REPARATIONS; A REQUIREMENT OF JUSTICE

THEO VAN BOVEN*

* Professor of international law, University of Maastricht, Netherlands.

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I. INTRODUCTION

Universal and regional human rights protection systems have gained over the years impact and importance. At the same time, given the large scope of gross violations of human rights, they bring home an awareness of the limited effect of these protection systems. Justice done is often too little and too late. Denials of justice adversely compete with the prevalence of justice. Against this background human rights anniversaries marking the adoption, proclamation and operation of human rights instruments and institutions - virtually every year such an anniversary is observed in a country, a continent or in the world at large - offer appropriate opportunities for constructive reflection.

The thirtieth anniversary of the American Convention on Human Rights: "Pact of San José, Costa Rica" which coincides with the twentieth anniversary of the Inter-American Court, ranks prominently with similar events relating to United Nations, European and African human rights instruments and institutions. In the normative sense all these instruments are inter-related and form part of a global *corpus* of human rights standards, with due regard for regional conceptions and requirements. In institutional terms the protection systems range from judicial, quasi-judicial to investigative and other monitoring devices, with State accountability as a common feature. The Inter-American Commission on Human Rights and the Inter-American Court o Human Rights are leading actors in this domain and no student of international human rights law and practice can afford to ignore the vitality of their work and proceedings.

This paper will reflect upon certain issues relating to the right to reparation as a requirement of justice *vis-à-vis* the victims of gross violations of human rights. Given the anniversaries of the American Convention and the Inter-American Court of Human Rights, the practice of the Inter-American Court will receive special attention against the background and the trends on the same subject prevailing in the United Nations and on the European scene. It is intended to highlight some contextual and comparative aspects rather than to review in detail all the applicable norms and the full scope of the relevant case law. It is useful to distinguish at the outset between a range of reparative measures which commend themselves in the policy sphere in order to render justice to victims and on the other hand the role of international judicial institutions, such as the Inter-American Court, to order reparations. The former aspect is obviously not limited to an applicant in a judicial procedure and includes a broad spectrum of measures to satisfy the demands of justice in the context of society as a whole. The role of international judicial institutions in contentious procedures is more specific and raises issues of the parameters of the judicial function on the basis of the competence attributed to these institutions, with due regard to the rights and interests of applicants who are claiming justice.

II. THE SCOPE OF REPARATIONS

Reparations are often assessed in terms of the payment of compensation. While compensation is indeed an important means of indemnifying damage suffered, other forms of reparation, including those which are not economically assessable, should not be overlooked. An elementary catalogue of various forms of reparation is contained in the Draft Articles on State Responsibility, provisionally adopted by the International Law Commission of the United Nations on first reading[1]. The relevant provisions were drawn up as part of a system of inter-state relation under the heading of "rights of the injured State which has committed an internationally wrongful act" (Chapter II), but the catalogue equally lends itself to the listing of various forms of reparation at other levels than those of inter-state relations. The Draft Articles enumerate the following forms of reparation:

– *Restitution* in kind, that is, the re-establishment of the situation which existed before the wrongful act was committed (Article 43);

– *Compensation* for the damage caused by the wrongful act, if and to the extent that the damage is not made good by restitution in kind (Article 44);

– *Satisfaction* for the damage, in particular moral damage caused by the wrongful act. Satisfaction may take the form of

1 *Draft Articles on State responsibility*, Report of the International Law Commission on the work of its forty-eight session (1996). UN doc. A/51/10, Articles 42-46.

(a) an apology;
(b) nominal damages;
(c) in cases of gross infringements of rights, damages reflecting the gravity of the infringement;
(d) in cases of serious misconduct of officials or criminal conduct of officials or private parties, disciplinary action against, or punishment of those responsible (Article 45);

– *Assurances and guarantees of non-repetition* of the wrongful act (Article 46).

