of drinking water, setting up latrines, and establishing a school); Yakye Axa Indigenous Community v. Paraguay, *supra* note 71, at ¶ 221 (again, ordering provision of drinking water, latrines, and education).

184 *Cf.* ATTANASIO, *supra* Part III.D (explaining how fundamental notions of due process require explicit and motivated decisions, which safeguard against carelessness, overreach, or abuse).

typically orders compensation for moral injury to the victim, which requires evaluating pain and suffering and translating it into monetary terms.[185] But even if the Court is competent to make these sorts of assessments, it ought to cautiously and carefully defend its assessments in the hard case of victim trust.

### 5. REPAIR OF COMMUNITIES

Despite the fact that we might understand orders like those requiring infrastructure for communities as justified in order to repair harm to trust, some such orders could be understood more simply as efforts to repair the harm done to communities. The fundamental idea of reparations as community repair is that, when a past human rights violation harms a community, genuine reparations may attempt to eliminate the harm, or the effects of that harm, to the community. Just as traditional corrective justice focuses on undoing, repairing, or compensating for certain material harms to a victim, repair of communities focuses on undoing, repairing, or compensating for harms to community structures. This basis for reparations is consistent with the great regard the Inter-American Court has shown for community and social bonds—especially for those of indigenous and similar communities.[186] This section will analyze the concept of community employed in the Inter-American Court's jurisprudence, and then argue that harms to such communities can justify legitimate orders to provide reparations.

#### *5.1. The Concept of a Community*

To begin, it is necessary to identify what a community is according to the Inter-American Court in order to determine the sense in which community might be harmed by a human rights violation. Although the idea of community can be understood in many ways, it is possible to organize the different concepts into three main groups. First, there are communities of geography composed of people living together in the same place or geographical region, but not necessarily sharing any other connection beyond geographic

[185] See generally JO. M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (Cambridge Univ. Press 2003).

[186] It helps explain reparations orders such as those granting reparations directly to communities instead of to particular persons who were victims of a human rights violation, *See* Villalba, *supra* note 1, at 271-72.

proximity. Second, there are communities of common characteristics that include people with shared characteristics, such as history, language, religion, economic production methods, values, or culture. The people who are part of such a community share characteristics but need not have any additional relationship to the other members. Third, there are communities of shared interpersonal bonds where the members are related to the other members in some way, such as a by frequent interactions, social relations (friendship and the like), organization, interdependence, or trust. These sorts of communities are intrinsically composed of networks or webs of these sorts of relationships among their members, and not just by common personal characteristics.[187]

Despite this diversity, a conception of community according to which a community is a group of persons whose members share interpersonal bonds—such as organization, interdependence, or social relations—best corresponds with the usage in the Inter-American jurisprudence. Abstractly, the Court has on occasion referred to "reestablishing the fabric of the community,"[188] a characterization that makes most sense when community consists of a network of social relations. More concretely, in its cases on indigenous and tribal communities, the Court repeatedly refers to the different forms of social organization that exist within the communities. For example, in one case it indicated that "the victims belonging to the Mayan indigenous people . . . possess their own traditional authorities and forms of community organization, centered on consensus and respect. They have their own social, economic and cultural structures."[189] But the bonds among individuals do not have to rise to

[187] Finally, a community of shared consciousness involves awareness or recognition among members that one of the previous concepts of community binds them into a group. This notion of community does not stand alone, but rather is an additional trait that one might think is necessary for a community to fully exist and to be of value. The Court has not emphasized that individual awareness of the community is necessary for the group to merit legal protection.

[188] Fernández Ortega v. Mexico, *supra* note 12, at ¶ 267.

[189] Plan de Sánchez Massacre v. Guatemala, *supra* note 63, at ¶ 85. *See also* Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 112, at ¶ 149 (noting communitarian traditions among indigenous peoples that fosters a sense of culture); Afro-descendant Communities (Operation Genesis) v. Colombia, *supra* note 62, at ¶ 354 (recognizing social structure among indigenous peoples as necessary to continuing their culture); Saramaka People. v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 121 (Nov. 28, 2007) (acknowledging that indigenous peoples are entitled to a communal, juridical personality).

the level of a distinctive authority structure; the Court on a number of occasions has indicated the importance of other social ties: "These surviving victims who were displaced from their place of origin, 'lost the community and affective ties on which their identity was rooted, in addition to their possessions,' which led to 'forced changes in the social structure, which entail[ed] ruptures, losses, pain, and much suffering.'"[190] Even though the Court frequently makes reference to shared characteristics of the group, it has almost always focused on coherent groups held together by social bonds.

