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Strategizing for Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative for Victims' Representatives

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STRATEGIZING FOR COMPLIANCE:

THE EVOLUTION OF A COMPLIANCE PHASE OF INTER-AMERICAN COURT LITIGATION AND THE STRATEGIC IMPERATIVE FOR VICTIMS’ REPRESENTATIVES

DAVID C. BALUARTE*

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INTRODUCTION

For decades, international law and relations scholars have debated why nations comply, when they do, with international law.¹ Some posit that compliance reflects rational calculations of national interest, while others argue that compliance is a response to the persuasive power of legal obligations.² International lawyers, regardless of whether they have a rationalist or normative understanding of the effects of their work, generally accept the assertion by Louis Henkin that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”³ The assumed truth of this assertion has led many international lawyers to pursue their work without seriously evaluating its real impact or considering measures to make it more meaningful. As Oona Hathaway has aptly put it, “[t]he disinclination of international lawyers to confront the efficacy of international law is nowhere more evident—or more problematic—than in the field of human rights law.”⁴

1. See, e.g. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2600 (1997) (noting that the question of why nations sometimes obey, or disobey, international law “is fundamental from both a theoretical and practical perspective”).

2. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1944-64 (2002) (discussing the different theories of compliance that she categorizes as the rational actor models and normative models).

3. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979); see also Hathaway, *supra* note 2, at 1937 (“This assumption undergirds the work of many legal scholars and practitioners, who endeavor to explicate and form the law presumably because they believe that it has real impact.”).

4. Hathaway, *supra* note 2, at 1938.

There is, however, a marked increase in concern over the “compliance question” among international human rights lawyers, who are “eager to move beyond a discussion about why nations comply with international human rights law to a discussion about the process by which they can be made to do so.”⁵ This concern has been reflected in a surge in scholarship about compliance with the decisions of regional human rights bodies,⁶ fora which present human rights lawyers with the rare opportunity to bring states to account for human rights violations perpetrated against individuals and communities. This increased attention to the topic has been mirrored by developments in the regional human rights systems themselves to address compliance deficits as they struggle with this question that cuts to the core of their legitimacy.⁷

In the inter-American human rights system, a particularly notable development is the evolution of a compliance phase of litigation

5. Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 471 (2008).

6. See, e.g., James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT’L L. 768, 770 (2008) (arguing that the Inter-American Court of Human Rights’ most effective judgments incorporated respect for human rights into broader domestic policies affecting the underlying issues); Philip Leach et al., *Can the European Court’s Pilot Judgment Procedure Help Resolve Systemic Human Rights Violations? Burdov and the Failure to Implement Domestic Court Decisions in Russia*, 10 HUM. RTS. L. REV. 346, 346-47, 350 (2010) (analyzing the effort of the European Court of Human Rights to address some systemic non-enforcement problems by developing the pilot judgment procedure in 2004); Frans Viljoen & Lorette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights, 1994–2004*, 101 AM. J. INT’L L. 1 (2007) (discussing the direct effect of the establishment of the African Commission on Human and Peoples’ Rights on ensuring compliance with regional human rights treaties).

7. See, e.g., Agreement of Madrid, May 12, 2009, C.E.T.S. No. 194 (amending the European Convention on Human Rights Article 46 to permit referral of states that have not complied with judgments of the European Court of Human Rights to that body for “infringement proceedings”); Rules of Procedure of the Inter-American Court of Human Rights, *approved* November 28, 2009, art. 69, http://www.corteidh.or.cr/reglamento/regla_ing.pdf [Inter-Am. Ct. H.R. Rules of Procedure] (entered into force Jan. 1, 2010) (amending the Court’s previous rules to create a procedure for monitoring compliances); Rules of Procedure of the African Commission on Human and Peoples’ Rights, *approved* May 26, 2010, <http://www.achpr.org/english/ROP/Rules%20of%20Procedure.pdf> (creating in its Rule 112 a framework for follow-up on the recommendations of the Commission).

before the Inter-American Court of Human Rights (“the Inter-American Court” or “the Court”), the highest human rights court in the Americas. History is clear that the open refusal by some states to comply with the Court’s reparations orders led the tribunal to take the unprecedented step of issuing public orders highlighting particularly troubling cases of non-compliance. These first orders sparked the development of a phase of litigation in which states, the representatives of victims, and the Inter-American Commission on Human Rights (“the Inter-American Commission” or “the Commission”), debate the adequacy of measures taken by the states to implement the reparations orders of the Court. In the decade since it inaugurated this practice, the Court has issued hundreds of compliance orders, addressing the implementation processes in over 80 percent of the cases in which it has issued reparations decisions, with multiple and complex orders in many of those cases.⁸

The importance of this rapidly growing body of jurisprudence has not been lost on those engaged with the inter-American system.⁹ International relations scholars have seized on these orders as potential windows into the tendencies of states to comply with human rights obligations¹⁰ and human rights practitioners have begun to develop an empirical narrative of the Court’s success.¹¹ However, despite the potential of this compliance jurisprudence to aid inter-American litigants in understanding the viability of their litigation

8. See, e.g., Cavallaro & Brewer, *supra* note 6, at 784 (noting that “88 percent of resolved contentious matters [before the Court] were in the phase of supervision of compliance . . .”).

9. The Court itself lists four types of jurisprudence on its webpage, including: decisions and judgments; advisory opinions; provisional measures; and compliance with judgment. INTER-AMERICAN COURT OF HUMAN RIGHTS, <http://www.corteidh.or.cr/> (last visited Mar. 8, 2012).

10. See, e.g., Courtney Hillebrecht, *Domestic Politics, International Human Rights Adjudication, and the Problem of Political Will: Cases from the Inter-American Human Rights System* (Mar. 20, 2009) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (conceptualizing compliance with regional human rights tribunals’ orders as a “signaling game” for states to indicate their commitment to human rights).

11. See, e.g., Fernando Basch et al., *La Efectividad del Sistema Interamericano de Protección de Derechos Humanos* [*The Effectiveness of the Inter-American System for the Protection of Human Rights*], ASOCIACIÓN POR LOS DERECHOS CIVILES (Jan. 30, 2012), <http://www.adc-sidh.org/images/files/adclaeffectivaddel-sidh.pdf>.

initiatives and improving their chances of achieving their desired outcomes, it has been underutilized for this purpose. This article aims to fill this gap, and provide guidance for those willing to strategize for compliance.

This article provides a comprehensive review of the Court's compliance jurisprudence by developing a typology of the Court's reparations and systematizing all available information on the implementation of those reparations. By culling more than 90 experiences with implementation and providing both quantitative and qualitative analysis of these experiences, this article highlights the predictive potential of this body of jurisprudence. This article encourages inter-American representatives to inquire into state tendencies with regard to compliance as a means to formulate compliance strategies at the earliest stages of litigation. Representatives should view the compliance phase of litigation like any other, with a range of possible outcomes that can be tactically achieved. In this way, compliance jurisprudence can help representatives to reflect on the potential impact of their work, and to take deliberate, strategic steps to maximize that impact at each stage of a litigation project.

The first part of this article will provide an overview of the procedure under which contentious cases are processed in the inter-American system and describe the implementation experience in general terms. It will then trace the evolution of a compliance phase of Inter-American Court litigation, reviewing both its historical roots and some dynamic developments from the past few years, culminating in the Court's newly passed 2010 Rules of Procedure. Following this description of the compliance procedures, the second part of this article places the compliance phase of Court litigation into the context of the debate about implementation in the inter-American system. This section synthesizes the thrust of the principal observers' critiques of the inter-American system with regard to implementation and their recommendations for improving the track record in the system, and specifically the Court. The second part concludes by identifying ways in which the Court's evolving compliance proceedings respond to the principal critiques and provide a real opportunity to practitioners to make their litigation more meaningful.

The third part of this article systematizes the information produced in the compliance proceedings in order to provide a framework for understanding the likelihood of achieving implementation goals. Specifically, it provides a comprehensive analysis of over 500 reparations ordered in 91 reparations decisions issued by the Court between 1989 and 2009 in which it subsequently issued compliance orders. This analysis organizes, systematizes, and codes the compliance orders in terms of the reparations they discuss and provides rates of implementation for 13 different categories of reparations ordered by the Court.¹²

Building on this analysis, the fourth part of this article suggests that these fairly reliable rates of implementation of a somewhat predictable range of remedies should be used by victims' representatives to counsel clients in an informed way and to strategize for compliance with Inter-American Court decisions. Specifically, the fourth part of this article identifies certain implementation roadblocks in the areas of monetary reparations, legislative reforms, and measures to encourage the investigation and prosecution of perpetrators that can inform case-specific strategies to boost the chances that states will implement Court-ordered reparations. In conclusion, this article encourages victims' representatives to incorporate this knowledge of compliance into their own work to both make the litigation more meaningful for the victims they represent, and to deliver them the best results.

I. INTER-AMERICAN CASE PROCESSING FROM AN IMPLEMENTATION PERSPECTIVE AND THE EVOLUTION OF A COMPLIANCE PHASE OF COURT LITIGATION

Before exploring the compliance jurisprudence of the Inter-American Court and its implications for the representatives of victims and survivors of human rights abuse, it is important to contextualize that inquiry. Accordingly, this section will look at how cases are processed from the Commission to the Court and look at the rates of implementation of the decisions of those bodies in broad

12. Compliance orders issued through March 2011 were reviewed as part of this study.

strokes. It will then follow the historical development of the compliance phase of Inter-American Court litigation and describe that dynamic system as it was articulated in the newly passed 2010 rules of procedure.

A. AN OVERVIEW OF IMPLEMENTATION IN THE INTER-AMERICAN SYSTEM

While this article is focused on the Inter-American Court, it is important to begin the discussion with the Inter-American Commission, as it is there that representatives must litigate individual petitions in the first instance.¹³ The Commission is a quasi-judicial human rights body with promotional functions like human rights reporting and training, as well as protective functions related to the processing of cases alleging specific violations of human rights.¹⁴ As to the latter function, it bears emphasis that the Commission has made particular strides in articulating its individual case processing functions in recent years. Notably, the Commission is empowered to process individual complaints against all 35 member states of the Organization of American States (“OAS”) and has received over 14,000 such petitions to date.¹⁵ It received 1,598 such complaints in 2010, more than doubling the 658 received in 2000.¹⁶ While the Commission’s growing popularity has strained its resources and created problems in case processing times, it indicates that survivors of human rights abuse in the Americas value the inter-American system as a means of addressing injustice that they have suffered on the national level.

The individual case procedure established by the American Convention on Human Rights (“American Convention”) and the Commission’s Rules of Procedure includes an admissibility stage and a merits stage.¹⁷ At any point during this proceeding, the

13. JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 5-7 (2003).

14. Organization of American States, American Convention on Human Rights art. 41, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

15. Inter-Am. Comm’n H.R. [IACHR], *Annual Rep. of the Inter-Am. Comm’n H.R.*, at 1-15, OEA/Ser.L/V/II (Mar. 7, 2011) [hereinafter *IACHR 2010 Annual Report*].

16. *Id.*

17. ACHR, *supra* note 14, arts. 44-47; Rules of Procedure of the Inter-

Commission may preside over a friendly settlement process if the parties so request, and if settlement discussions do not produce the results desired by the parties, the Commission continues to process the case.¹⁸ In the event that the Commission finds violations of the relevant human rights instruments at the conclusion of its merits review, it will prepare a preliminary report with recommendations to the State to come into compliance with its obligations.¹⁹ If the State fails to comply with the Commission's recommendations, the Commission may issue a final decision publicly,²⁰ or in those cases involving one of the 21 countries that have ratified the contentious jurisdiction of the Court,²¹ it may submit the case for review by the Court.²² At the conclusion of 2010, the Commission reported that 1,584 cases were pending before it, and that during that year it had submitted 16 cases to the jurisdiction of the Inter-American Court.²³

Once submitted to the jurisdiction of the Inter-American Court, a case will proceed through a jurisdictional, or preliminary objections stage, a merits stage, and a reparations and costs stage.²⁴ Over the years, as the caseload of the Court has grown, these procedures have become more streamlined. Where it once took the Court years to proceed through these three stages individually,²⁵ it is now common

American Commission on Human Rights, *approved* November 13, 2009, arts. 30-37,

<http://www.oas.org/en/iachr/mandate/Basics/22.RULES%20OF%20PROCEDURE%20IA%20COMMISSION.pdf> [hereinafter IACHR Rules of Procedure].

18. See IACHR Rules of Procedure, *supra* note 17, art. 40; see also ACHR, *supra* note 14, arts. 48, 50.

19. See IACHR Rules of Procedure, *supra* note 17, art. 44.2; see also ACHR, *supra* note 14, art. 50.

20. See IACHR Rules of Procedure, *supra* note 17, art. 47; see also ACHR, *supra* note 14, art. 51.

21. See ACHR, *supra* note 14, art. 62.

22. See IACHR Rules of Procedure, *supra* note 17, art. 45; see also ACHR, *supra* note 14, art. 50.

23. IACHR 2010 Annual Report, *supra* note 15.

24. Inter-Am. Ct. H.R. Rules of Procedure, *supra* note 7, arts. 35-69.

25. See, e.g., Velásquez Rodríguez v. Honduras, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1 (Jun. 26, 1987) [hereinafter Velásquez Rodríguez, Preliminary Objections] (ruling on only the preliminary objections of the state and noting that the Court would follow with a hearing on the merits); Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1 (Jul. 29, 1988) [hereinafter Velásquez Rodríguez, Merits] (ruling on the merits of the case after a hearing before the Court); Velásquez Rodríguez v.

for the Court to resolve all three stages of litigation in one written decision published after a single public hearing.²⁶ A decision then enters into a compliance phase, the procedures for which will be described in more detail below. By the end of 2010, the Inter-American Court had reached final dispositions in 126 contentious cases.²⁷

By all accounts, final decisions by both the Commission and Court are generally received unenthusiastically by states, and efforts to comply are generally slow if they exist at all. The Commission published implementation data in its 2010 Annual Report with regard to the 142 cases that it had resolved through friendly settlement agreement or final merits decision since 2000, when it first started collecting such data.²⁸ According to that data, states have fully complied with recommendations in 15 percent of its cases, taken some steps towards compliance in 65 percent of its cases, and refused to comply with any recommendations in 20 percent of its cases.²⁹ This can be contrasted with the information provided by the Inter-American Court with respect to compliance in its annual reports. Between 1989, when the Court issued its first reparations decision, and 2009, the Court had issued a total of 115 reparations decisions in contentious cases.³⁰ In its 2010 Annual Report to the

Honduras, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1 (Jul. 21, 1989) [hereinafter *Velásquez Rodríguez v. Honduras, Reparations and Costs*] (declaring the reparations and costs at the end of the case).