The present author as Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (since 1999 renamed as the Sub-Commission on the Promotion and Protection of Human Rights) carried out a Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.[2] On the basis of this study he submitted a set of basic principles and guidelines which are now before the UN Commission on Human Rights.[3] In the light of the pattern and the modalities of reparation outlined by the International Law Commission in the Draft Articles on State Responsibility, the just mentioned basic principles and guidelines describe the various forms of reparation in the following terms:

– *restitution* may require, as the case may be, the restoration of liberty, family life, citizenship, return to one's place of residence, and restoration of employment or property;

– *compensation* may be provided for any economically assessable damage resulting from physical or mental harm, lost opportunities, material damages and loss of earnings, harm to reputation or dignity, and costs required for legal or expert assistance, medication and medical services;

– *satisfaction* may be given by means of (a) cessation of continuing violations; (b) verification of the facts and full public disclosure of the truth; (c) official declaration or a judicial decision affirming or restoring the dignity, reputation and legal rights of the victim; (d) apology, including public acknowledgement of the facts and acceptance of responsibility; (e) judicial or administrative sanctions against persons responsible for violations; (f) commemorations and the payment of tribute to the victims; (g) inclusion in training and in history or schoolbooks of an accurate account of the wrongs committed;

– *assurances and guarantees of non-repetition* should entail measures aimed at the prevention of the recurrence of violations by such means as (a) ensuring effective civilian

2 UN doc. E/CN.4/Sub.2/1993/8.

3 UN doc. E/CN.4/1997/104.

control over military and security forces; (b) restricting the jurisdiction of military tribunals specifically to military offences committed by members of the armed forces; (c) strengthening the independence of the judiciary; (d) protecting persons in the legal profession and human rights defenders; (e) conducting and strengthening human rights training in all sectors of society, in particular those programs aimed at military and security forces and law enforcement officials

In this paper the issue of reparations will be discussed in relation to *gross* violations of human rights. While redress is called for as a response to all violations of human rights, the requirements of justice are all the more imperative in the face of gross violations of human rights. The category of gross violations includes at least the following practices: genocide, slavery and slavery- like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; prolonged arbitrary detention; deportations or forcible transfer of population; and systematic discrimination, in particular based on race or gender.[4]

Given the nature of these violations and the scale on which they are being committed in times of armed conflict and severe repression, broad schemes and policies of reparations, encompassing a whole range of measures and a variety of modalities outlined above, are required as one of the conditions for the restoration of peace and justice in civil society. Such a process involves the legislative, executive and judicial branches of government. The role of the judicial branch is important for the settlement of disputes, the interpretation of the applicable standards and for affording remedies in cases of denial of justice. Similarly, international judicial and quasi-judicial institutions, deriving their competence from agreements and commitments undertaken by States, can play a vital role for the benefit of those persons whose rights are immediately affected but also, in a wider sense, as catalysts to influence the international and domestic legal orders in favour of larger sectors of victimized people. This perspective has to be kept in mind when the role of international judicial institutions is reviewed.

III. THE RIGHTS TO AN EFFECTIVE NATIONAL REMEDY

Many international human rights instruments contain express provisions relating to the rights of every person to an *effective remedy* by competent national tribunals for acts violating human rights which are granted by the constitution of by law.[5] For present purposes reference is made to three such provisions which were basic in the development of case law by international (quasi-) judicial institutions relating to the obligation to take effective measures to

4 UN doc. E/CN.4/Sub.2/1993/8, para. 13.

5 See also Manfred Nowak, *The Right of victims of gross human rights violations to reparations*, in Rendering Justice to the Vulnerable, Liber-Amicorum in honour of Theo van Boven (eds, F. Coomans, F. Grünfeld, I. Westendorp, J. Willems), forthcoming.

redress gross violations of human rights. They are Article 2, para. 3, of the International Covenant on Civil and Political Rights, Article 13 of the European Convention of Human Rights and Article 25 of the American Convention on Human Rights. While under the European and the American Conventions the European Court and the Inter-American Court are called upon to render binding judgments as to whether the Convention is violated, no such binding decisions can be made by the Human Rights Committee which is the (quasi-judicial) supervisory body established by the International Covenant on Civil and Political Rights. Under the first Optional Protocol to this Covenant relating to the right of individual petition, the Human Rights Committee may formulate "views" (Article 5, Optional Protocol). Unlike court judgments these *views* do no have legally binding force but nevertheless they carry considerable moral and political weight.[6]