This notion of community has the theoretical advantage that it can easily explain the importance of communities to individuals; thus, Inter-American human rights law does not have to assume that communities in themselves have independent legal standing. If a community is composed of a network of interpersonal bonds, and those bonds are of importance to individuals, then the community itself is of value to individuals. The sorts of interpersonal bonds at issue—authority and economic structures, for example—can be of fundamental importance to individuals, at least when those structures are not themselves abusive. Individuals structure their lives around their interpersonal bonds, and disruptions to or weakening of those interpersonal bonds can have a strong negative effect on their lives. This is particularly true when participation in one community is not easily replaced with participation in another, similar community, notably the case for many indigenous and tribal communities. Perhaps for these reasons, the Inter-American system has been relatively comfortable in granting communities some legal status in human rights law.[191] Although some states have argued that a "community as such could not be considered a victim because it

[190] Massacres of El Mozote And Nearby Places v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 194 (Oct. 25, 2012) (citing an expert opinion presented by the representatives). *See also* Ituango Massacres v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 213 (July 1, 2006) ("Other major negative effects of internal forced displacement include . . . social disintegration."); "Mapiripán Massacre" v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 175 (Sept. 15, 2005) (explaining the "acute vulnerability" of displaced persons).

[191] *See e.g.*, Xákmok Kásek Indigenous Community. v. Paraguay, *supra* note 7, at ¶ 45 (referencing a decree which granted the Indigenous Community legal status).

did not comply with the respective requirements,"[192] it is not necessary to view the community itself as the victim, but instead the individuals who participate in the community.

Moreover, if a network of interpersonal bonds within a group of persons constitutes a community, we can understand the relevance of geography and common characteristics to certain communities. In a number of important decisions concerning communities, the Inter-American Court recognizes that communities continue to exist and have value even when displaced from their traditional lands.[193] These communities are constituted independently of mere cohabitation of a particular place. Nonetheless, according to the Court, geography can be important for many communities because they are organized around certain physical places. The Court comments, for example, that "the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival."[194] Given the particular characteristics of indigenous and tribal communities, traditional land may be necessary for the long-term preservation and flourishing of the community even if the interpersonal bonds among its members are what constitute the community itself.

Similarly, common characteristics of a group of people may be important for developing or maintaining the social bonds that constitute certain communities. The Inter-American Court's line of cases concerning indigenous and tribal peoples repeatedly notes

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[192] *See* Afro-descendant Communities (Operation Genesis) v. Colombia, *supra* note 62, at ¶ 416 (elaborating on the state argument in footnote 62).

[193] *See* Sawhoyamaxa Indigenous Community v. Paraguay, *supra* note 6, at ¶ 118-44 (detailing and analyzing how the Indigenous Community is tied to the natural resources of the land); Río Negro Massacres v. Guatemala, *supra* note 8, at ¶¶ 160-64 (using the example of funeral rites to explain how indigenous people have a special relationship with their ancestral lands because they are an integral part of the indigenous people's religious beliefs and therefore their cultural identity and integrity).

[194] Mayagna (Sumo) Awas Tingni Community v. Nicaragua**,** *supra* note 112, at ¶ 149 (cited by Saramaka People. v. Suriname, *supra* note 189, at ¶ 90). *See also* Rio Negro Massacres v. Guatemala, *supra* note 8, at ¶ 160; Xákmok Kásek Indigenous Community v. Paraguay, *supra* note 7, at ¶ 174; Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 217 (June 27, 2012), http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf; Afro-descendant Communities (Operation Genesis) v. Colombia, *supra* note 62, at ¶ 354,; Yakye Axa Indigenous Community v. Paraguay, *supra* note 71, at ¶ 131 (recognizing the significance of indigenous peoples' ties to their land in varying circumstances).