26. See, e.g., *Humberto Sánchez v. Honduras*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 99 (Jun. 7, 2003) (combining multiple phases of the case into one written judgment). There does exist the possibility, albeit rare, that the Court will decide a case without first holding a public hearing. See Inter-Am. Ct. H.R. Rules of Procedure, *supra* note 7, art. 15.1 (contemplating this possibility).

27. See *Decisions and Judgments*, INTER-AMERICAN COURT OF HUMAN RIGHTS, www.corteidh.or.cr/casos.cfm (last visited Mar. 8, 2012) (listing the jurisprudence of the Court regarding contentious cases, including the final disposition of numerous cases).

28. *IACHR 2010 Annual Report*, *supra* note 15, ch. 3 (describing the status of compliance with the recommendations of the IACHR in cases from 2000-2010).

29. *Id.* at 67-74. Specifically, the Inter-American Commission reported that of the 143 friendly settlement agreements and final merits decisions it had issued since 2000, 22 (or 15 percent) had reached “full compliance,” 28 (or 20 percent) were “pending compliance,” and 93 (or 65 percent) were in a state of “partial compliance.” *Id.*

30. See *Decisions and Judgments*, *supra* note 27 (listing all of the Court’s

OAS, the Court reported that it was monitoring compliance with 102 of the 115 reparations decisions it had issued by the close of 2009, which translates into a rate of full compliance of just over 11 percent.³¹

While the rates of full compliance before the Commission and the Court would appear to indicate that the experience of each of these bodies is similar, a more nuanced approach provides a more accurate picture. For example, some observers have begun to explore cases of partial compliance in more detail and review which parts of the remedial orders of the bodies are implemented by states. One study reviewed the implementation of 462 separate remedies recommended in final merits decisions and friendly settlement agreements of the Inter-American Commission and ordered in reparations decisions of the Inter-American Court between 2001 and 2006.³² The study found an 11 percent rate of full observance with specific remedies recommended by the Commission, an 18 percent rate of partial observance, and an unfortunate 71 percent rate of non-observance with recommendations in final merits decisions.³³ Looking then at the Court, the study found a 29 percent rate of total observance with the different types of remedies ordered, a 12 percent rate of partial observance, and a 59 percent rate of non-observance.³⁴ These numbers indicate that, as a general matter, states tend to comply with more of the reparations ordered by the Court than those recommended by the Commission.

One explanation for the difference in rates of implementation of the decisions of these two bodies is the common perception that the Commission issues non-binding recommendations while the Court's judgments are legally binding. While the Court itself has found that

decisions and judgments in contentious cases, including those with reparations).

31. Inter-Am. Ct. H.R., *Annual Rep. of the Inter-American Court of Human Rights: 2010*, at 79-82 (2011). Moreover, as of the date of this writing, no other case has been closed as a result of full compliance. See *Decisions and Judgments*, *supra* note 27.

32. See Basch et al., *supra* note 11, § III.3.

33. See *id.*

34. *Id.* At the same time, the higher level of implementation of remedies agreed to in friendly settlement procedures, which the previously cited study found to have a 54 percent rate of observance, and corresponding 16 percent and 30 percent rates of partial observance and non-observance. *Id.* § III.4.

states have the obligation to comply with the recommendations of the Commission in good faith, it has also recognized that interpreted the word "recommendation" to conform to its ordinary meaning³⁵ With respect to the Court, the American Convention provides that its decisions are "final and not subject to appeal," and while parties can request that the Court clarify the scope or meaning of its decision, once such clarification has been provided, "States Parties to the Convention undertake to comply with the judgment of the Court."³⁶ Moreover, the 21 states subject to these binding provisions have taken on those obligations through a separate process of ratification, which likely indicates more engagement with the inter-American process generally.³⁷ In that sense, the states themselves have manifested with greater seriousness their willingness to participate in the adjudicatory process, and therefore may be more inclined to comply with the ordered outcome.³⁸

Further, there is a fairly substantial difference between the levels of detail and specificity with which the Court and Commission approach reparations. Where the Court takes arguments from the parties on reparations and issues a reasoned reparations decision,³⁹ the Commission moves more quickly between finding a violation and articulating remedial steps that should be taken.⁴⁰ Similarly, the

35. See *Loayza Tamayo v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33 (Sep. 17, 1997), ¶¶ 79-80.

36. *ACHR*, *supra* note 14, arts. 67-68.

37. *ACHR*, *supra* note 14, art. 62 (signatories of the American Convention "may, upon depositing its instrument of ratification or adherence to th[e] Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of th[e] Convention.").

38. Of course, state interests often change when governments change and the level of engagement with the Inter-American system is subject to change just like any other political platform; take for example Peru under President Alberto Fujimori. See, e.g., *Castillo Petruzzi et al. v. Peru*, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 41, ¶¶ 99-104 (Sept. 4, 1998) (overruling Peru's preliminary objections that "the sovereign decision . . . of Peru cannot be modified much less rendered ineffective by any . . . international authority").

39. See, e.g., *Gomes Lund et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 245-324 (Nov. 24, 2010) (discussing in detail the obligations of Brazil arising out of the Court's findings in this case, including summaries of arguments made by the state and the victims' representatives on each matter).

40. See, e.g., *de Oliveira v. Brazil*, Case 12.308, Inter-Am. Comm'n H.R.,

reparations orders of the Court tend to be fairly specific while the recommendations of the Commission can be quite vague. This greater level of specificity in the reparations ordered by the Court reflects more specific expectations and creates a clearer framework for follow-up. Moreover, the Court has engaged in a serious process over the last decade to develop procedures for compliance supervision, where the Commission has largely limited its compliance activities to annual reporting.⁴¹

B. THE EVOLUTION OF A COMPLIANCE PHASE OF INTER-AMERICAN COURT LITIGATION

When the Inter-American Court issued its first reparations orders in 1989 against Honduras,⁴² it took affirmative steps to outline a framework for monitoring compliance with those orders. In both *Velásquez Rodríguez v. Honduras* and *Godínez Cruz v. Honduras*, in which the Court condemned a systematic practice of forced disappearance in Honduras, the Court ordered “just compensation” to be paid to the families of the victims, and detailed the exact amounts to be paid and specified the “form and amount of such compensation.”⁴³ It is significant that this was the only remedy mentioned in the operational portion of the Court’s reparations orders, at the conclusion of which it provided that it would “supervise the indemnification ordered and . . . close the file only when the compensation has been paid.”⁴⁴ The Court closed both of

Report No. 37/10, ¶¶ 151-59 (2010), <http://www.oas.org/en/iachr/decisions/merits.asp> (assessing the allegations against Brazil, finding it violated the American Convention on Human Rights, and promptly issuing recommendations for reparations to the victim’s family).

41. See OPEN SOC’Y JUSTICE INITIATIVE, FROM JUDGMENT TO JUSTICE: IMPLEMENTING INTERNATIONAL AND REGIONAL HUMAN RIGHTS DECISIONS 77-88 (2010) (describing in detail the compliance reports from the Commission and the number of new compliance mechanisms developed by the Court over the last decade).

42. *Velásquez Rodríguez v. Honduras*, Reparations and Costs, *supra* note 25; see also *Godínez Cruz v. Honduras*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 8 (Jul 21, 1989) [hereinafter *Godínez Cruz*].

43. *Velásquez Rodríguez*, Reparations and Costs, *supra* note 25, ¶¶ 1-6; see also *Godínez Cruz*, *supra* note 42.

44. *Velásquez Rodríguez*, Reparations and Costs, *supra* note 25, ¶ 60; see also

the these cases when Honduras completed payment to the victims' families in 1996, an act finalized under president Roberto Reina, former Judge for the Inter-American Court.⁴⁵

The Court also explicitly tied its compliance functions largely to payment of pecuniary damages in the next two reparations orders in *Aloeboetoe et al. v. Suriname*—a case involving seven members of a Maroon ethnic community that had been killed by members of the military,⁴⁶ and *Gangaram-Panday v. Suriname*—a case of a man who had died in military detention,⁴⁷ issued in 1993 and 1994 respectively. In 1996, however, the same year that the Court closed the Honduran cases, the Court explicitly ordered for the first time in the operative portion of its reparations decision in *El Amparo v. Venezuela* that “the State of Venezuela shall be obliged to continue investigations into the events referred to in the instant case, and to punish those responsible,” and indicated that it would “supervise compliance with this Judgment and that only when it has been executed will the case be considered closed.”⁴⁸

This was the first time that the Court made closure of a case contingent on a completed investigation of human rights abuse and prosecution of those responsible. Notably, the Court is still monitoring compliance in *El Amparo*,⁴⁹ as it is in every decision it has since issued in which it has required investigation, prosecution and punishment of perpetrators.

As the compliance challenge became clearer to the Court, it took more deliberate steps to address state reticence. In the late 1990s,

Godínez Cruz, *supra* note 42, ¶ 54.

45. See Cavallaro & Brewer, *supra* note 6, at 791 (describing how supranational litigation can support human rights advocacy by certain governmental actors).

46. *Aloeboetoe et al. v. Suriname*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 96 (Sep. 10, 1993) (requiring the government to reopen and staff a school as part of the damages awarded to the victims).

47. *Gangaram Panday v. Suriname*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 16, ¶ 69-71 (Jan. 21, 1994).

48. *El Amparo v. Venezuela*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 28, ¶ 64 (Sep. 14, 1996).

49. See *El Amparo v. Venezuela*, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. (July 4, 2006); see also Inter-Am. Ct. H.R., *Annual Rep. of the Inter-Am. Ct. H.R.: 2008* (2009).

when the composition of the Court changed and the new judges demonstrated a more progressive and nuanced approach to reparations,⁵⁰ the need to be more comprehensive in monitoring compliance became even more important. Specifically, during these years, President Alberto Fujimori of Peru began to openly contest the decisions of the Inter-American Court, refusing to implement numerous reparations orders.⁵¹

It is likely no coincidence that when Fujimori attempted to withdraw from the contentious jurisdiction of the Court in 1999, arguing that the Court was interfering with the State's right to control a terrorist threat, the Court took the unprecedented step of issuing its first ever compliance orders.⁵² In 2001, the Court took the additional steps of including in the reparations decisions issued in *Barrios-Altos v. Peru* and *Durand and Uguarte v. Peru* orders that Peru present a report on compliance to the Court within six months of the date that the decision was issued.⁵³ In *Cantoral Benavides v. Peru*, the Court went a step further and required a report "every six months" following the decision.⁵⁴

These new procedures, which the Court appears to have initially developed as a response to the Fujimori regime's non-compliance, soon became standard practice. By 2002, the Court had begun to attach timetables to the specific aspects of its reparations decisions, which had the effect of clearly establishing its expectations for when

50. See generally Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008).

51. See Cacado Trinidad, *Jornadas de Derecho Internacional* (2006).

52. CENTRO POR LA JUSTICIA Y EL DERECHO INTERNACIONAL [CEJIL], IMPLEMENTACIÓN DE LAS DECISIONES DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: JURISPRUDENCIA, NORMATIVA Y EXPERIENCIAS NACIONALES [IMPLEMENTATION OF THE DECISIONS OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: LAW, LEGISLATION AND NATIONAL EXPERIENCES] 32 n.73 (Viviana Krsticevic & Liliana Tojo eds., 2007) [hereinafter CEJIL IMPLEMENTATION I] (citing specifically Resolutions on Compliance in *Castillo Partruzzi et al.* and *Loyaza Tamayo*).

53. *Barrios Altos v. Peru*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 87, ¶ 50 (Nov. 30, 2001); *Durand & Ugarte v. Peru*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 89, ¶ 45 (Dec. 3, 2001).

54. *Cantoral Benavides v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 99 (Dec. 3, 2001).

the state should pay pecuniary damages, issue public apologies, or complete legislative and administrative reforms to guarantee non-repetition.⁵⁵ In almost every decision since issued, the Inter-American Court has incorporated a reporting requirement, though it has fluctuated between six months and one year in 2002 and 2003, one year in 2004 and 2005, one year and 18 months in 2006 and 2007, and six months and one year in 2008 and 2009.⁵⁶

The Court continued the process of developing its compliance procedures with a 2005 Resolution entitled "Supervision of Compliance with Sentences (Applicability of Article 65 of the American Convention on Human Rights)."⁵⁷ The Resolution indicated that the Court will make a final determination with regard to compliance after the prescribed time periods indicated in the judgment lapses, and then report that case to the OAS in its annual report until such time as the state demonstrates implementation of all reparations ordered.⁵⁸ In the Resolution, the Court retains its ability to require reporting about compliance whenever it deems such reporting necessary.⁵⁹ Since the issuance of the 2005 Resolution, the Court has progressively developed its compliance practices.

In 2008, the Court convened its first compliance hearings to provide the parties with an opportunity to present their evidence and arguments orally.⁶⁰ The General Assembly of the OAS issued a Resolution in 2009 "recognizing the important and constructive practice begun by the Inter-American Court of Human Rights to hold closed hearings on the monitoring of compliance with its judgments,

55. *Bámaca-Velásquez v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶¶ 96-105 (Feb. 22, 2002).

56. Notably, while the timetables associated with specific reparations have become increasingly specific over time, in recent years, the Court has become less consistent in establishing timetables for State compliance reporting, actually declining to do so in a handful of recent decisions.

57. *Aplicabilidad del Artículo 65 de la Convención Americana sobre Derechos Humanos [Applicability of Article 65 of the American Convention on Human Rights]*, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. (Inter-Am. Ct. H.R. June 29, 2005), available at www.corteidh.or.cr/docs/supervisiones/general_29_06_05.pdf.

58. *Id.* ¶ 9.

59. See CEJIL IMPLEMENTATION I, *supra* note 52, at 33.

60. Interview with Francisco Quintana, Deputy Program Director, Andean, North America & Caribbean Region, CEJIL, in Washington, D.C. (Dec. 2009).

and the outcomes thereof.”⁶¹ Just as the practice of closed hearings with one to three judges became institutionalized, the Court again began to innovate, creating opportunities for public hearings,⁶² and hearings on multiple cases involving one country and a similar type of reparations order.⁶³ It is clear that this particular component of the compliance supervision procedures of the Court has only begun to evolve, and if history is any indicator, this is likely just the newest facet of a very dynamic process.