A. THE HUMAN RIGHTS COMMITTEE

Analysis of case law pertaining to the right to life and the prohibition of torture (Articles 6 and 7 of the Covenant) bears out that the Human Rights Committee repeatedly expressed the view that States Parties are under and obligation to take the following measures on the basis of Article 2, para. 3, of the Covenant:

– to investigate the facts;
– to take action thereon as appropriate;
– to bring to justice persons found responsible;
– to extend to the victim(s) treatment in accordance with the provisions of the Covenant;
– to provide medical care to the victim(s);
– to pay compensation to the victim(s) or to his (her) family.[7]

With respect to the obligation to pay compensation, the Human Rights Committee used a variety of formulations:

– compensation to the victim's family (in the case of a disappeared person) for any injury suffered;
– compensation to the husband for the death of his wife;
– appropriate compensation to the family of the person killed;
– compensation for the wrongs suffered;

6 Eckart Klein, *Individual Reparation Claims under the International Covenant on Civil and Political Rights: The Practice of the Human Rights Committee*, in State Responsibility and the Individual; Reparation in Instances of Grave Violations of Human Rights, (eds. A. Randelzhofer and C. Tomuschat), 1999, pp. 27-41 (at pp. 34-35).

7 UN doc. E/CN.4/Sub.2/1993/8, para. 56.

– compensation for physical and mental injury and suffering caused to the victim by the inhuman treatment to which he was subjected;
– compensation to the surviving families.[8]

It is not fully clear whether the Committee recognizes, in the case of the death or disappearance of a person, that family members in their own right are entitled to compensation because of their own sufferings and anguish or that family members are entitled to compensation as relatives for the injury inflicted upon the immediate victim. However, in a landmark case the Committee ruled that the mother of the disappeared person had herself also been a victim. The Committee expressed itself in the following terms:

> "The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has a right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter, in particular of Article 7."[9]

B. THE EUROPEAN COURT OF HUMAN RIGHTS

While the European Court of Human Rights was for quite some time restrictive in its interpretation of the effective remedy provision in Article 13 of the European Convention, in recent times the Court started to change its position when faced with complaints about gross violations of human rights which occurred in Turkey, in particular in connection with Article 2 (right to life) and Article 3 (prohibition of torture or inhuman or degrading treatment or punishment)[10]. But for the first time in the history of the European Convention the European Court held in a recent judgment that also another European country had violated the prohibition of torture in Article 3 of the European Convention.[11] The case related to a complaint of serious ill-treatment inflicted on a Netherlands and Moroccan national while in French police custody. Referring to earlier pronouncements of the Court to the effect that *the Convention is a living instrument which must be interpreted in the light of present-day conditions*, the Court stated remarkably in the that case, recalling that in the past certain acts were classified as "inhuman or degrading treatment" as opposed to "torture", that "the increasingly high standard being

8 *Ibídem*, para 57.

9 *Elena Quinteros Almeida and María del Carmen Almeida de Quinteros v. Uruguay.* Comm. No. 107/81, Final Views of 21 July 1983, para. 14.

10 See Manfred Nowak, *supra* note 5.

11 *Selmouni v France*. Judgment of the European Court of Human Rights 28 July 1999, 20 Human Rights Law Journal (1999), pp. 228-241. This judgment triggered a cartoon in the leading French newspaper *Le Monde* showing a self-complacent conversation among Turkish politicians and diplomats with the words: *l'Europe s'ouvre à nous!*

required in the area of the protection of human rights and fundamental freedoms correspondingly and inevitably requires greater firmness in assessing breaches of fundamental values of democratic societies."[12] In making this pronouncement the Court had analyzed in detail the gravity of the treatment complained of.

In recent landmark cases, involving gross violations of human rights in Turkey, the European Court developed a more extensive interpretation of the notion "effective remedy" in Article 13 of the European Convention. In the case of *Aksoy v. Turkey*, relating to serious ill-treatment against a member of the Kurdish minority in South East Turkey while in policy custody, the European Court gave particular weight to the prohibition of torture and the vulnerable position of torture victims and their implications for Article 13. Consequently the notion of an "effective remedy" entails, according to the European Court, an obligation to carry out a thorough and effective investigation of incidents of torture and, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including access for the complainant to the investigatory procedure.[13] The European Court followed the same reasoning in the case of alleged rape and ill-treatment of a female detainee and the failure of authorities to conduct an effective investigation into her complaint that she was tortured in this way.[14]