their distinctive and common cultures, religions, languages, values, and modes of economic production in support of the need to ensure their survival.[195] However, the Court has never found the mere sharing of such traits to be sufficient by itself to constitute a community deserving legal protection, since these cases always involved groups of people connected in other ways as well.[196] Instead, on occasion the Court has directly suggested that these common traits are important simply because of their independent contribution to the maintenance and survival of the community, without being what makes it a community. For example, in *Plan de Sánchez*, the Court said "[t]raditions, rites and customs have an essential place in their community life."[197] Sharing such highly distinctive common traits, while important for certain communities, is not necessary for a community to merit legal protection. The Court in *Ituango Massacres*, *El Mozote,* and *Mapiripán Massacre* implied that a group merits legal protection even when, unlike indigenous and tribal communities, it does not share distinctive cultural, religious, or linguistic traits.[198] Thus, even ordinary villages might constitute communities deserving of legal consideration in the Inter-American system.

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[195] *See e.g.*, Yakye Axa Indigenous Community v. Paraguay, *supra* note 71, at ¶ 131 (emphasizing "culture, spiritual life"); Plan de Sánchez Massacre v. Guatemala, *supra* note 63, at ¶ 85 (highlighting the indigenous "linguistic community"); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 112, **at** ¶ 149 (focusing on "their cultures, their spiritual life, their integrity, and their economic survival"); Rio Negro Massacres v. Guatemala, *supra* note 8, at ¶ 160 (pointing specifically to "religious beliefs and . . . their cultural identity"); Afro-descendant Communities (Operation Genesis) v. Colombia, *supra* note 62, at ¶ 354 (highlighting, again "cultural identity, . . . customs, beliefs and traditions").

[196] *See, e.g.*, Yakye Axa Indigenous Community v. Paraguay, *supra* note 71, at ¶ 131 (recognizing the close relationship of peoples with their land as the basis for their culture); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 112, at ¶ 149 (discussing a communitarian tradition of taking collective ownership over a piece of property); Rio Negro Massacres v. Guatemala, *supra* note 8, at ¶ 160 (acknowledging the relationship indigenous peoples have with their ancestral lands as a part of their identity); Afro-descendant Communities (Operation Genesis) v. Colombia, *supra* note 62, at ¶ 354 (noting Article 21 protection of ties between a territory and its peoples).

[197] Plan de Sánchez Massacre v. Guatemala, *supra* note 63, at ¶ 85.

[198] Ituango Massacres v. Colombia, *supra* note 190, at ¶ 213; "Mapiripán Massacre" v. Colombia, *supra* note 190, at ¶ 175; Massacres of El Mozote And Nearby Places v. El Salvador, *supra* note 190, at ¶¶ 194, 305 (citing an expert opinion presented by the representatives).

*5.2. Community Repair, Reparations, and Legitimacy*

The fundamental idea of reparations as repair of communities is that reparations measures may serve to repair the harm that a human rights violation causes to a community. The violation may weaken or destroy the shared interpersonal bonds that constitute that community.[199] It may also remove or change some circumstance necessary for those bonds to endure or to thrive. For example, if severe human rights violations cause the displacement of a community like a village, the community members may resettle in different locations, completely shattering the bonds. Alternatively, they may relocate together, but without access to the land that was the material basis for the bonds. In such circumstances, the state may provide reparations that attempt to rebuild or strengthen those social bonds, such as by making the existence of the community in its place of displacement more viable through the provision of the various material resources necessary for it to survive and thrive.[200] At the same time, although a community is constituted by a group of people linked by interpersonal relationships, social organization, or the like, the reparations might not directly rebuild those relationships. Rather, they may instead contribute to establishing conditions in which they may thrive. For this reason, providing circumstances in which traditional modes of economic production or religious observance are possible may be a form of reparation for communities like indigenous or tribal groups.