Interestingly, while the articulation of this process began in 1999, the Court passed on the opportunity to institutionalize the reporting procedures when it reformed its Rules of Procedure along with the Inter-American Commission in 2001.⁶⁴ However, in the Court's newest revision of its Rules of Procedure, which entered into force on January 1, 2010, the Court took the decisive step of providing the basis for all of these compliance-related procedures.⁶⁵

The 2010 Rules of Procedure provide that “[t]he procedure for monitoring compliance with the judgments and other decisions of the Court shall be carried out through the submission of reports by the State and observations to those reports by the victims or their legal representatives,” and that “[t]he Commission shall present observations to the state's reports and to the observations of the victims or their representatives.”⁶⁶ They further empower the Court to request expert opinions about issues relating to compliance where appropriate, and provide that it may “convene the State and the victims' representatives to a hearing in order to monitor compliance

61. See IACHR, *Observations and Recommendations on the Annual Report of the Inter-American Court of Human Rights*, AG/RES. 2500 (XXXIX-O/09) (Jun. 4, 2009) [hereinafter *Observations and Recommendations*].

62. See Inter-Am. Ct. H.R., *Annual Rep. of the Inter-Am. Ct. H.R.* 2009, at 65 (2010).

63. IACtHR, Resolution April 29, 2010, available at www.corteidh.or.cr/docs/asuntos/8casos_29_04_10.pdf (convening a hearing in eight Colombian cases simultaneously to hear submissions from the parties on the state's implementation of the Court's orders to provide medical and psychological treatment).

64. See generally Rules of Procedure of the Inter-American Court of Human Rights, June 1, 2001, OEA/Ser.L/V/I.4 rev.9 (2003).

65. See Inter-Am. Ct. H.R. Rules of Procedure, *supra* note 7, art. 69.

66. *Id.* art. 69.1.

with its decisions,” when it deems appropriate.⁶⁷ Finally, the Rules provide that “[o]nce the Tribunal has obtained all relevant information, it shall determine the state of compliance with its decisions and issue the relevant orders.”⁶⁸ These provisions lay out a flexible, though fairly reliable procedure that allows for litigants involved in Court cases to strategize about how they can use the Court to apply pressure on the state after a decision has issued.

II. TESTING THE COURT’S COMPLIANCE PROCEDURES AGAINST THE PRINCIPAL RECOMMENDATIONS AND CRITIQUES OF INTER-AMERICAN ACTORS

The need to develop strategies to improve implementation of inter-American human rights decisions has been recognized by system adjudicators, litigants and advocates, and some of the most prominent actors have formulated recommendations on how to address this challenge. These recommendations provide a coherent framework to evaluate the significance of the Court’s compliance procedures.

Former President of the Inter-American Court, Antonio Cançado Trinidad, consistently expressed his concern about the level of state observance of the Court’s decisions.⁶⁹ Cançado became an outspoken proponent of the “Europeanization” of the inter-American system with regard to implementation of the Court’s decisions. He contemplated a system for the OAS in which, like in the Council of Europe, jurisdiction over compliance with Inter-American Court decisions would pass from the Court itself to the political organs of the OAS once a decision had issued.⁷⁰

67. *Id.* art. 69.2-69.3.

68. *Id.* art. 69.4.

69. Antônio Augusto Cançado Trinidad, *Fragmentos de Primeras Memorias de la Corte Interamericana de Derechos Humanos*, JORNADAS DE DERECHO INTERNACIONAL (2007).

70. In the Council of Europe, jurisdiction over the enforcement of European Court of Human Rights judgments passes to the Committee of Ministers, a political organ of the Council that meets in closed sessions to deliberate about state implementation of the Court’s remedial orders. See Eur. Consult. Ass., *Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements*, 964th Sess. (May 10, 2006).

Specifically, Cançado's proposal was to create a political body within the Permanent Council of the OAS responsible for overseeing the implementation of the Court's decisions. The European model is enticing inasmuch as, historically, the European Court of Human Rights and the Committee of Ministers of the Council of Europe responsible for the enforcement of judgments have enjoyed relative success.⁷¹ Moreover, this proposal is insightful because it acknowledges the role of politics in implementing decisions of the Court. Nevertheless, it has thus far not been taken seriously as a proposal for reform by the OAS Member States,⁷² which would need to implement this change through the OAS General Assembly.

Short of this large scale reform to the structure of the inter-American system, Cançado has proposed a strategy for the "full application" of Article 65 of the American Convention,⁷³ which instructs the Court to report to the OAS General Assembly every year and "specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."⁷⁴ This strategy proposed by Cançado would have the President of the Court utilize the time provided to the Court during the General Assembly to denounce particularly recalcitrant states. Ideally, such an approach would thrust that state into dialogue with other states, which are the collective guarantors of human rights in regional systems,⁷⁵ and pressure a state into compliance. Cançado

71. See Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights* (Aug. 18, 2008) (unpublished manuscript), available at <http://www.stevendroper.com/ECHR%20Hawkins%20and%20Jacoby%20APSA%202008.pdf> (agreeing with the proposition that the ECHR theoretically has higher compliance than the IACtHR, but comparing the different systems in an attempt to explain varying degrees of compliance).

72. See, e.g., Michael J. Camilleri & Vivianna Krsticevic, *Making International Law Stick: Reflections on Compliance with Judgments in the Inter-American Human Rights System*, in *PROTECCIÓN INTERNACIONAL DE DERECHOS HUMANOS Y ESTADO DE DERECHO* 244 (Joaquín González Ibáñez ed., 2008).

73. Cançado Trindade, *Jornadas de Derecho Internacional* (2006).

74. *ACHR*, *supra* note 14, art. 65.

75. See Judge Antônio A. Cançado Trindade, President, Inter-American Court of Human Rights, Address Before the Committee on Juridical and Political Affairs, Organization of American States (Apr. 19, 2002) ("[T]he collective guarantee exercised by the Convention's states parties should not merely be reactive, coming into play when one of the Court's judgments is not observed; it should also be

cites two examples of this full application of Article 65 from his term as President of the Court, once denouncing the Fujimori regime in Peru for its refusal to implement Court orders with regard to its conduct in its fight against domestic terrorism, and again denouncing Trinidad and Tobago for practices related to capital punishment.⁷⁶ However, the fact that the Fujimori regime did not buckle under this pressure, and that Trinidad and Tobago ultimately withdrew its recognition of the Court's jurisdiction raises questions about the viability of relying on the pressure of the General Assembly in urging compliance.

Where Cançado's recommendations largely focus on the relationship between the Court and the Member States of the OAS *vis-à-vis* the General Assembly, other observers have focused on the relationship of the Court directly with the states. For example, Alexandra Huneus highlights in her work on the challenge of achieving compliance with Inter-American Court orders directed at judiciaries and public ministries that the judges and prosecutors ultimately responsible for compliance have very little invested in the cause.⁷⁷ Huneus suggests that the Court itself should reach out to the judicial organs of the nations against which they issue judgments and build relationships of mutual understanding to foster the commitment of these state actors to the implementation project.⁷⁸ Huneus encourages the Court to identify specific state actors that are responsible for implementing Court decisions at the domestic level, and simultaneously call on them to carry out their obligations while being more mindful of how they will receive the decisions and elevating their profile by incorporating them into a regional "social

proactive, in that all the states parties should previously have adopted positive measures of protection in compliance with the precepts of the American Convention.").

76. See Cançado Trindade, *Fragmentos de Primeras Memorias de la Corte Interamericana de Derechos Humanos*, 19-26 (discussing the Court's "full application" of Article 65 in cases of severe non-compliance, and recalling when the Court denounced the Fujimori regime's non-compliance with the decisions of the Court during the 2000 General Assembly and its statement against Trinidad & Tobago's reticence in the 2003 General Assembly).

77. See Alexandra Huneus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L. J. 493, 494 (2011).

78. *Id.* at 526.

network" of persons concerned with the rule of law.⁷⁹

Viviana Krsticevic, one of the most seasoned litigators in the inter-American system, has produced a comprehensive volume on the implementation of the decisions in the Inter-American Commission and Court.⁸⁰ Krsticevic emphasizes the importance of institutional and legal structures within countries as the key to the implementation of inter-American human rights decisions.⁸¹ She highlights formal mechanisms to incorporate international obligations into domestic court proceedings, specific implementation policies or mechanisms for coordination between agencies, and special procedures in the judicial sphere to overcome barriers to compliance.⁸² A subsequent volume on implementation issued by the Center for Justice and International Law (CEJIL), the organization Krsticevic directs, provides specific considerations for national legislators in creating national implementation mechanisms.⁸³ Other prominent inter-American actors have echoed this call for national implementation mechanisms, urging that any such mechanisms should have a "precise mandate,"⁸⁴ and a comprehensive basis for the interaction of all state agencies with a stake in implementation.⁸⁵

The national implementation mechanism model shifts the focus from the OAS Member States as collective guarantors of human

79. *Id.* at 529 (recognizing that "[c]ourts and prosecutors do not work in isolation . . .").

80. See generally CEJIL IMPLEMENTATION I, *supra* note 52.

81. *Id.*

82. *Id.* at 16, 69-91; see also Camilleri & Krsticevic, *supra* note 72, at 243-44.

83. See VIVIANA KRSTICEVIC, CEJIL, IMPLEMENTACIÓN DE LAS DECISIONES DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: APORTES PARA LOS PROCESOS LEGISLATIVOS [IMPLEMENTATION OF DECISIONS OF THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS: CONTRIBUTIONS TO THE LEGISLATIVE PROCESS] (2009) [hereinafter CEJIL IMPLEMENTATION II].

84. Soraya Long Saborio, *Aciertos y desaciertos de la Corte Interamericana de Derechos Humanos en el caso Baena Ricardo y otros v. Panamá (Caso Ley 25)* [Successes and Failures of the Inter-American Court of Human Rights in the case of Baena Ricardo et al. V. Panama (Case Law 25)], 5 REVISTA CEJIL 38 (2009).

85. See Ariel E. Dulitzky, *The Inter-American Commission on Human Rights, in DUE PROCESS OF LAW FOUND., VICTIMS UNSILENCED: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND TRANSNATIONAL JUSTICE IN LATIN AMERICA* 144-46 (Catherine A. Sunshine ed., Gretta K. Siebentritt trans., 2007) [hereinafter VICTIMS UNSILENCED] (analyzing the need for dialogue and interaction between the international organs and domestic institutions to ensure adequate compliance).

rights to the states as individual guarantors of human rights as signatories to the American Convention. The most comprehensive versions of such mechanisms have been established by law in Colombia and Peru and have played an important role in the effort to implement the decisions of the inter-American bodies in both of those contexts.⁸⁶ There have also been legislative processes to develop implementation laws in countries like Argentina and Brazil, though neither has produced concrete results.⁸⁷ This emphasis on national mechanisms highlights the importance of establishing processes and identifying the roles of specific state actors in carrying out implementation. Notably, however, the establishment of such mechanisms requires a level of engagement with the inter-American system that is not present in all states. As such, Krsticevic also urges strategic consideration of compliance beyond implementation mechanisms in a separate article co-authored by Michael Camilleri,⁸⁸ and has recognized in more recent writing the need for flexible case-specific strategies for compliance.⁸⁹

James Cavallaro and Emily Schaffer have observed that national implementation mechanisms are “insufficient to guarantee the effective implementation of decisions of the Inter-American supervisory bodies,” but have emphasized utility of such mechanisms to activists in their broader advocacy work.⁹⁰ Cavallaro

86. See Colombia, Law 288/96, Regulate the Procedure for the Indemnity of Victims of Human Rights Violations, (Jul. 5, 1996); see also Peru, Supreme Decree 014-2000-JUS, Regulate the Procedure to Follow-Up on the Recommendations of International Human Rights Bodies (Dec. 22, 2000); Supreme Decree No 015-2001-JUS, Approve the Regulations of the National Human Rights Advisory and Create the Special Commission to Follow-Up on International Procedures (Apr. 27, 2001); Law No 27.775, Regulate the Procedure for the Execution of Judgments Emited by Supranational Tribunals (June 27, 2002) (unofficial translations; laws not available in English).

87. See CEJIL IMPLEMENTATION I, *supra* note 52, Appendix.

88. Camilleri & Krsticevic, *supra* note 72, at 245 (claiming that NGOs should take a more active role in compliance monitoring as it “is critical to achieving the aims of their strategic litigation”).

89. See Viviana Krsticevic, *A Strategy for Improving the Level of Implementation of Judgments in the Inter-American System*, in 16 INTERIGHTS BULLETIN 91 (2010) (summarizing the various efforts of CEJIL and other advocates in increasing compliance within the Inter-American System through procedural and case specific changes).

90. James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking*

and Stephanie Erin Brewer have highlighted the role of advocacy in implementation efforts and stressed the need to coordinate litigation with "social movements . . . and others carrying on long-term advocacy campaigns or pushing for better policies."⁹¹ Cavallaro and Brewer emphasize that in order for Inter-American Court decisions to be most useful to these actors in carrying out their efforts to induce change, the tribunal must be attendant to the national context in which its decision will come down, a perspective that has been echoed by other Court observers.⁹² This vision of implementation highlights the importance of the advocacy initiatives that accompany Court litigation, and critique the Court's streamlined procedures as providing less space to develop the stories of emblematic human rights abuse, which undermines the utility of the decisions to advocates. Such an analysis turns the attention of the implementation debate to the advocates themselves, and urges creative initiatives that accompany inter-American litigation to make it more meaningful.

The essence of each of these recommendations emphasizes alternatively the role of the Inter-American Court before the OAS General Assembly, the Court in relation to specific states and sub-state actors, implementation mechanisms developed by individual states, and advocates that strategize at the national and local levels. The compliance procedures that have been developed by the Court over the past decade respond in some way to each of these recommendations and critiques, and provide a framework for their further incorporation. First, and perhaps most obviously, the Court's compliance procedures provide a means for the Court to continue to inform the General Assembly about issues related to the implementation of its reparations orders with regard to specific states. While the full application of Article 65 as described by Cançado has been used sparsely, and with limited success, the compliance procedures inherently value the exchange between the

Supranational Litigation of Economic and Social Rights in the Americas, 56 HASTINGS L.J. 217, 233 (2004).

91. Cavallaro & Brewer, *supra* note 6, at 770.

92. Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 109 (2008) (analyzing the Inter-American Court's interpretation of the regional treaties by reference to global human rights regimes and the European Court of Human Rights).

Court and the General Assembly and provide the possibility of more comprehensive reporting in the future, written and otherwise.