c. The Inter-American Court of Human Rights

While most of the cases that reached the European Court of Human Rights did not involve gross violations of human rights -although the complaints originating in Turkey since this State Party accepted the right of petition substantially increased the number of cases falling within that category – most cases examined and adjudicated by the Inter-American Court involved killings and disappearances pertaining to the right to life. In this context Reisman aptly observed that many of the human rights violations in the European regional system were assimilable to torts but most of the gross human rights violations in the Americas were, until recently, part of a systematic effort by one group to maintain political power and its perquisites. He referred in this respect to the notion of *Doppelstaaten* which are characterized by formalistic and ineffective governance with effective power exercised by the military beyond the control of the civil authorities.[15]

12 *Selmouni v. France*, Judgment, para. 101.

13 *Aksoy v. Turkey*, Judgment of 18 December 1996, para. 98, Reports 1996 vi.

14 *Aydin v. Turkey*, Judgment of 25 September 1997, para. 103, 19 Human Rights Law Journal (1998), at. p. 70.

15 W. Michael Reisman, *Compensation for Human Rights Violations: The Practice of the Past Decade in the Americas*, in State Responsibility and the Individual; Reparation in Instances of Grave Violations of Human Rights, (eds. A. Randelzhofer and C Tomuschat) 1999, pp. 63-108 (at p. 66).

The first and leading case before the Inter-American Court was *Velásquez Rodríguez v. Honduras* relating to a disappearance attributed to the armed and security forces of Honduras.[16] Rather than relying on the effective recourse provision of Article 25 of the American Convention, the Inter-American Court emphasized the importance of Article 1 relating to the obligation to respect and to guarantee the rights recognized in the Convention. The Court stated that as a consequence of this obligation, States must prevent, investigate and punish any violations of the rights recognized by the Convention and moreover, if possible, attempt to restore the right violated and provide compensation as warranted for damages resulting from the violations. In the same vein the Court ruled that the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim compensation.[17] Like the Human Rights Committee and the European Court of Human Rights (in recent cases involving gross violations of human rights), the Inter-American Court emphasized the duty to investigate, the duty to prosecute and punish the guilty and the duty to provide compensation to the victim as basic elements of redress and restoration. In addition, the Inter-American Court stated clearly and emphatically that the duty to restore and the duty to prevent are equally essential ingredients for ensuring respect for human rights.

Although in early decisions the Inter-American Court appeared reluctant to establish a violation of Article 25 of the American Convention on the right to judicial protection and effective domestic recourse, in later cases concerning forced disappearances by security forces in Peru[18] and *incommunicado* detention and denial of *habeas corpus* procedure in Ecuador[19] the Court ruled that Article 25 is "one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in terms of the Convention". And the Court continued: "Article 25 is closely linked to the general obligation contained in Article 1(1) of the American Convention, in that it assigns duties of protection to the States Parties through their domestic legislation. The purpose of *habeas corpus* is not only to guarantee personal liberty and humane treatment, but also to prevent disappearance or failure to determine the place of detention, and, ultimately, to ensure the right to life".[20]

16 *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, Series C No. 4.

17 *Ibídem*, paras 166 and 174.

18 *Castillo Páez v. Perú*, Judgment of 3 November 1977, 19 Human Rights Law Journal (1998), pp. 219-229.

19 *Suárez-Rosero v. Ecuador*, Judgment of 12 November 1977, 19 Human Rights Law Journal (1998), pp. 229-240.

20 Judgment, note 18, paras 82-83 and Judgment, note 19, para. 65.

IV. THE ROLE OF THE HUMAN RIGHTS COURTS IN ORDERING REPARATIONS

The European Convention on Human Rights, as amended since the entry into force of the eleventh protocol, empowers the European Court of Human Rights to afford just satisfaction to the injured party. Article 41 (a slightly amended version of the earlier Article 50) reads:

> "If the Court finds that there has been a violation of the Convention of the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

In its case law the European Court held that various requirements had to be met for the affording of "just satisfaction", notably that:

a) The Court has found a decision or measure taken by an authority of a contracting State to be "in conflict with the obligations arising from the Convention";

b) There is an "injured party";

c) The Court considers it "necessary" to afford just compensation[21].