Such reparations can be genuine for exactly the same reason that traditional monetary compensation can be. Reparations as repair of communities attempt to eliminate or compensate for the concrete harmful effects of human rights violations as a form of corrective justice. More traditional applications of corrective justice focus on the harms to the individual, whether in concrete forms like loss of income or in more ephemeral forms like pain and suffering. These reparations for communities focus instead on eliminating or compensating for the harm to the community that human rights violations occasion, whether directly to the fabric of the community itself or to the way of life in which the community engages. Fundamentally, this is simply an expansion of a corrective justice perspective

199 *See, e.g.*, Rio Negro Massacres v. Guatemala, *supra* note 8, at ¶87 (noting that "[t]he community also suffered the 'destruction of its social structure' because 'its relationships with other individuals were forcibly redefined'…").

200 *See supra* note 70 and surrounding text.

on reparations to include a greater array of harms, analogous to an expansion of corrective justice to include psychological and not just physical harms. It does not require a major rethinking of reparations because it once again is aimed at eliminating or compensating for the effects of harm caused.

Measures that appropriately attempt to undo, repair, or compensate for harm to community will vary depending on the circumstances. When a community is completely destroyed by a past human rights violation, such as a village that disbands following a massacre, it may not be possible to do anything more than compensate the victims for the loss of community, either monetarily or in some other form that is appropriate. When a community is merely injured, the social bonds weakened or their substructure removed, reparations measures may be appropriate to strengthen the bonds or restore or replace their substructure. Measures such as the establishment of a community development fund,[201] or the provision of new community infrastructure[202] to ensure the community can survive and rebuild, respond to the harm inflicted on a community as the result of human rights violations.

The Inter-American Court seems to have applied an idea of reparations as repair to communities in certain decisions. On some occasions, the Inter-American Court indicated that reparations should aim to repair the community fabric, and on other occasions it has implied that they might do so.[203] *Fernández Ortega* states: "In the present case, the Court underscores the importance of implementing reparations that have a community scope and that allow the victim to reincorporate herself into her living space and cultural identity, as well as re-establishing the fabric of the community." [204]

This case, which limits the need for community repair to indigenous communities, ordered the state to fund a community center in part in order to re-establish "the fabric of the community." [205] Similarly, in *Plan de Sánchez Massacre*, the Court granted monetary

[201] Moiwana Community v. Suriname, *supra* note 63, at ¶¶ 213-15.

[202] Rio Negro Massacres v. Guatemala, *supra* note 8, at ¶ 284; Xákmok Kásek Indigenous Community v. Paraguay, *supra* note 7, at ¶ 301; Sawhoyamaxa Indigenous Community v. Paraguay, *supra* note 6, at ¶ 230; Yakye Axa Indigenous Community v. Paraguay, *supra* note 71, at ¶ 221.

[203] Fernández Ortega v. Mexico, *supra* note 12, at ¶¶ 223, 267; Rosendo Cantú v. Mexico, *supra* note 12, at ¶ 206.

[204] Fernández Ortega v. Mexico, *supra* note 12, at ¶ 267.

[205] *Id.*

compensation to community members for non-pecuniary damage, taking into account in part the harm that the community as a whole suffered.[206] The *Moiwana Community* decision explicitly ordered a number of measures for the "community as a whole," including investigation into the human rights violations, collective titling of lands, creation of a community development fund, and construction of a monument.[207] In other cases, the Court has simply hinted that it ordered reparations to repair the community. In *El Mozote*, the Court ordered, for example, that the state implement a community development program for the members of the communities that suffered massacres to improve roads, access to water and electricity, health care, and education.[208]

However, in several cases, the Court has remained entirely silent about the basis of its reparations even though they might be understood as repair of communities. For example, in *Rio Negro Massacres*, where many residents of Rio Negro resettled in Pacux following massacres, the Court required that the state implement a number of measures to improve life in Pacux without comment on the basis for the measures. These measures included provision of medical personnel for the health center, food security programs, improved streets, supply of water, drainage and sewers, and improved schooling facilities.[209] Similarly, in a number of cases concerning displaced and dispossessed indigenous and tribal communities, the Court has ordered similar measures while the community awaits the restoration of its traditional lands.[210] A natural interpretation is that the

[206] Plan de Sánchez Massacre v. Guatemala, *supra* note 63, at ¶¶ 86-88.

[207] Moiwana Community v. Suriname, *supra* note 63, at ¶¶ 194, 205, 209, 213-14, 218.

[208] Massacres of El Mozote And Nearby Places v. El Salvador, *supra* note 190, at ¶ 339; Moiwana Community, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 212-15.