Second, the compliance proceedings can act as a forum for different implementation stakeholders to interface and as a surrogate for national implementation mechanisms where there are none and encourage the establishment of case-specific mechanisms. Examples are wide ranging, and include a compliance order in *Molina Thiessen v. Guatemala*, in which the Court urged the state to name interlocutors from the National Commission for Follow-Up and Support on the Strengthening of Justice (*Comisión Nacional para el Seguimiento y Apoyo al Fortalecimiento de la Justicia*, “CNSAFJ”) and the legislative branch in Guatemala to develop implementation plans for specific reparations orders that corresponded to them.⁹³ In the compliance proceedings in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Court encouraged the work of two committees created by Nicaragua to oversee different aspects of compliance, each of which provided a framework for ongoing debate on the national level about difficult matters related to implementation.⁹⁴ Similarly, in compliance with the Court’s decision in *Mapiripán Massacre v. Colombia*,⁹⁵ Colombia established a national mechanism to follow up on the implementation of the Court ordered reparations in that case, and the compliance procedures of the Court provided a means to review its work on the regional level.⁹⁶

93. *Molina Thiessen v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, “Having Seen” (Inter-Am. Ct. H.R. Nov. 16, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/molina_10_07_07%20ing.pdf.

94. See Leonardo J. Alvarado, *Prospects and Challenges in the Implementation of Indigenous Peoples’ Human Rights in International Law: Lessons From the Case of Awas Tingni v. Nicaragua*, 24 ARIZ. J. INT’L & COMP. L. 609, 619 (2007). See generally *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Monitoring Compliance with Judgment, Order of the Court, “Having Seen” (Inter-Am. Ct. H.R. May 7, 2008) [hereinafter *Awas Tingni*, Monitoring Compliance 2008], available at http://www.corteidh.or.cr/docs/supervisiones/mayagna_07_05_08_ing.pdf; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Monitoring Compliance with Judgment, Order of the Court, “Having Seen” (Inter-Am. Ct. H.R. Apr. 3, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/mayagna_03_04_09_ing.pdf.

95. *Mapiripán Massacre v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 311 (Sep. 15, 2005).

96. *Mapiripán Massacre v. Colombia*, Monitoring Compliance with Judgment, Order of the Court, “Having Seen” (Inter-Am. Ct. H.R. Jul. 8, 2009), available at

Finally, the compliance phase of Inter-American Court litigation can provide an authoritative response to states that push back against national advocacy strategies related to compliance. Just as advocacy initiatives that are born from national strategic action are crucial to give Court decisions meaning, the compliance phase of Court litigation provides a way to hold states accountable for negative reactions to these initiatives. In this regard, the compliance procedures provide advocates one way to recover some of the space they lost in the streamlining of the Court's procedures. Moreover, the compliance jurisprudence that is produced by this phase of litigation can be useful to advocates who are working to devise creative implementation strategies. Because many of the Court's reparations orders often follow a pattern, and the challenges faced by advocates urging that states comply with them can be similar, this body of jurisprudence can provide a means for advocates around the continent to communicate with one another and exchange strategies. Before reviewing the strategic value of this jurisprudence, it is important to systematize that jurisprudence so as to understand the framework that it provides for understanding tendencies of states with regard to the implementation of Court decisions.

III. SYSTEMATIZING COMPLIANCE JURISPRUDENCE IN TERMS OF REPARATIONS TO BETTER UNDERSTAND THE IMPLEMENTATION OF COURT DECISIONS

In order to facilitate a closer look at the body of compliance jurisprudence that has been developed over the past decade and to identify some of its uses for inter-American litigants, preparation for the present article included a review of all 115 reparations decisions issued by the Court between 1989 and 2009. In 91 of those 115 decisions, the Court has issued compliance orders, and in many of those cases it has issued multiple such orders.⁹⁷ Because the compliance orders are consistently organized as point-by-point

http://www.corteidh.or.cr/docs/supervisiones/mapiripan_08_07_09_ing.pdf.

97. These 91 cases were identified by comparing the reparations decisions reported by the Inter-American Court on its website, <http://www.corteidh.or.cr/casos.cfm>, with the supervision orders also published on the website, <http://www.corteidh.or.cr/supervision.cfm>.

discussions of the specific reparations ordered by the Court, this information was organized, systematized and coded in this way.⁹⁸

It has been observed that the remedial approaches by the Inter-American Court have evolved progressively over the years into a broad and nuanced framework for repairing human rights violations.⁹⁹ That framework has also become somewhat consistent, and therefore reliable, which means that inter-American litigants can predict at the outset the range of reparations that may be available to them if they prevail in their litigation. Similarly, an analysis of the systematized compliance jurisprudence can provide insight into the likelihood of achieving implementation of those reparations.

The analysis undertaken for this article identified two tiers of reparations, separated by the frequency with which they have been ordered. The first tier, comprised of those reparations ordered most often by the Inter-American Court, includes: (1) money damages and costs, (2) symbolic recognitions of responsibility and apologies, (3) legislative and administrative measures to guarantee non-repetition, and (4) investigation, prosecution, and punishment of those responsible.¹⁰⁰

The second tier of reparations is composed of a variety of measures ordered less frequently but still with some degree of consistency, and includes: (5) human rights training for public officials, as well as a wide variety of restitution and cessation measures, such as: (6) annulling or otherwise revising national judicial or administrative decisions, (7) provision of medical and psychological care to survivors of human rights abuse, (8) return of victims' remains to their next-of-kin, (9) reinstatement to prior employment, (10) scholarships or educational benefits for affected

98. Compliance orders issued through March 2011 were reviewed as part of this study.

99. See Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351, 365–86 (2008) (explaining the historical change in Inter-American Court reparation practices that has led to a varied and comprehensive remedial framework allowing for numerous non-monetary and equitable remedies).

100. See *id.* at 371–86 (outlining the current remedial approach adopted by the Inter-American Court toward individuals, society as a whole, and discrete communities).

persons, (11) protection of persons at risk, (12) amendment of public records, and (13) the establishment of development funds and other community remedies.¹⁰¹

While many victims' representatives are familiar with this range of possible remedial orders and will share this information with the individuals and communities they represent at different stages of litigation, what is less common is to acknowledge with the intended beneficiaries the likelihood of successful implementation of these remedies. While this is by no means a science, and representatives should feel neither completely confident in such predictions nor limited by them, with more than 90 regional experiences with implementation of Inter-American Court decisions on record, it would be irresponsible not to recognize the trends.

The category of reparations that is most consistently ordered by the Court is money damages and costs. As was described above, these were the only reparations ordered in the first Inter-American Court cases, and they have continued to be a central feature of the decisions of the Court even as the remedial framework has diversified. This category includes all monetary relief ordered by the Court to the victims and survivors identified in the proceedings, which can include individual victims,¹⁰² communities,¹⁰³ and the families or next-of kin of those most directly affected.¹⁰⁴ Such compensation can be ordered to repair both material, and non-material losses.¹⁰⁵ This category also includes fees and costs that states are often ordered to pay to lawyers and NGOs that represent victims before national courts and the inter-American bodies.

101. *See id.*

102. *See, e.g.,* Loayza-Tamayo v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 192(4a) (Nov. 27, 1998) [hereinafter Loayza-Tamayo] (awarding the victim, Ms. Maria Elena Loayza-Tamayo, \$99,190.30).

103. *See, e.g.,* Sawhoyamaza Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 8 (Mar. 29, 2006) (mandating that Paraguay pay compensation for non-pecuniary damages, costs and expenses to members of the Sawhoyamaza Community).

104. *See, e.g.,* Loayza-Tamayo, *supra* note 102, ¶ 192(4b, d) (awarding \$18,000 to next of kin of the victim).

105. *See, e.g.,* Escué-Zapata v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 165, ¶ 196(8) (July 4, 2007) (ordering Colombia to pay compensation for pecuniary and non-pecuniary damages).

According to the compliance jurisprudence in the 91 cases reviewed in preparing this article, the Court has issued 208 discrete measures ordering a state to pay money damages or costs, and states fully complied with 126, which constitutes an implementation rate of approximately 60 percent.¹⁰⁶ While 60 percent does not appear remarkable, considering the above-mentioned rates of full implementation below 20 percent, this is actually quite a promising rate of compliance. Indeed, monetary damages are among the most reliably implemented measures, so for those survivors of human rights abuse looking principally for the state to recognize their injury through cash payments, the Inter-American Court could provide a good option.

Of course, when advising the potential beneficiaries of inter-American litigation, these rates can be calculated for specific countries as well as certain types of violations. For example, the Inter-American Court has issued 13 such orders against Ecuador, and the Ecuadorian state has implemented 9 monetary damages orders, which is a rate of 69 percent.¹⁰⁷ Paraguay on the other hand has only

106. The central criterion for this category was an order for payment of money. Excluded from this category are those orders from the Court instructing how such money should be paid, such as orders to set up a trust for a minor, pay the amount in a specific current, or not to charge taxes. Additionally, related orders to pay interest on late payments were excluded, inasmuch as compliance with such orders is related to non-implementation of underlying orders and it was decided that this might skew slightly the results.

107. *See, e.g.,* Acosta-Calderón v. Ecuador, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 7, 2008), *available at* http://www.corteidh.or.cr/docs/supervisiones/acosta_07_02_08_ing.pdf; Albán Cornejo et al. v. Ecuador, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Aug. 27, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/cornejo_27_08_10_ing.pdf; Benavides-Cevallos v. Ecuador, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 27, 2003), *available at* http://www.corteidh.or.cr/docs/supervisiones/cantoral_14_11_10_ing.pdf; Tibi v. Ecuador, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. July 1, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/tibi_01_07_09%20_ing.pdf (recognizing that several orders for monetary damages were complied with, but also noting several orders of payment still fully or partially unfulfilled); Suárez-Rosero v. Ecuador, Monitoring Compliance with Judgment, Order of the President of the Court (Inter-Am. Ct. H.R. Mar. 20, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/suarez_20_03_09.pdf; Zambrano-Vélez et al. v. Ecuador, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R.

implemented 5 out of 14, at a much lower rate of 36 percent.¹⁰⁸ As another point of comparison, the Paraguayan state has implemented money damages ordered in the freedom of expression case *Ricardo Canese v. Paraguay*, which is also the only case against Paraguay that the Court has deemed fully implemented and closed, but not in the indigenous rights cases *Yakye Axa v. Paraguay* and *Sawhoyamaxa v. Paraguay*.¹⁰⁹

The second category of reparations reviewed for this article includes a wide range of symbolic admissions of responsibility and apologies to affected persons which are largely innovations of the Inter-American Court. These measures require states to publish pertinent parts of the final decision in a newspaper of national circulation, organize and carry-out a public event acknowledging international responsibility for human rights violations and asking forgiveness from victims, build memorials, name plazas, streets, and buildings after victims, and create scholarships in victims' names.¹¹⁰

Nov. 23, 2010), available at http://www.corteidh.or.cr/docs/supervisiones/zambrano_23_11_10_ing.pdf (declaring the state to have partially failed to comply with an order to pay monetary damages by failing to pay moratorium interest owed on the damages).

108. See *Ricardo Canese v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Aug. 6, 2008), available at http://www.corteidh.or.cr/docs/supervisiones/canese_06_08_08_ing.pdf; *Goiburú et al. v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 19, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/goiburu_19_11_09_ing.pdf; *Vargas-Areco v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 24, 2010), available at http://www.corteidh.or.cr/docs/supervisiones/vargas_24_11_10_ing.pdf (deciding to continue to monitor the state's failure to pay moratorium interest for compensation for pecuniary and non-pecuniary damages even though the state had made monetary payments to victims).

109. Compare *Ricardo Canese v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Aug. 6, 2008), available at http://www.corteidh.or.cr/docs/supervisiones/canese_06_08_08_ing.pdf, with *Yakye Axa Indigenous Community v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 8, 2008), available at http://www.corteidh.or.cr/docs/supervisiones/yakyeaxa_08_02_08-ing.pdf, and *Sawhoyamaxa Indigenous Community v. Paraguay*, Monitoring Compliance with Judgment, Order of the President of the Court, ¶¶ 14-16 (Inter-Am. Ct. H.R. May 20, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/sawhoyamaxa_20_05_09.pdf (noting that the state party made partial payments to victims).

110. See, e.g., *Myrna Mack-Chang v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 301(7-9, 11, 12) (Nov. 25, 2003)

Out of 131 such measures ordered by the Court, 84 have been implemented, which is a rate of approximately 64 percent. These measures also enjoy a comparatively high rate of compliance, which means that victims can think creatively about how they would like their hardship recognized, and states may well comply. Important is that, while the implementation of these measures often requires little more than a simple executive act, they can be incredibly significant to survivors of human rights abuse that have searched years for some acknowledgment.

One context in which these measures have been particularly significant is in Guatemala, where the Court has ordered these measures in seven of the eleven cases reviewed for this article.¹¹¹ In those seven cases, the Court has issued 19 orders for symbolic reparation, and Guatemala has implemented all but 2, which

(ordering the state to publish facts of the case in a national newspaper, carry out a public act of acknowledgment of responsibility, publicly honor the victims, establish a scholarship in the name of Myrna Mack Chang, and name a well-known street after the victim).

111. *See, e.g.,* Villagrán-Morales et al. v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 77, ¶ 123(17) (May 26, 2001) (ordering Guatemala to designate an educational center with a name relating to the victims of the case); Raxcacó-Reyes v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 133, ¶ 145(13) (Sept. 15, 2005) (ordering the state to publish facts of the case in a national newspaper or gazette); Myrna Mack-Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 301(8, 9, 11, 13) (Nov. 25, 2003); Molina-Theissen v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 108, ¶ —106(4-6) (July 3, 2004) (mandating that the state pay pecuniary and non-pecuniary damages to victims as well as adopt and enforce legislation in compliance with international legal norms and treaties); Bámaca-Velásquez v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 106(3) (Feb. 22, 2002) (ordering the state to publish the facts of the case and carry out an act of public recognition of responsibility); Carpio-Nicolle et al. v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 117, ¶ —155(4-6) (Nov. 22, 2004) (ordering the state to carry out a public act in recognition of its responsibility and publish facts of the case in the state gazette, a national newspaper, and in a bulletin with the highest circulation within the armed forces); Plan de Sánchez Massacre v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 125(2-6) (Nov. 19, 2004) (ordering the state to carry out a public act in each of the villages affected, publicly honor the victims, translate and publish the American Convention on Human Rights into the local dialect, and publish the facts of the judgment in national publications).

constitutes an implementation rate of approximately 89 percent.¹¹² The most common of such measures are orders to publish the Court's judgment in a periodical of national circulation,¹¹³ and the organization of a public ceremony admitting responsibility for the human rights violations and asking for forgiveness.¹¹⁴ Other symbolic measures ordered by the Court are requirements to name educational centers after children murdered in *Villagran Morales* and *Molina Thiessen*, naming a street and a scholarship after the victim in *Myrna Mack Chang*, and creating a memorial chapel for the victims in *Plan de Sanchez*.¹¹⁵ Two measures that have not been implemented

112. See Carpio-Nicolle et al. v. Guatemala, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. July 1, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/carpio_01-07-09_ing.pdf (declaring Guatemala's failure to hold a public ceremony acknowledging its responsibility as it was ordered to do); Plan de Sánchez Massacre v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, ¶ 8(3b) (Inter-Am. Ct. H.R. July 1, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/sanchez_01_07_09_ing.pdf (noting Guatemala's failure to translate the American Convention on Human Rights into Maya-Achi and have it published).