The Court also argued that in view of the adjective "just" and the phrase "if necessary" it enjoyed a certain discretion in the exercise of its power to afford satisfaction.[22] In many cases the Court held in fact that a favourable decision on the merits constituted in itself "just satisfaction to the injured party" and that consequently a further award of compensation was not called for.

It may be concluded that for affording just compensation under Article 41 of the European Convention basically four conditions must be fulfilled: (i) a breach by a State Party of its obligations under the Convention; (ii) the absence of the possibility of a complete reparation *(restitutio in integrum)* on the part of that State Party; (iii) the existence of material and or moral damage; (iv) a causal link between the breach of the Convention and the existence of damage.[23]

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21 *De Wilde, Ooms and Versijp v. Belgium*, Judgment of 10 March 1972 (Article 50), Series A, vol. 14, para. 21.

22 *Guzzardi v. Italy*, Judgment of 6 November 1980, Series A, vol. 39, para. 114.

23 See also Jonathan L. Sharpe, Article 50 (41), in *La Convention Européenne des Droits de l'Homme (2e. édition)*, 1999 *(Louis-Edmond Pettiti, Emmanuel Decaux, Pierre-Henri Imbert eds.)*, pp. 809-842, and Matti Pellonpää, *Individual Reparation Claims under the European Convention on Human Rights*, in State Responsibility and the Individual; Reparation in Instances of Grave Violations of Human Rights, (eds. A. Randelzhofer and C. Tomuschat), 1999, pp. 109-129.

The corresponding provision in the American Convention on Human Rights is much broader and essentially more generous *vis-à-vis* the injured party than the just satisfaction clause of the European Convention. Article 63, para. 1, of the American Convention reads:

> "If the Court finds that there has been a violation of the right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of this right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party".

As Reisman observed[24], Article 63, para.1, of the American Convention provides for three categories of remedy; *first,* injunctive relief to the effect that the injured party be ensured the enjoyment of his (or her) right or freedom that was violated (the European Court lacks such explicit competence); *second,* adjustments in the social and legal structures that gave rise to or allowed the breach to occur (again, the European Court lacks such explicit competence); *third,* fair compensation to be paid to the injured party (the European Convention used in this context the restrictive wording "if necessary")[25]. Article 63, para. 1, is one of a series of examples that the drafters of the American Convention went in a progressive manner beyond the terms of the European Convention. Another example, equally showing greater sensitivity to the rights and interests of the victim as injured party, is Article 63, para. 2, concerning the power of the American Court to adopt provisional measures.

A. THE EUROPEAN COURT AND GROSS VIOLATIONS

Given the limited scope of Article 41 of the European Convention on Human Rights and the restrictive interpretation of its competence under this article, the European Court of Human Rights has not gone beyond awarding pecuniary compensation for material and moral damages as well as payment for costs and damages. The Court has always refused to order or even to recommended the respondent government to amend its legislation or to institute criminal proceedings against perpetrators.[26]

Since the European Court is increasingly dealing with gross violations of human rights, involving in particular the right to life and the prohibition of torture (Articles 2 and 3 of the European Convention) the Court, in fixing the amount to be paid by the State Party as compensation for the damage suffered by the victim, takes into account the seriousness of the

24 W. Michael Reisman, note 15, at. p. 73.

25 See also Michiel van Emmerik, *Schadevergoeding bij schending van mensenrechten: hoe ver ligt San José van Straatsburg? (Reparation in case of violations of human rights: how far is San José removed from Strasbourg?)* 20 NJCM Bulletin (1995), pp. 303-315, at p. 313.