[209] The Court based the measures on the state's responsibility for the original displacement without clearly identifying a causal relationship. There is some indication in the judgment that the food insecurity was in fact caused by the original displacement, as the Rio Negro community made a living from fishing and agriculture. However, the judgment neither indicated that the community previously had adequate healthcare, streets, water and sewage, and education, nor held that their absence in itself constitutes a human rights violation. *See* Río Negro Massacres v. Guatemala, *supra* note 8, at ¶¶ 65, 183, 284. *See also* Plan de Sánchez Massacre v. Guatemala, *supra* note 63, at ¶ 110 (requiring similar measures without clarity about the basis).

[210] Yakye Axa Indigenous Community v. Paraguay, *supra* note 71, at ¶ 221; Xákmok Kásek Indigenous Community v. Paraguay, *supra* note 7, at ¶ 301; Sawhoyamaxa Indigenous Community v. Paraguay, *supra* note 6, at ¶ 230.

Court is attempting to maintain the viability of the communities until they can be reunited with the land that forms a fundamental basis for their long-term existence.[211]

*5.3. The Scope and Limits of Repair of Communities*

Assuming that ordering repair of communities harmed by human rights violations is legitimate, the Court would have substantial space to require reparations with this aim. Although many human rights violations straightforwardly harm communities—mass displacements, for example—other violations may also cause such harm even when the violation does not appear collective in nature. For example, the extrajudicial execution of a community leader may well cause harm directly to the community, which depends on that person for much of its coherence and stability. In some cases, this harm to the community might be exactly the point of such an extrajudicial execution. Consequently, it may well be legitimate in such cases to grant reparations that attempt to overcome the harm to the community resulting from the human rights violation. In fact, the Court has even suggested on occasion that repair to community may be necessary in cases where the human rights violation does not directly harm the community, such as in two cases where soldiers from the Mexican armed forces committed sexual assault against indigenous women.[212]

Reparations as repair of community can explain a range of the extraordinary reparations that the Inter-American Court has ordered, but it cannot explain just any extraordinary measure. The Court may legitimately order reparations to repair communities only when a community was actually harmed. First, the Court must determine that a relevant community actually exists, which involves both a factual and legal inquiry concerning the nature of communities that can be the basis for reparations. Second, it must find that the community was harmed in some way by the human rights violations proven in the case. Some human rights violations—for example, the forced disappearance and torture of street children—would not cause substantial harm to communities and so could not

[211] Another possible interpretation is that these measures are necessary to avoid violating economic, social, and cultural rights, and so constitute a disguised cessation order.

[212] Rosendo Cantú v. Mexico, *supra* note 12, at ¶¶ 70-75; Fernández Ortega v. Mexico, *supra* note 12, at ¶¶ 78-84.

be the predicate for legitimate orders to repair a community. The Court must explicitly satisfy both of these requirements in order for its reparations orders to be fully legitimate, as motivating the orders is an essential due process protection against judicial carelessness, overreach, or abuse, which is particularly important when exercising an expansive power to intervene in state policy.[213]

### 6. CONCLUSION

This Article has argued that many of the extraordinary reparations orders the Inter-American Court makes in its contentious cases are legitimate despite initial appearances. Some may be understood as legitimate orders to cease ongoing human rights violations, such as a failure to take measures to ensure the enjoyment of human rights. These are not technically orders to provide reparations, but are within the competence of the Court nonetheless. Many orders to provide guarantees of non-repetition may be understood in this way. Other orders may be understood as legitimate orders to provide genuine reparations that repair the social bonds between a state and individual by eliminating the reasonable barriers to trust arising from the human rights violation. Measures of satisfaction may seek to eliminate these barriers to trust, whether the measure is primarily symbolic in nature, or combines symbolism with concrete benefits for the victim. Finally, certain orders directed at communities may constitute genuine reparations, even when they do not correspond to concrete material harm to victims, if they repair harm to communities that resulted from the human rights violations.

[213] *Cf.* ATTANASIO, *supra* Part III.D (explaining how fundamental notions of due process require explicit and motivated decisions which safeguard against carelessness, overreach, or abuse).