113. See Bámaca-Velásquez v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 106(3) (Feb. 22, 2002); Myrna Mack-Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 301(7) (Nov. 25, 2003); Carpio-Nicolle et al. v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 117, ¶ 155(4) (Nov. 22, 2004); Molina-Theissen v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 108, ¶ 106(4) (July 3, 2004); Plan de Sánchez Massacre v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 125(4) (Nov. 19, 2004); Raxcacó-Reyes v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 133, ¶ 145(13) (Sept. 15, 2005).

114. See Bámaca-Velásquez v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 106(3) (Feb. 22, 2002); Myrna Mack-Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 301(9) (Nov. 25, 2003); Carpio-Nicolle et al. v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 117, ¶ 155(5) (Nov. 22, 2004); Molina-Theissen v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 108, ¶ 106(5) (July 3, 2004); Plan de Sánchez Massacre v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 125(2, 3) (Nov. 19, 2004).

115. See Villagrán-Morales et al. v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 77, ¶ 123(7) (May 26, 2001); Myrna Mack-Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 301(11, 13) (Nov. 25, 2003); Molina-Theissen v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 108, ¶ 106(6) (July 3, 2004); Plan de Sánchez Massacre v. Guatemala, Reparations and

by Guatemala include an order to translate the American Convention into Maya-Achi and disseminate it within the community of Plan de Sacherz,¹¹⁶ and an order to hold a public ceremony to acknowledge state responsibility for the extrajudicial execution of a political opposition leader in *Carpio-Nicolle*.¹¹⁷ In the Guatemalan context, the state's clear willingness to implement this type of order should encourage litigants to get more creative with the types of symbolic reparations they request.

After these two categories most often ordered in Inter-American Court decisions, there are numerous others that reveal a more troubling trend of non-implementation. The first of these is a category of legislative and administrative measures, which the Court will order when it identifies violations of a systemic nature. Such measures will often consist of an order to modify national legal frameworks to comply with international human rights standards, or to institute legislative and administrative measures to provide national institutions with all the necessary means to effectively perform their duties, in a way that permits the enjoyment of human rights.¹¹⁸ The Court has referred to improving access to national courts, the effectiveness of public prosecutors, and prison conditions.¹¹⁹ Out of 77 legislative and administrative measures ordered by the Court, only 15 have been fully implemented, which constitutes a rate of implementation of approximately 19 percent.

Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 125(6) (Nov. 19, 2004).

116. Plan de Sánchez Massacre v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, ¶ 125(3) (Inter-Am. Ct. H.R. July 1, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/sanchez_01_07_09_ing.pdf.

117. Carpio-Nicolle et al. v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, ¶ 2b (Inter-Am. Ct. H.R. July 1, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/carpio_01-07-09_ing.pdf (noting that the state had not complied with the order to carry out a public ceremony to acknowledge its responsibility).

118. See, e.g., Chaparro-Alvarez & Lapo-Íñiguez v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 170, ¶ 289(11) (Nov. 21, 2007) ("The state must adapt its legislation within a reasonable time to the parameters of the American Convention on Human Rights . . .").

119. See Raxcacó-Reyes v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 133, ¶ 145(7, 9) (Sept. 15, 2005).

If these reparations are purely administrative in nature, they can be implemented by the executive alone; however, it is much more common for the legislature to be implicated in the compliance process, which brings with it a unique set of complications. The countries that have implemented this category of reparations order are Argentina, Bolivia, Costa Rica, Chile, Ecuador, Guatemala, Honduras, Nicaragua, and Paraguay.¹²⁰ This does not mean of course that these countries will always implement such measures; indeed, there are a number of cases in which some of these same countries

120. See *Herrera-Ulloa v. Costa Rica*, Supervision of Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 22, 2010), available at http://www.corteidh.or.cr/docs/supervisiones/herrera_%2022_11_10_ing1.pdf; *Villagrán-Morales et al. v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Jan. 27, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/villagran_27_01_09_ing.pdf; *Juan Humberto Sánchez v. Honduras*, Monitoring Compliance with Judgment, Order of the President (Inter-Am. Ct. H.R. May 22, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/sanchez_22_05_09.pdf; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Apr. 3, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/mayagna_03_04_09_ing.pdf; *Goiburú et al. v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 19, 2009) available at http://www.corteidh.or.cr/docs/supervisiones/goiburu_19_11_09_ing.pdf; *Vargas-Areco v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 24, 2010), available at http://www.corteidh.or.cr/docs/supervisiones/vargas_24_11_10_ing.pdf; *Barrios Altos v. Peru*, Monitoring Compliance with Judgments, Order of the President (Inter-Am. Ct. H.R. Dec. 7, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/barrios_7_12_09.pdf; *Kimel v. Argentina*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 15, 2010), available at http://www.corteidh.or.cr/docs/supervisiones/kimel_15_11_10_ing.pdf; *Trujillo-Oroza v. Bolivia*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 16, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/trujillo_16_11_09_ing.pdf; *Olmedo-Bustos et al. v. Chile*, Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 28, 2003), available at http://www.corteidh.or.cr/docs/supervisiones/tentacion_28_11_03_ing.pdf; *Claude-Reyes et al. v. Chile*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 24, 2008), available at http://www.corteidh.or.cr/docs/supervisiones/reyes_24_11_08_ing.pdf; *Zambrano-Vélez et al. v. Ecuador*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 23, 2010), available at http://www.corteidh.or.cr/docs/supervisiones/zambrano_23_11_10_ing.pdf.

have not complied with orders to develop legislative or administrative measures to address systematic violations identified by the Court.¹²¹ Nevertheless, a history of the legislature responding to an order from the Inter-American Court creates a precedent that can make an argument for similar action in the future more compelling.

One context in which there has been substantial success with implementing these types of measures is in Chile, which amended its Constitution in 2003 in compliance with the Inter-American Court's

121. *See, e.g.*, *Bulacio v. Argentina*, Monitoring Compliance with Judgment, Order of the Court, ¶¶ 29-35 (Inter-Am. Ct. H.R. Nov. 26, 2008), *available at* http://www.corteidh.or.cr/docs/supervisiones/bulacio_26_11_08_ing1.pdf (noting Argentina had taken numerous steps to reform the legislative environment in the country in regards to protecting children and teenagers but that it had failed to fully and effectively adopt and integrate the proposed reforms into domestic legislation); *Miguel Castro-Castro Prison v. Peru*, Monitoring Compliance with Judgment, Order of the President-in-Office of the Court (Inter-Am. Ct. H.R. Dec. 21, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/castro_21_12_10_ing.pdf (noting the state's complete failure to implement any orders of the judgment including creating human rights education programs); *Sawhoyamaya Indigenous Community v. Paraguay*, Monitoring Compliance with Judgment, Order of the President of the Court, ¶ 1(7-10) (Inter-Am. Ct. H.R. May 20, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/sawhoyamaya_20_05_09.pdf (calling for a public hearing in Bolivia due to the state's failure to implement legislation to facilitate the return of tribal lands to the Sawhoyamaya indigenous community); *Yatama v. Nicaragua*, Monitoring Compliance with Judgment, Order of the Court, ¶¶ 13-18 (Inter-Am. Ct. H.R. May 28, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/yatama_28_05_10_ing.pdf (noting Nicaragua's failure to comply with orders mandating legislative changes in the Supreme Court and election laws); *López-Álvarez v. Honduras*, Monitoring Compliance with Judgment, Order of the Court, ¶¶ 17-20 (Inter-Am. Ct. H.R. Feb. 6, 2008), *available at* http://www.corteidh.or.cr/docs/supervisiones/lopezal_06_02_08_ing.pdf (noting the state's failure to adopt measures to reform the prison system as ordered); *Fermin Ramírez v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, ¶¶ 2(a-b), 5(a, d) (Inter-Am. Ct. H.R. May 9, 2008), *available at* http://www.corteidh.or.cr/docs/supervisiones/raxcaco_09_05_08_ing.pdf (noting that Guatemala failed to comply with several orders, in two separate cases, to change the penal code, reform prisons, and change the procedure relating to the death penalty); *Chaparro-Álvarez and Lapo-Íñiguez v. Ecuador*, Monitoring Compliance with Judgment, Order of the Court, ¶¶ 12-15 (Inter-Am. Ct. H.R. Feb. 22, 2011), *available at* http://www.corteidh.or.cr/docs/supervisiones/chaparro_22_02_11_ing.pdf (noting the state's failure to purge the criminal records of the victims through legislative reform).

2001 reparations order in "*The Last Temptation of Christ*" (*Olmedo-Bustos et al.*) v. *Chile*.¹²² In 2006, the Court issued a reparations order in *Claude-Reyes et al.* v. *Chile*, which led Chile to promulgate a law on access to state-held information.¹²³ Significantly, the law established a state institution dedicated to the oversight of the exercise of this newly articulated right. Notably, both of these cases involved freedom of expression, an issue that was also central to the next case against Chile, *Palamara-Iribarne v. Chile*, but which also raised the more contentious issue of the need to limit military jurisdiction.¹²⁴ The proper scope of military jurisdiction is a controversial issue, in Chile and throughout the region, but a process is currently under way in Chile to amend the legislative framework to comply with the Inter-American Court order.

Perhaps the greatest challenge in the compliance context is achieving state implementation of orders to investigate, prosecute and punish those responsible for the human rights violations at issue in a case. These reparations are a fundamentally important and fairly common feature of the Court's reparations decisions. The standard order will require states to investigate the facts established before the Court, identify the perpetrators of human rights violations found in the decision, and prosecute and sanction the perpetrators in accordance with national legal norms and international human rights law.¹²⁵ This refers to either state agents or private citizens, and may also explicitly include the direct perpetrators as well as the intellectual authors of human rights violations.¹²⁶

122. See *Olmedo-Bustos et al. v. Chile*, Compliance with Judgment, Order of the Court, ¶ 19 (Inter-Am. Ct. H.R. Nov. 28, 2003), available at http://www.corteidh.or.cr/docs/supervisiones/tentacion_28_11_03_ing.pdf.

123. *Claude-Reyes et al. v. Chile*, Monitoring Compliance with Judgment, Order of the Court, ¶¶ 8-14 (Inter-Am. Ct. H.R. Nov. 24, 2008), available at http://www.corteidh.or.cr/docs/supervisiones/reyes_24_11_08_ing.pdf.

124. *Palamara-Iribarne v. Chile*, Monitoring Compliance with Judgment, Order of the Court, ¶¶ 27-30 (Inter-Am. Ct. H.R. Nov. 30, 2007), available at http://www.corteidh.or.cr/docs/supervisiones/palamara_30_11_07_ing.pdf.

125. See, e.g., *Myrna Mack-Chang v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 301(5) (Nov. 25, 2003).

126. See, e.g., *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 296(7) (Jan. 31, 2006) (ordering the state to take measures to investigate all possible participants in the 1990 Pueblo Bello massacre, including those responsible by "act or omission").

Out of 57 discrete measures ordering the investigation, prosecution and punishment of human rights violators, only 1 has been fully implemented,¹²⁷ which represents a 2 percent compliance rate. This single victory aside, clearly, if a central goal of inter-American litigation is to bring human rights abusers to justice, that goal is not being met. More importantly, this means that if the central goal of victims' next of kin is to bring those responsible to justice, the inter-American system may not give them the remedy they seek. As is often the case, pursuing justice may be adequate, but there is certainly a difference and this difference should be communicated to the intended beneficiaries of the litigation.

The second tier of reparations orders identified in the analysis of compliance jurisprudence performed for this article are less consistently ordered by the Court, but appear with enough frequency to be accounted for in the case planning and compliance strategizing processes. The Court will on occasion order states to design and implement training programs for public officials, such as police, armed forces, and judicial employees, in relevant areas of international human rights obligations with the goal of preventing future violations and ensure the full exercise of all rights. Of 24 discrete measures under supervision, 9 have been fully implemented, which represents an implementation rate of 38 percent. States that have complied with this type of order are Bolivia, Chile, Colombia, Ecuador, and Guatemala.¹²⁸

127. See *Castillo-Páez v. Peru*, Monitoring Compliance with Judgment, Order of the Court, ¶¶ 7-11 (Inter-Am. Ct. H.R. Apr. 3, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/castillo_03_04_09_ing.pdf.

128. See *Trujillo-Oroza v. Bolivia*, Monitoring Compliance with Judgment, Order of the Court, ¶ 1d (Inter-Am. Ct. H.R. Nov. 16, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/ituango_07_07_09_ing.pdf; *Claude-Reyes et al. v. Chile*, Monitoring Compliance with Judgment, Order of the Court, ¶¶ 15-21 (Inter-Am. Ct. H.R. Nov. 24, 2008), available at http://www.corteidh.or.cr/docs/supervisiones/reyes_24_11_08_ing.pdf; *Rochela Massacre v. Colombia*, Monitoring Compliance with Judgment, Order of the Court, ¶ 1(f) (Inter-Am. Ct. H.R. Aug. 26, 2010), available at http://www.corteidh.or.cr/docs/supervisiones/rochela_26_08_10_ing.pdf; *Mapiripán Massacre v. Colombia*, Monitoring Compliance with Judgment, Order of the Court, ¶ 1(b) (Inter-Am. Ct. H.R. July 08, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/mapiripan_08_07_09_ing.pdf; *Ituango Massacres v. Colombia*, Monitoring Compliance with Judgment, Order of the Court, ¶ 1a (Inter-Am. Ct. H.R. July 7, 2009), available at

One interesting example of compliance can be found in Colombia, where the government created a single permanent human rights training program on human rights law and international humanitarian law for its armed forces, which satisfied the requirements of four separate Inter-American Court orders.¹²⁹ This program, entitled “Comprehensive Policy on Human Rights and International Humanitarian Law” was created in January 2008, and includes the creation of a “Human Rights Directorate” in the Army, and a cooperation agreement with the Inter-American Human Rights Institute (“IIDH”) to supervise the program. The state has also submitted a detailed report on the program during a private hearing with the Court.¹³⁰ The Court concluded, in a compliance order issued in *Mapiripán* that:

“... education on human rights within the Armed Forces is vital to create guarantees of non-repetition of facts as the ones seen in the instant case. Therefore, it positively values the progress mentioned by the State at the hearing [and] ... considers that the State complied with this measure of

http://www.corteidh.or.cr/docs/supervisiones/ituango_07_07_09_ing.pdf; *Gutiérrez-Soler v. Colombia*, Monitoring Compliance with Judgment, Order of the Court, ¶ 1b-c (Inter-Am. Ct. H.R. Jan. 31, 2008), *available at* http://www.corteidh.or.cr/docs/supervisiones/gutierrez_31_01_081.pdf; *Zambrano-Vélez et al. v. Ecuador*, Monitoring Compliance with Judgment, Order of the Court, ¶ 1d (Inter-Am. Ct. H.R. Sept. 21, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/castillo_03_04_09_ing.pdf; *Myrna Mack-Chang v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, ¶ 12 (Inter-Am. Ct. H.R. Sept. 12, 2005), *available at* http://www.corteidh.or.cr/docs/supervisiones/mack_12_09_051.pdf.