26 See Matti Pellonpää, note 23, at p. 110 and Manfred Nowak, note. 5.

violation. Thus, in the *Aksoy* case involving torture of a detainee in police custody, the Court decided, in view of *the extremely serious violations* suffered by the victim and the anxiety and distress that these undoubtedly caused to his father who had continued with the application after his son's death, to award the full amounts of compensation sought as regards pecuniary and non-pecuniary damage.[27] In the *Aydin* case where the victim, a female detainee, was ill-treated and raped as an especially grave and abhorrent form of torture and where the authorities failed to conduct an effective investigation, the European Court spoke in similar terms. It explicitly referred to the seriousness of the violations of the Convention.[28] Equally in the *Selmouni* case which involved ill-treatment in police custody amounting to torture, the Court considered that, having regard to the extreme seriousness of the violations, the victim had suffered personal and non-pecuniary injury for which the findings of violations in the judgment did not afford sufficient satisfaction.[29] Therefore, the Court awarded the victim compensation on the basis of its assessment on an equitable basis, but the statement by the Court that the findings in its judgment did not only afford limited satisfaction appears more than self-evident, given the extreme seriousness of the violation.[30]

Two other issues which came up with respect to Article 41 deserve attention. With regard to the request by the applicant, a national of Morocco and the Netherlands, for a transfer to the Netherlands to serve there the remainder of his sentence, the Court confirmed its (limited) interpretation of Article 41 to the effect that this article did not give it jurisdiction to make such an order against a Contracting State. Further, in connection with the applicant's request that, in view of the fact that he owed the French State a customs fine, the Court be asked to specify that the sums awarded to him under Article 41 should be exempt from attachment, the Court did not grant this request because it felt it lacked the jurisdiction to do so. Instead of issuing an order as requested, the Court devoted some consideration to this issue. It considered that it would be incongruous to award the applicant an amount in compensation for, *inter alia*, ill-treatment constituting a violation of Article 3 of the Convention if the State itself were then to be both the debtor and creditor in respect of that amount. The Court further considered that the purpose of compensation for non-pecuniary damage would inevitably be frustrated and the Article 41 system perverted if such a situation were to be deemed satisfactory.[31] It would be an interesting and positive development if in the future the European Court would make more frequent use of

27 *Aksoy v. Turkey*, note 13, para. 113.

28 *Aydin v. Turkey*, note 14, para. 131.

29 *Selmouni v. France*, note 11, para. 123.

30 It could be assumed that, since the victim might have been involved in drug-trafficking, the Court wished nevertheless to distinguish the present case and its award of compensation, from *Mc Cann and Others v. United Kingdom* (see note 32), where in spite of the finding of a violation of Article 2 of the European Convention, the claims for damages were dismissed.

31 *Selmouni v. France*, note 11, para. 133.

such "considerations" whenever it feels that a request for an order cannot be acceded to because of lack of competence. Such a nuanced approach could not be ignored by the States Parties and be helpful in the victim's interest.

Finally, the case of *Mc Cann and Others v. the United Kingdom*[32] deserves attention. In this case the European Court decided by a narrow majority (10 votes to 9) that the killing by members of the security forces of three members of the IRA in Gibraltar suspected of involvement in a terrorist bombing mission, constituted a violation of Article 2 (right to life). The Court nevertheless denied compensation to the applicants who were relatives of the persons killed and considered that "having regard to the fact that the three killed terrorist suspects, had been intending to plant a bomb, it was not appropriate to make an award under this head."[33] The Court's refusal to award compensation to the applicants, which is a perfect example of the Court's discretionary approach under Article 41, was seriously questioned by commentators. While the Court, albeit with the narrowest possible majority, *legally* concluded that the most basic rights under the European Convention had been violated, it appears that *moral* considerations stemming from the terrorist intents of the IRA members led the Court to dismiss the claim for compensation as "not appropriate". As Tomuschat suggested, the Court was perhaps not persuaded of its own judgment and wanted to satisfy both sides by striking a compromise between two contradictory positions.[34]

B. THE INTER-AMERICAN COURT

As was noted above, in the case law of the European Court of Human Rights the award of compensation is very much to the discretion of the Court, and although an integral part of the judgment relating to the merits, it comes somehow as a secondary matter or as an afterthought. On the other hand the application of the Article 63, para. 1, of the American Convention and the role played in this respect by the organs of the American Convention, the Commission and the Court, are very substantial and prominent. Unlike the general practice under the European Convention, the award of reparations under the American Convention is the subject of an elaborate separate procedure following the judgment on the merits, with full reasoning and argumentation. In this procedure, and this has no parallel in the European context, the Inter-American Commission plays an active part in representing the interests of the victim(s), both in negotiations with the Government concerned and in the hearings before the Inter-American Court. It is not intended to review in detail in this paper the very substantial case law on reparations developed by the Inter-American Court. Experts on the practice of the American

32 *Mc Cann and Others v. UK*, Judgment of 27 September 1995, Series A no. 234, and 16 Human Rights Law Journal (1995), pp. 260-286.