129. *See, e.g.*, *Gutiérrez-Soler v. Colombia*, Monitoring Compliance with Judgment, Order of the Court, ¶1 (c-d) (Inter-Am. Ct. H.R. Jan. 31, 2008), *available at* http://www.corteidh.or.cr/docs/supervisiones/gutierrez_31_01_081.pdf; *La Rochela Massacre v. Colombia*, Monitoring Compliance with Judgment, Order of the Court, ¶ 1(f) (Inter-Am. Ct. H.R. Aug. 26, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/rochela_26_08_10_ing.pdf; *Ituango Massacres v. Colombia*, Monitoring Compliance with Judgment, Order of the Court, ¶ 1(a) (Inter-Am. Ct. H.R. July 7, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/ituango_07_07_09_ing.pdf; *Mapiripán Massacre v. Colombia*, Monitoring Compliance with Judgment, Order of the Court, “Considering,” ¶¶ 62-64 (Inter-Am. Ct. H.R. July 8, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/mapiripan_08_07_09_ing.pdf.

130. *See* *Mapiripán Massacre v. Colombia*, Monitoring Compliance with Judgment, Order of the Court, “Considering,” ¶¶ 62-64 (Inter-Am. Ct. H.R. July 8, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/mapiripan_08_07_09_ing.pdf.

reparation, as to the design and development of human rights and international humanitarian law training program, *in view of the fact that these are permanent program.*”¹³¹ (Emphasis added.)

Human rights education may often seem like an appropriate means of addressing systematic or society-wide human rights problems. Certainly, there exist substantial differences of opinion between what constitutes genuine human rights education, and the experiences of programs that have been developed in compliance with Inter-American Court orders can provide an important perspective in this debate.

The Court has ordered a wide variety of restitution and cessation measures that can be identified and grouped together for purposes of analysis. For example, the Court has issued orders to annul or otherwise revisit judicial or administrative decisions on 16 occasions, and states have complied with 9 such orders.¹³² Additionally, the Court has ordered on 7 occasions that states amend public records of such unjust state actions, and states have complied with 6 of those orders.¹³³ This could provide some hope for people who turn to the

131. *Id.* ¶ 64.

132. *See, e.g., Cantos v. Argentina*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Aug. 26, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/cantos_26_08_10_ing.pdf (noting that Argentina “has failed to carry out its obligation of informing this Court about the measures adopted to comply with that ordered in the Judgment on merits . . .”); *Herrera-Ulloa v. Costa Rica*, Supervision of Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 22, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/herrera_%2022_11_10_ing1.pdf (finding that Costa Rica had complied with the Court’s orders); *see also* *Fermin Ramírez v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. May 9, 2008), *available at* http://www.corteidh.or.cr/docs/supervisiones/raxcaco_09_05_08_ing.pdf; *id.* (reviewing compliance of two cases in one order, *Fermin Ramírez v. Guatemala* and *Raxcaco Reyes v. Guatemala*, in which the court ordered the state to annul or revisit judicial or administrative decisions); *Tristan Donoso v. Panama*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Sept. 1, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/tristan_01_09_10_ing.pdf; *Cantoral-Benavides v. Peru*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 14, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/cantoral_14_11_10_ing.pdf.

133. *See Kimel v. Argentina*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 15, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/kimel_15_11_10_ing.pdf; Chaparro-

inter-American system to address unfair judicial proceedings.

Unfortunately, other restitution and cessation measures do not provide the same type of promise. For example, the Court has ordered that the state in question provide medical or psychological care to survivors of human rights abuse on 30 occasions, and every one of those orders is in some stage of incomplete compliance.¹³⁴

Álvarez & Lapo-Íñiguez v. Ecuador, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 22, 2011), *available at* http://www.corteidh.or.cr/docs/supervisiones/chaparro_22_02_11_ing.pdf; Acosta-Calderón v. Ecuador, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 7, 2008), *available at* http://www.corteidh.or.cr/docs/supervisiones/acosta_07_02_08_ing.pdf; Gómez-Paquiyaui Brothers v. Peru, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. May 3, 2008), *available at* http://www.corteidh.or.cr/docs/supervisiones/gomez_%2003_05_08_ing.pdf.

134. See 19 Tradersmen v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. July 8, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/comerciantes_08_07_09_ing.pdf; Gutiérrez-Soler v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. June 30, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/gutierrez_30_06_09_ing.pdf; Ituango Massacres v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 28, 2011), *available at* http://www.corteidh.or.cr/docs/supervisiones/ituango_28_02_11_ing.pdf; Mapiripán Massacre v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. July 8, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/mapiripan_08_07_09_ing.pdf; Pueblo Bello Massacre v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. July 9, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/bello_09_07_09_ing.pdf; Rochela Massacre v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Aug. 26, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/rochela_26_08_10_ing.pdf; Valle-Jaramillo et al. v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. May 15, 2011), *available at* http://www.corteidh.or.cr/docs/supervisiones/jaramillo_15_05_11_ing.pdf; Escué-Zapata v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 21, 2011), *available at* http://www.corteidh.or.cr/docs/supervisiones/escue_21_02_11_ing.pdf; García-Prieto et al. v. El Salvador, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Aug. 27, 2011), *available at* http://www.corteidh.or.cr/docs/supervisiones/garcia_27_08_10_ing.pdf; Serrano-Cruz Sisters v. El Salvador, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 3, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/serrano_03_02_10_ing.pdf; Plan de Sánchez Massacre v. Guatemala, Monitoring Compliance with Judgment, Order of

the Court (Inter-Am. Ct. H.R. Feb. 21, 2011), *available at* http://www.corteidh.or.cr/docs/supervisiones/sanchez_21_02_11_ing.pdf; *Fermin Ramírez v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. May 9, 2008), *available at* http://www.corteidh.or.cr/docs/supervisiones/raxcaco_09_05_08_ing.pdf; *id.* (reviewing compliance of two cases in one order, *Fermin Ramírez v. Guatemala* and *Raxcaco Reyes v. Guatemala*); *Heliodoro Portugal v. Panama*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Apr. 20, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/portugal_20_04_10%20ing.pdf; *Goiburú et al. v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 19, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/goiburu_19_11_09_ing.pdf; “Juvenile Reeducation Institute” v. Paraguay, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 19, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/instituto_19_11_09_ing.pdf; *Vargas-Areco v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 24, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/vargas_24_11_10_ing.pdf; *Baldeón-García v. Peru*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Apr. 3, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/baldeon%20_03_04_09_ing.pdf; *Barrios Altos v. Peru*, Monitoring Compliance with Judgments, Order of the President (Inter-Am. Ct. H.R. Dec. 7, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/barrios_7_12_09.pdf; *Cantoral-Benavides v. Peru*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 14, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/cantoral_14_11_10_ing.pdf; *Cantoral-Huamaní & García-Santa Cruz v. Peru*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 22, 2011), *available at* http://www.corteidh.or.cr/docs/supervisiones/cantoral_22_02_11_ing.pdf; *De la Cruz-Flores v. Peru*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Sept. 1, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/cruz_01_09_10_ing.pdf; *Durand & Ugarte v. Peru*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Aug. 5, 2008), *available at* http://www.corteidh.or.cr/docs/supervisiones/durand_05_08_08_ing.pdf; *García-Asto & Ramírez-Rojas v. Peru*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. July 12, 2007), *available at* http://www.corteidh.or.cr/docs/supervisiones/garcia_12_07_071.pdf; *Gómez-Palomino v. Peru*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Dec. 21, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/gomez_%2021_12_10_ing.pdf; *Huilca-Tecse v. Peru*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 7, 2008), *available at* http://www.corteidh.or.cr/docs/supervisiones/huilca_%2007_02_08_ing.pdf; *La Cantuta v. Peru*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 20, 2009), *available at*

Similarly, in 10 cases the Court has ordered the state to either ensure the lives, safety and security of the victims and their representatives, or guarantee a safe return to the country for expatriated victims, 7 of which were issued against Colombia, and none of which have been implemented.¹³⁵

Other orders have been only slightly better received by states. The Court has ordered the reinstatement of victims to their prior employment on 7 occasions, and states have complied on 2 occasions.¹³⁶ States have only complied with 1 of 12 Court orders to

http://www.corteidh.or.cr/docs/supervisiones/cantuta_20_11_09_ing1.pdf; Lori Berenson-Mejía v. Peru, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Sept. 22, 2006), *available at* http://www.corteidh.or.cr/docs/supervisiones/lori_22_09_06_ing.pdf; Miguel Castro-Castro Prison v. Peru, Monitoring Compliance with Judgment, Order of the President-in-Office of the Court (Inter-Am. Ct. H.R. Dec. 21, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/castro_21_12_10_ing.pdf.

135. See 19 Tradesmen v. Colombia, Monitoring Compliance with Judgment, Order of the Court, ¶ 10, 11 (Inter-Am. Ct. H.R. July 8, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/comerciantes_08_07_09_ing.pdf; Gutiérrez-Soler v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. June 30, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/gutierrez_30_06_09_ing.pdf; Ituango Massacres v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 28, 2011), *available at* http://www.corteidh.or.cr/docs/supervisiones/ituango_28_02_11_ing.pdf; Mapiripán Massacre v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. July 8, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/mapiripan_08_07_09_ing.pdf; Pueblo Bello Massacre v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. July 9, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/bello_09_07_09_ing.pdf; Valle-Jaramillo et al. v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. May 15, 2011), *available at* http://www.corteidh.or.cr/docs/supervisiones/jaramillo_15_05_11_ing.pdf; “Juvenile Reeducation Institute” v. Paraguay, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 19, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/instituto_19_11_09_ing.pdf; Moiwana Community v. Suriname, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 22, 2010), *available at* http://www.corteidh.or.cr/docs/supervisiones/moiwana_22_11_10_ing1.pdf; Blanco-Romero et al v. Venezuela, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. July 7, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/blanco_07_07_09_ing.pdf.

136. See De la Cruz-Flores v. Peru, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Sep. 1, 2010), *available at*

provide scholarships and other educational benefits for the victims or their next of kin.¹³⁷ The Court has ordered the state to locate and return the remains of victims of extrajudicial executions and forced disappearances to their next of kin on 23 occasions, and just twice states have complied.¹³⁸ Finally, the Court has ordered the establishment of development funds and community support projects in 9 cases that have involved human rights abuses against entire communities, and only one such order has been implemented.¹³⁹

Highlighting that measures of non-repetition, justice, restitution, and cessation have exceedingly low rates of implementation is, of course, not meant to imply that they should not be pursued. Indeed, working to prevent future harm, seeking justice for the perpetrators of human rights abuse, and restoring victims' rights can be some of the most important goals of human rights litigation, and are often what the participants in the litigation most desire. However, these low rates of implementation do provide a basis to responsibly counsel clients about the challenges they will face in the course of inter-American litigation. Additionally, they provide a roadmap to representatives for how they should be organizing and prioritizing their evolving compliance strategies throughout the course of litigation.

http://www.corteidh.or.cr/docs/supervisiones/cruz_01_09_10_ing.pdf; Ivcher-Bronstein v. Peru, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Aug. 27, 2010), available at http://www.corteidh.or.cr/docs/supervisiones/ivcher_27_08_10_ing1.pdf.

137. See Loayza-Tamayo v. Peru, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 6, 2008), available at http://www.corteidh.or.cr/docs/supervisiones/loayza_06_02_08_ing.pdf.

138. See Paniagua-Morales et al. v. Guatemala, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 27, 2007), available at http://www.corteidh.or.cr/docs/supervisiones/paniagua_27_11_07_ing.pdf; Juan Humberto Sánchez v. Honduras, Monitoring Compliance with Judgment, Order of the President, ¶ 10b (Inter-Am. Ct. H.R. Nov. 21, 2007), available at http://www.corteidh.or.cr/docs/supervisiones/sanchez_21_11_07_ing.pdf.

139. See Escué-Zapata v. Colombia, Monitoring Compliance with Judgment, Order of the Court, ¶ 17-21 (Inter-Am. Ct. H.R. Feb. 22, 2011), available at http://www.corteidh.or.cr/docs/supervisiones/escue_18_05_10_ing.pdf (noting that the State reported compliance, representatives initially contested exchange rate then eventually joined Commission in recognizing compliance, the Court then declared compliance).

IV. THE ROLE OF COMPLIANCE JURISPRUDENCE IN FORMULATING STRATEGIES TO COMPEL STATES TO IMPLEMENT THE COURT'S REPARATIONS ORDERS

In the same way that the Court's compliance jurisprudence can provide insight into the likelihood of implementation of different reparations, it can help litigants to anticipate what the implementation trouble areas will be. The predictability of these challenges, together with the years that such litigation projects endure, provides an important opportunity for representatives to begin to strategize to accomplish their implementation goals. For example, if the intended beneficiaries of a certain litigation project have established the investigation, prosecution and punishment of those responsible for the disappearance of their family member as the central goal of the litigation, the compliance jurisprudence can provide guidance for the representative in explaining the challenges of reaching such a goal. At the same time, the representative has access to 57 documented attempts at achieving such individualized responsibility through the inter-American process, which provides dozens of approaches that may have produced incremental victories. In this way, the compliance jurisprudence can also inform a strategy moving forward to both shape a final decision that is more implementable, and simultaneously work to create the conditions most conducive to implementation. Specific examples are drawn from the compliance jurisprudence of the first tier – most commonly ordered – reparations highlighted in the previous section.