33 *Ibídem*, para. 219.

34 See in particular Matti Pellonpää, note 23, at pp. 112-113 and Christian Tomuschat as a discussant in the same publication at pp. 133-134.

Convention have already done this work in a most competent manner.[35] This paper will only deal with some trends and developments and notably with the functions and powers of the Inter-American Court pursuant to Article 63, para. 1.

The first and leading case in which the Inter-American Court was called upon to award reparations, failing an agreement on the matter between the Commission and Honduras, was the case of *Velásquez Rodríguez* accompanied by the *Godínez Cruz* case relating to disappearances in Honduras. In its judgment on compensatory damages in *Velásquez Rodríguez*[36], the Court awarded compensation to the family of the victims for the loss of earnings (roughly 500 times of the monthly salary of the victim), other pecuniary damages and for moral damages in view of the emotional harm and the psychological impact suffered by the family, especially by the dramatic characteristics of the involuntary disappearance of persons. However, the Court did not rule on the request by the Commission and the attorneys that it order the Government of Honduras to take such measures as the investigation of the facts related to the involuntary disappearance, the punishment of those responsible, the issuing of a public statement condemning the practice of disappearances. The Court argued that measures of this type would constitute a part of the reparation of the consequences of the violation of rights and freedoms and not part of the indemnity. Moreover the Court referred to its judgment on the merits where it had pointed to the Government's continuing duty to investigate in addition to the duties to prevent and to punish those directly responsible. And the Court added, in line with numerous pronouncements to the same effect by the European Court, that the judgment on the merits was itself a type of reparation and moral satisfaction of significance and importance for the families of the victims. A request by the lawyers of the victim's family that the Court would also order punitive damages as part of the indemnity in view of the extremely serious violation of human rights in the case involved, was not granted by the Court. The Court held that the expression "fair compensation" in Article 63, para. 1, did not include punitive damages. The Court considered that in some domestic systems, particularly the Anglo-American, damages were awarded in amounts to deter or to serve as an example, but that this principle is not applicable in international law, at least for the time being.

In his review of the case law on reparations by the Inter-American Court, Reisman aptly pointed out, in his paper and in the ensuing discussion[37], that the Inter-American Court as from 1989 in *Velásquez Rodríguez* followed consistently the line of awarding pecuniary damages as reflected in the ultimate words of Article 63, para. 1, that "fair compensation be paid to the injured party". However, at the same time the Court showed great reluctance to order other

35 See in particular W. Michael Reisman, note 15, and Dinah Shelton, *Reparations in the Inter-American System, on the Inter-American System of Human Rights*, (David Harris and Stephan Livingstone ed.), 1998, pp. 151-172.

36 *Velásquez v. Rodríguez*, Judgment of 21 July 1989, Compensatory Damages, 11 Human Rights Law Journal (1990), pp. 127-133.

37 W. Michael Reisman, note 15, at pp. 80 and 84, and discussion at pp. 144-145.

reparative measures as envisaged in another component element of Article 63, para. 1, that it shall also rule "if appropriate, that the consequences of the measure or situation that constituted the breach of such rights or freedom be remedied", referred to by Reisman as "the social reconstruction competence" of the Court. It is apparently one thing for the Court to pronounce itself in judgments on the merits about the need for broader structural and reparative measures which would involve matters of State policy, it is another thing for the Court to issue specific orders pursuant to Article 63, para. 1, relating to such pervasive measures.