A. APPROACHES TO MONEY DAMAGES AND SYMBOLIC REPARATIONS

In the less controversial context of money damages and costs, there are lessons that can inform litigation strategies in both successful and unsuccessful implementation efforts. For instance, in the three Panamanian cases in which compliance orders have been handed down, money damages and costs have been ordered on 6 occasions and 2 have yet to reach compliance.¹⁴⁰ The case that is still

140. See *Baena Ricardo et al. v. Panama*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 22, 2011), *available at*

pending compliance is *Baena Ricardo et al v. Panama*, in which the Court ordered the state to pay 270 workers the lost salaries they were entitled under national law.¹⁴¹ When this is compared with the other two cases, *Heliodoro Portugal v. Panama* and *Tristan Donoso v. Panama*, a distinction that is instantly apparent is the number of victims, which corresponds directly to the size of the damages order. Taking a closer look at the compliance jurisprudence reveals that the problem is not necessarily related to the amount of the damages ordered, but that the Court ordered the state to pay the 270 workers lost salaries and other compensation as they are entitled under national legal and administrative procedures.¹⁴²

The compliance record shows that between 2002 and 2003 the state made the ordered payments, however it failed to provide information on how it performed the required calculations and the Inter-American Court ultimately found Panama to be non-compliant with this aspect of the reparations order.¹⁴³ In a second round of payments, some 202 victims signed agreements with the State while others refused to do so, an act of resistance that resulted in non-payment for many. Accordingly, it would appear that the non-compliance in this case is only partially a function of the number of victims and the resulting complexity of the matter. Part of the problem is that the final decision about how much the individuals should be paid by the state was sent back to state institutions to resolve.¹⁴⁴ Ultimately, it appears to have led to more conflicts and a

http://www.corteidh.or.cr/docs/supervisiones/baena_22_02_11_ing.pdf; *Heliodoro Portugal v. Panama*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Apr. 20, 2010), available at http://www.corteidh.or.cr/docs/supervisiones/portugal_20_04_10%20ing.pdf; *Tristan Donoso v. Panama*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Sep. 1, 2010), available at http://www.corteidh.or.cr/docs/supervisiones/tristan_01_09_10_ing.pdf.

141. *Baena Ricardo et al. v. Panama*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 22, 2011), available at http://www.corteidh.or.cr/docs/supervisiones/baena_22_02_11_ing.pdf.

142. See *Baena Ricardo et al. v. Panama*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 22, 2011), available at http://www.corteidh.or.cr/docs/supervisiones/baena_22_02_11_ing.pdf.

143. See *Baena Ricardo et al. v. Panama*, Monitoring Compliance with Judgment, Order of the Court, ¶ 4 (Inter-Am. Ct. H.R. Nov. 28, 2005), available at http://www.corteidh.or.cr/docs/supervisiones/baena_28_11_051.pdf.

144. See *Baena Ricardo et al. v. Panama*, Monitoring Compliance with

protracted process of implementation in which the money damages – apparently uncontroversial in the Panamanian context – have still not been paid after a decade.¹⁴⁵

The lesson for victims' representatives that are developing compliance strategies in similarly complex cases would be to plead the case in the reparations stage in a way that would permit the Court to set the amount of payment to each victim, as it often does. This would obviate the need for additional national procedures and perhaps bring the intended beneficiaries of the litigation years closer to the money they deserve. Most importantly, this level of consideration implicates a phase of the litigation that is probably not considered by the victims' representatives when they are first preparing the case. However, if money payments are important to the victims, and the process itself provides no guarantee that these payments will be made, it is incumbent on the representatives that they begin to strategize in this regard from the outset.

A similarly strategic approach may also be possible in the context of symbolic reparations. For example, the previous section described how the Court has ordered a wide range of such reparations in Guatemala, and the implementation record of that country indicates that it has embraced this approach to remedying past wrongs. This past track record of success may encourage representatives to help the intended beneficiaries of the litigation to brainstorm creative symbolic acts that might help their healing process. The reality is that victims of human rights abuse very rarely think in these terms, and truth be told, neither does the average representative. But reference to the compliance jurisprudence can instigate this creative process, and over the course of litigation, reasonable symbolic goals can be set. Meeting these goals can return some sense of control and provide for a feeling of vindication, where those sensations can be

Judgment, Order of the Court, ¶¶ 9-14 (Inter-Am. Ct. H.R. Oct. 30, 2008), *available at* http://www.corteidh.or.cr/docs/supervisiones/baena_30_10_08_ing.pdf (outlining the dispute between the state and the parties over how to calculate reparations, interest, and what law or procedure to apply).

145. See Baena Ricardo et al. v. Panama, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 22, 2011), *available at* http://www.corteidh.or.cr/docs/supervisiones/baena_22_02_11_ing.pdf.

absent with the more difficult processes of justice and systemic reform.

As an example, a recent friendly settlement agreement signed between the family of the deposed President of Guatemala, Jacobo Árbenz Guzmán and the Guatemalan state reflects a willingness to go far beyond the standard remedy. In its press release, the Inter-American Commission reviewed some of the reparations agreed to between the parties:

the State will hold a public ceremony recognizing its responsibility; send a letter of apology to the next of kin; name a hall of the National Museum of History and the highway to the Atlantic after the former president; revise the basic national school curriculum (Currículo Nacional Base); establish a degree program in Human Rights, Pluriculturalism, and Reconciliation of Indigenous Peoples; hold a photographic exhibition on Arbenz Guzmán and his legacy at the National Museum of History; recover the wealth of photographs of the Arbenz Guzmán family; publish a book of photos; reissue the book *Mi Esposo el President Arbenz* ("My Husband President Arbenz"); prepare and publish a biography of the former President; and issue a series of postage stamps in his honor.¹⁴⁶

As negotiated outcomes, friendly settlement agreements provide an opportunity to achieve what might not otherwise be available through litigation. Such negotiations, however, are subject to the implementation considerations that apply to litigated outcomes, and knowing that Guatemala has historically been open to a wide range of symbolic reparations undoubtedly encouraged the creativity reflected in the above agreement. While the parties have yet to report on implementation, there is cause for optimism.

The preceding examples touch on the two types of reparations that are most often ordered by the Inter-American Court, which also enjoy the highest rates of compliance. The situation obviously complicates considerably when it comes to the legislative and administrative measures of non-repetition, and the orders to investigate, prosecute, and punish perpetrators that are rarely, if ever,

146. Press Release, IACHR Satisfied with Friendly Settlement Agreement in Arbenz Case Involving Guatemala, IACHR Press Release No. 46/11 (May 20, 2011); see also Elizabeth Malkin, *Guatemala to Restore Legacy of a President the U.S. Helped Depose*, N.Y. TIMES, May 23, 2011, <http://www.nytimes.com/2011/05/24/world/americas/24guatemala.html>.

implemented by offending states. This makes compliance strategies that much more imperative in these areas, and the potential value of compliance jurisprudence that much greater.

B. CONSIDERATIONS FOR IMPLEMENTING LEGISLATIVE REFORMS

Examples of success in urging national administrative and legislative reform pursuant to Inter-American Court orders are few and far between, but those that exist should be fully explored as models for compliance strategy. A range of examples exist, including the development of legislative initiatives to protect vulnerable populations,¹⁴⁷ the establishment of certain human rights violations as crimes in the national legal framework,¹⁴⁸ reforming court procedures to provide adequate due process guarantees,¹⁴⁹ and demarcating and titling indigenous lands.¹⁵⁰

In the case of *Villagran Morales v. Guatemala*, the Court ultimately found that Guatemala complied with its order to amend its internal legislation to provide adequate protection for minors when it adopted the Integral Protection of Children and Adolescents Act by Decree 27-03, which protects the rights of the child in accordance with Article 19 of the American Convention.¹⁵¹ An important aspect of this compliance effort was highlighted by the representatives, who reported that the state created an Office of the Public Defender of Children and Youth as well as courts specializing in children and adolescents, and indicated that such institutional developments

147. See, e.g., *Villagran Morales et al. v. Guatemala*, Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 27, 2003), available at http://www.corteidh.or.cr/docs/supervisiones/villagran_27_11_03_ing.pdf.

148. See, e.g., *Trujillo-Oroza v. Bolivia*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 21, 2007), available at http://www.corteidh.or.cr/docs/supervisiones/trujillo_21_11_07_ing.pdf.

149. See, e.g., *Herrera-Ulloa v. Costa Rica*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Jul. 9, 2009) [hereinafter *Herrera-Ulloa*, Monitoring Compliance 2009], available at http://www.corteidh.or.cr/docs/supervisiones/herrera_09_07_09_ing.pdf.

150. See, e.g., *Asaw Tingi*, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. May 7, 2008), available at http://www.corteidh.or.cr/docs/supervisiones/mayagna_07_05_08_ing.pdf.

151. *Villagran Morales v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, "Having Seen" (Inter-Am. Ct. H.R. Nov. 27, 2003), available at http://www.corteidh.or.cr/docs/supervisiones/villagran_27_11_03_ing.pdf.

would facilitate monitoring compliance with the new legislation.¹⁵² Notably, the Inter-American Commission highlighted that this change came about after an “important effort by civil society during many years.”¹⁵³ While there is not an abundance of information about this effort in the supervision jurisprudence, the models for institutional implementation and oversight noted by the representatives are important.

The Bolivian state complied with the Inter-American Court’s order to incorporate the crime of forced disappearance into its legislative framework in *Trujillo Oroza v. Bolivia*.¹⁵⁴ This process started with the executive branch urging the legislature to consider during its 2004-2005 sessions a proposal to criminalize forced disappearance that had been introduced in 2001-2002.¹⁵⁵ In 2005, purportedly in response to these urgings by the executive, the legislature began working on a technical report on the proposal to incorporate the crime of forced disappearance into national law.¹⁵⁶ The Court recognized the concerns of the Commission that this process had been ongoing for many years, and recalling that it had ordered the promulgation of such legislation within a reasonable time period.¹⁵⁷ Nevertheless, the Bolivian state completed this process when it incorporated the crime of forced disappearance of people into a section in its Penal Code through the enactment of National Act N° 3326.¹⁵⁸ This process highlights both the importance of generating a legislative proposal in advance, as well as the importance of pronouncements by the executive and the elaboration of analytical reports when legislation ordered by the Inter-American Court is pending on the national level.

More complex legislative processes are also recorded in the

152. *Id.* at 6.

153. *Id.* at 5.

154. *Trujillo Oroza v. Bolivia*, Monitoring Compliance with Judgment, Order of the Court, “Having Seen” (Inter-Am. Ct. H.R. Nov. 21, 2007), *available at* http://www.corteidh.or.cr/docs/supervisiones/trujillo_21_11_07_ing.pdf.

155. *See id.*

156. *Trujillo Oroza v. Bolivia*, Monitoring Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. (Sept. 12, 2005), *available at* http://www.corteidh.or.cr/docs/supervisiones/trujillo_12_09_051.pdf.

157. *Id.*

158. *Trujillo Oroza v. Bolivia*, *supra* note 154, at 7.

compliance jurisprudence, such as the process by which Costa Rica expanded the ability to appeal judicial decisions and use the “recourse of cassation” in compliance with the Inter-American Court decision in *Herrera Ulloa v. Costa Rica*.¹⁵⁹ Within a couple years of the Court’s decision, the state reported that a bill for the enactment of a law entitled “Relaxation of Criminal Cassation Requirements Law” was unanimously approved by the Legislative Assembly’s Permanent Commission on Legal Affairs.¹⁶⁰ The state further reported that both the Supreme Court of Justice and the Criminal Cassation Court had adjusted their case law in accordance with the Inter-American Court decision, and claimed that implementation was near completion.¹⁶¹

The representatives in this case argued that the proposed reform was a compromise between the existing judicial system and the one envisioned by the Inter-American Court decision, and that a genuine guarantee of appeal was more appropriate than a relaxation of existing onerous requirements in the appeals process.¹⁶² The Commission highlighted a different legislative proposal mentioned by the state in a compliance hearing before the Court, a “bill to establish the motion for appeal, introduce other amendments to appellate proceedings and adopt new trial rules,” which it felt would genuinely remedy the situation.¹⁶³ This was ultimately the proposal passed by the Costa Rican legislature, which led to a consensus among the parties that the state had fully complied with the Court’s order.¹⁶⁴ An important strategy to highlight in these proceedings was the amicus participation of prominent national lawyers in the compliance proceedings, some of whom were also active in lobbying in favor of the congressional bill that was ultimately passed and deemed to constitute compliance with the Court’s reparations

159. *Herrera-Ulloa v. Costa Rica*, Supervision of Compliance with Judgment, Order of the Court, Inter-Am. Ct. H.R. (Nov. 22, 2010), ¶ 11, available at http://corteidh.or.cr/docs/supervisiones/herrera_%2022_11_10_ing1.pdf.

160. *Herrera-Ulloa v. Costa Rica*, Monitoring Compliance with Judgment, Order of the Court, “Having Seen” (Inter-Am. Ct. H.R. Jul. 9, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/herrera_09_07_09_ing.pdf.

161. *Id.*

162. *See id.* ¶ 21.

163. *Id.* ¶ 25.

164. *Herrera-Ulloa v. Costa Rica*, *supra* note 160.

order.¹⁶⁵ As described above, the possibility of expert opinions with regard to implementation is specifically contemplated by the Court's 2010 Rules of Procedure.

In the supervision phase of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the state reported on the adoption of Act No. 445, entitled "Act concerning the Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast and of the Coco, Bocay, Indio and Maiz Rivers."¹⁶⁶ This was the first decision of any supranational tribunal that recognized the special quality of indigenous land rights, and it continues to be the only inter-American case in which an order to demarcate and title indigenous land has been fully implemented. For this reason, advocates should pay special attention to the legislative vehicle that facilitated compliance. The law established a specific procedure for the demarcation and titling of lands by institutional authorities, which included the following stages: (1) presentation of the demarcation application to the Intersectoral Demarcation and Titling Commission ("CIDT"), which must be accompanied by a document called a "diagnosis"; (2) dispute settlement; (3) measurement of the land and marking of the boundaries; (4) titling, and (5) clearance (dealing with non-indigenous third parties who may be in the area claimed).¹⁶⁷ Notably, money was specifically allocated for the preparation of the initial report on titling the lands, and a consultancy firm was hired for this purpose.¹⁶⁸

It is important to highlight that the community's representatives took the position in the context of the supervision proceedings that the excessive delay in moving between the stages established by the law made it ineffective.¹⁶⁹ Despite this position taken by the representatives, the Commission opined that the law constituted compliance and the Court ultimately took this position as well.¹⁷⁰ This is important to highlight because it demonstrates the utility of

165. Herrera-Ulloa, Monitoring Compliance 2009, *supra* note 160, ¶ 7.

166. Awas Tingni, Monitoring Compliance 2008, *supra* note 94.

167. *Id.* at ¶ 9.

168. *Id.* at ¶ 17.

169. *See id.* at ¶ 13.

170. *See id.* at ¶ 15.

building reasonable timeframes into legislation of this nature. Further, the supervision orders can provide important guidance on the means for overcoming time delays, such as emphasizing when more financial resources might be necessary and when consultants could be useful.¹⁷¹

Certain lessons can be generalized from these experiences in the compliance proceedings of the Court. *Villagran Morales* and the *Awas Tingni* proceedings highlight the importance of normative development accompanied by an institutional framework within the state to oversee implementation. *Awas Tingni*, which provides more detail about the various considerations, highlights costs and the contracting of non-state actors to facilitate the process of compliance, which can inform the nature of future requests to the Court in both the reparations and supervision phases of litigation. All of these examples counsel in favor of developing legislative proposals, and *Trujillo Oroza* and *Herrera Ulloa* can be read to encourage the initiation of legislative processes before a final decision of the Inter-American Court is issued in a particular case.

Any legislative process developed with the aim of complying with a decision of the Court is going to take time, and often the only thing that distinguishes such a legislative process from any other is of its resonance with a Court decision. Accordingly, any efforts to start such a process in anticipation of a decision would be important, and if a proposal is already being considered when the Court decision comes down, the process can be reinvigorated as opposed to simply initiated. Finally, *Herrera Ulloa* highlights the important role of the supervision hearings and the authority of the Court to compel the state to reconsider an inadequate legislative proposal and refine its efforts, and points to the possible role of expert opinions to inform the Court in this regard.

C. ANTICIPATING BARRIERS TO JUSTICE

As was noted in the previous section, there is only one Court order to investigate, prosecute and punish persons responsible for human rights violations that has been fully implemented. That case, *Castillo Páez v. Peru*, will be explored below. It bears emphasis that a

171. See *id.* at ¶ 17.

number of factors contribute to the low level of full implementation of justice measures. Often cited problems are that judges and prosecutors responsible for opening these investigations can be the subject of extreme political pressure, severe resource constraints, and, in some contexts, serious physical danger. All of these issues can compound the challenges inherent in achieving full accountability for violations of human rights which often implicate numerous state actors from all different levels of government. In this context, partial compliance can still represent a substantial victory. Perhaps the most obvious example is the investigation, prosecution and punishment of former Peruvian President Alberto Fujimori, his security chief Vladimiro Montesinos, and various members of the band of political assassins known as *Grupo Colina*, all reported as partial compliance with the Inter-American Court decisions in *La Cantuta v. Peru* and *Barrios Altos v. Peru*.¹⁷² Accordingly, while cases of partial compliance could easily be an important part of the discussion about strategies for compliance with any type of inter-American remedy, they are of particular value to an analysis of barriers to justice and will be included here.

Addressing first the issue of investigation, there are a number of considerations that should be highlighted. The first is that opening investigations, while perhaps not difficult as a formal matter, can be very complicated as a political matter when the suspected perpetrators are state agents. For example, three years after the Court issued its 2007 reparations order in *Zambrano-Vélez et al. v. Ecuador* to investigate a 1993 extrajudicial execution, the investigation was still in its initial stage.¹⁷³ The state reported to the Court that it was in direct communication with the Prosecutor General's office about its error in failing to properly investigate, and

172. See generally *La Cantuta v. Peru*, Monitoring Compliance with Judgment, Order of the Court, "Having Seen" (Inter-Am. Ct. H.R. Nov. 20, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/cantuta_20_11_09_ing1.pdf; *Barrios Altos v. Peru*, Monitoring Compliance with Judgment, Order of the Court, "Having Seen" (Inter-Am. Ct. H.R. Dec. 7, 2009), available at http://www.corteidh.or.cr/docs/supervisiones/barrios_7_12_09.pdf.

173. See *Zambrano-Vélez et al. v. Ecuador*, Monitoring Compliance with Judgment, Order of the Court, "Having Seen" (Inter-Am. Ct. H.R. Nov. 23, 2010), available at http://www.corteidh.or.cr/docs/supervisiones/zambrano_23_11_10_ing.pdf.

that it had coordinated with the Public Defense Office to present an action of non-compliance with the Inter-American Court before the national courts.¹⁷⁴ Additionally, the state indicated that it had initiated disciplinary actions against the judge that had initially pronounced the statutory period for prosecution to have run — a common problem that will be discussed in more detail below.¹⁷⁵ Representatives rightfully noted that these efforts had not brought about meaningful action.¹⁷⁶

In *Garrido and Baigorria v. Argentina*, the Supreme Court of Mendoza, in an implicit recognition of the inadequacies of the institutional mechanisms in place to carry out the necessary investigation, created an *ad hoc* Investigation Commission through an administrative provision.¹⁷⁷ That Commission carried out an investigation into the forced disappearance of the victims and submitted a final report that was later published and presented in an official and public ceremony.¹⁷⁸ As a result of this investigation, a judge was removed from office because of irregularities in the proceedings, and monetary rewards were publically offered for information about the disappearances and the victims' remains.¹⁷⁹

Creating *ad hoc* mechanisms is one way to compensate for inadequacies in existing state institutions, but it is not sustainable. For that reason, it is important to also focus on the ways in which state institutions have grown to better handle the investigation and prosecution of human rights violations. *Castillo Páez v. Peru*, the one example of full compliance cited above, provides an important example of how judiciaries can create the conditions necessary to implement Inter-American Court decisions through institutional development and judicial reasoning. After the Court's 1998 reparations order,¹⁸⁰ the state reported that by 2002 it had initiated

174. *See id.* ¶ 5.

175. *See id.* ¶ 10.

176. *See id.* ¶ 6.

177. *See Garrido and Baigorria v. Argentina*, Monitoring Compliance with Judgment, Order of the Court, "Having Seen" (Inter-Am. Ct. H.R. Nov. 27, 2007), available at http://www.corteidh.or.cr/docs/supervisiones/garrido_27_11_07_ing.pdf.

178. *See id.* ¶¶ 6-12.

179. *See id.*

180. *Castillo-Páez v. Peru*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R.

investigations and formalized criminal complaints against 16 suspects.¹⁸¹ The representatives pointed out however that these people had not been charged with forced disappearance — a crime against humanity — because at the time no such crime existed under the Peruvian criminal code, and that decision had “resulted in a different focus on the investigation in the instant case and in allowing the indictees to remain at large.”¹⁸² In 2004, the Peruvian judiciary created the National Criminal Chamber, with jurisdiction to hear “crimes against [h]umanity and crimes that constituted cases of violations to human rights,” and in 2005, the indictees were charged with forced disappearance.¹⁸³ In 2007-08, four of the accused were found guilty of forced disappearance and the presiding court specifically rejected their defense that forced disappearance did not exist under Peruvian law at the time of the offense, and found that certain elements of the crime of forced disappearance continued until the bodies were located, and prosecution of the ongoing crime was therefore permitted.¹⁸⁴ An appeal by those convicted was rejected on this same rationale.¹⁸⁵

This means of judicially addressing an impediment to meaningful prosecution can serve as an example to others facing the challenge of holding persons accountable for crimes that occurred many years prior. Problems of this nature are frequent in the context of regional human rights litigation, and representatives have had to face impediments to justice arising from statutes of limitation, the prohibition against instituting criminal proceedings against the same person for the same crime twice (“double jeopardy”), and amnesty laws that prohibit prosecution of members of former authoritarian regimes.¹⁸⁶ For example, a statute of limitations was one of the

(ser. C) No. 43 (Nov. 27, 1998).

181. Castillo-Páez v. Peru, Monitoring Compliance with Judgment, Order of the Court, “Having Seen,” ¶ 13 (Inter-Am. Ct. H.R. Nov. 27, 2003), *available at* http://www.corteidh.or.cr/docs/supervisiones/castillo_27_11_03_ing.pdf.

182. *Id.* ¶ 21.

183. Castillo-Páez v. Peru, Monitoring Compliance with Judgment, Order, Inter-Am. Ct. H.R., ¶ 8(c)-(d) (Apr. 3, 2009), *available at* http://www.corteidh.or.cr/docs/supervisiones/castillo_03_04_09_ing.pdf.

184. *See id.* ¶ 8(f).

185. *See id.* ¶¶ 8(h), 9.

186. *See* CEJIL IMPLEMENTATION I, *supra* note 52, at 52-55.

problems mentioned above in the short discussion of *Zambrano-Vélez et al. v. Ecuador*, and it has acted as an impediment to prosecution in other Ecuadorian cases, such as *Benavides-Cevallos v. Ecuador*.¹⁸⁷ The compliance proceedings in *Bulacio v. Argentina* provide one example of a case in which a national court has rejected a defense based on a statute of limitations, finding that such a statute cannot act as an impediment to the investigation and prosecution of human rights violations.¹⁸⁸ Despite this important judicial development in that case, the compliance jurisprudence indicates that the investigation had yet to conclude 17 years after the violations, and the courts remained susceptible to the delay tactics of the defense.¹⁸⁹ This is an important reminder of the complexity of implementing investigation orders and that representatives must have both legal arguments in their arsenal about the inapplicability of limitations on review as well as perseverance, and that the latter is often most valuable.

Finally, even in those cases in which an investigation is completed, and a prosecution effectively carried out, there are potential impediments to the actual punishment of those responsible. Perhaps one of the most salient examples is from *Myrna Mack-Chang v. Guatemala*¹⁹⁰, the case of the politically motivated extrajudicial execution of the well-known anthropologist Myrna Mack. The order to investigate, prosecute and punish the perpetrator is the only outstanding element of the Court's reparations decision; indeed, the state has satisfactorily complied with a wide range of

187. See *Benavides Cevallos v. Ecuador*, Monitoring Compliance with Judgment, Order of the Court, "Having Seen" (Inter-Am. Ct. H.R. Nov. 27, 2003), available at http://www.corteidh.or.cr/docs/supervisiones/benavides_27_11_03_ing.pdf (finding that in 1998, Ecuador declared that a statute of limitations was applicable to the criminal action against Mr. Fausto Morales-Villacorta, convicted for the forced disappearance of Ms. Benavides).

188. *Bulacio v. Argentina*, Monitoring Compliance with Judgment, Order of the Court, "Having Seen," ¶ 13 (Inter-Am. Ct. H.R. Nov. 26, 2008), available at http://www.corteidh.or.cr/docs/supervisiones/bulacio_26_11_08_ing1.pdf.

189. See *id.* ¶¶ 9–12.

190. See *Myrna Mack-Chang v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, "Having Seen" (Inter-Am. Ct. H.R. Nov. 16, 2009) [hereinafter *Mack-Chang*, Monitoring Compliance 2009], available at http://www.corteidh.or.cr/docs/supervisiones/mack_16_11_09_ing.pdf.

monetary, symbolic, legislative and administrative measures.¹⁹¹ As early as 2004, Juan Valencia Osorio, the man sentenced to 30 years in prison for the murder of Myrna Mack has been at large.¹⁹² Important measures that have been taken are to solicit the support of INTERPOL,¹⁹³ and to convene an “Expediting Committee” composed of the Supreme Court of Justice, the Ministry of Government, the Office of the Attorney General, and the Attorney for Human Rights for the purpose of locating and arresting Osorio.¹⁹⁴ The state further indicated that it had set up fixed surveillance posts and dedicated two investigators to locating Osorio; nevertheless, the representatives observed that none of these actions have resulted in an arrest and raised serious questions about the government’s actual commitment to this goal.¹⁹⁵ While the representatives are right to denounce the compliance failure, the measures implemented by the state may provide a framework for how to pursue such an arrest.

Without a doubt, that only one out of 57 orders to investigate, prosecute, and punish perpetrators of human rights abuse has been fully implemented raises significant questions about the potential for inter-American litigation to achieve this goal. However, when incremental successes are shared with the entire community of victims’ representatives and failures are analyzed to better understand the weaknesses of justice systems and the targets for needed reform, compliance strategies can also feed into the larger movement to promote the rule of law. The existing compliance jurisprudence provides insights and experiences that can help those committed to this endeavor, and it merits more emphasis by representatives in the inter-American system.

191. *See id.* ¶ 12.

192. Myrna Mack-Chang v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, “Having Seen” (Inter-Am. Ct. H.R. Sep. 12, 2005), *available at* http://www.corteidh.or.cr/docs/supervisiones/mack_12_09_051.pdf.

193. *Id.*

194. Myrna Mack-Chang v. Guatemala, Monitoring Compliance with Judgment, Order of the Court, “Having Seen,” ¶ 8 (Inter-Am. Ct. H.R. Nov. 26, 2007), *available at* http://www.corteidh.or.cr/docs/supervisiones/mack_26_11_07_ing.pdf.

195. Mack-Chang, Monitoring Compliance 2009, *supra* note 190, ¶¶ 8-9.

CONCLUSION

Human rights litigation and advocacy at their best provide a creative, strategic and indefatigable force to compel states to fulfill their fundamental rights-based responsibilities to those subject to their authority. The inter-American system has played an important role in this regard, helping Latin America move beyond a troubling era of violent dictatorship, and providing a regional platform to debate core democratic values such as non-discrimination, free expression, and access to justice. The Inter-American Court, as the highest authority within that system, has been a beacon of hope for the marginalized and abused peoples of the Americas, and as an institution it has responded to this population by steadily increasing the prominence of the role for their representatives in Court proceedings. The historical decision in 2001 to create a private right of petition for victims' representatives,¹⁹⁶ followed by the 2010 reform making the representatives the principal actor in cases before the Court, creates an expectation that victims' voices will be heard.¹⁹⁷ Accordingly, there is an increased responsibility for victims' representatives to make sure that the participation of the intended beneficiaries of this litigation is meaningful, and that their voice is genuine.

The compliance supervision procedures of the Inter-American Court provide an important opportunity for victims' representatives to more faithfully counsel their clients about the likely results of litigation and to strategize more effectively to attain those results. In this way, the intended beneficiaries of the litigation can have a more meaningful role in the case that bears their name, and the legitimizing effect that they lend to the effort is of substance, rather than merely form. After all, the wide range of reparations made available to litigants in the inter-American system mean very little if they are not communicated to the people they are directed towards, and if they do not have the opportunity to prioritize among them. With those priorities in place, and with informed likelihoods of

196. See generally Veronica Gomez, *Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: New Rules and Recent Cases*, 1 HUM. RTS. L. REV. 111 (2001).

197. See Press Release, Statement of Motives for the Reform of the Rules of Procedure, IACHR (Nov. 24, 2009).

success attached to each, the earnest advocacy endeavor that must accompany all human rights litigation finds its north. The compliance jurisprudence of the Court should be a point of reference for all representatives in devising the creative strategies that will bring the victims of human rights abuse the reparation, recognition, and guarantee of non-repetition that they so desire.

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