In at least one case, however, subsequent to the Honduras cases, the Court appeared to go into a new direction beyond awarding exclusively pecuniary damages. This was the *Aloeboetoe* case on the matter of reparations in connection with the arbitrary killings of seven young men, Maroons belonging to the Saramaca tribe in Suriname[38]. In fact, the Republic of Suriname admitted responsibility for the kidnapping and death of these persons. In this case the Inter-American Court awarded, after extensive calculations, substantive amounts of money to relatives or their heirs by way of reparations for material and moral damages. In addition the Court ordered the creation of a Foundation with a view to providing the beneficiaries with the opportunity of obtaining the best returns for the sums received in reparation. But the Court also wished to ensure –and this was somehow a new approach going beyond merely a pecuniary award- that the children of the victims be offered a school where they can receive adequate education and basic medical attention. As the Court stated, this goal will not be met merely by granting compensatory damages. Therefore, the Court ordered the State of Suriname, as an act of reparation, to reopen the school located in Gujaba and staff it with teaching and administrative personnel so that it will function on a permanent basis as of 1994, and to make the medical dispensary already in place in that locality operational during the same year. One commentator hailed this judgment in the *Aloeboetoe* case as evidence that the Inter-American Court interprets its competence pursuant to Article 63, para. 1, in a broad manner and contrasts this decision with the restrictive practice of the European Court under Article 50 (41) of the European Convention.[39] However, another commentator, in the meantime privy to subsequent case law of the Inter-American Court on the matter of reparations, was more sobering in his assessment. He referred to the Aloeboetoe case as an exception to the general practice of the Court's reparative competence. And he added that in all other cases where the Commission or the family asked for reparative orders that would require significant changes in the technique of public order of the defendent State, the Court refused to take the matter up. [40, 41]

38 *Aloeboetoe et al. v. Suriname*, Judgment of 10 September 1993, Reparations, 14 Human Rights Law Journal (1993), pp. 413-425.

39 Michiel van Emmerik, note 25, at p. 313.

40 W. Michael Reisman, note 15, at pp. 144-145 (discussion).

41 Although this may fall outside the scope of the present paper, it may be of interest to compare the practice of the Inter-American Court under Article 63, para. 1, with its practice under Article 63, para. 2, relating to provisional measures. Admittedly the circumstances and the implications relating to these two competences of the Court are different, but it would *prima facie* appear that the Court is bolder in its approach to provisional measures than in its practice relating to reparative orders.

The issue whether the Inter-American Court should also rule under Article 63, para. 1, on non-pecuniary reparations came up cogently in the *El Amparo* case[42] and in the *Caballero Delgado and Santana* case[43]. In these cases the Court continued to set forth its policy of reluctance to order non-pecuniary reparations but the underlying issues were highlighted by the elaborate dissenting opinions on the matter written by Judge Cançado Trindade. In *El Amparo* the Government of Venezuela had recognized responsibility for the killing by members of the military and the police of fourteen fishermen. The Court had decided that Venezuela was liable for the payment of damages and that the surviving victims and the next of kin of the dead be paid a fair indemnification. Since the Inter-American Commission and the Republic of Venezuela had not reached an agreement on the reparations and the form and amount of the indemnification, the Court had to determine these issues. The Court awarded on the basis of extensive calculation and in accordance with its practice substantial compensatory damages to the victims and the relatives but it did not wish to order non-pecuniary reparations. The latter were defined by the Commission in the following terms: reform of the Code of Military Justice and those military regulations and instructions that are incompatible with the Convention; investigation and effective punishment of the physical and intellectual authors; satisfaction of the victims by restoring their honour and reputation, and the unequivocal establishment of the facts; satisfaction of the international community through the declaration that acts such as those that occurred in the present case will not be tolerated; and the creation of a foundation for the promotion and dissemination of international human rights law in the region in which the events occurred.[44] The Court did decide that Venezuela had the obligation to continue investigations into the events of the case and to punish those responsible and considered that its judgment on the merits and its present judgments constituted adequate reparation in themselves.

The *Caballero Delgado and Santana* case pertained to the forced disappearance of two persons in Colombia. Again, the Court awarded monetary reparation for material and moral damages but decided that the requested non-pecuniary reparations were inadmissible. The Court did, however, state that Colombia is obliged to continue its efforts to locate and identify the remains of the victims and deliver them to their next of kin. It should be noted that, as regards non-pecuniary reparations, the Commission had requested reform of the Colombian legislation on the remedy of *habeas corpus* and codification of the crime of forced disappearances and that judicial proceedings on the disappearances of the two persons should remain within the jurisdiction of the ordinary courts and not be transferred to the military courts. The Court was of the opinion that such matters as the examination and review of legislation and the question of the competence of military tribunals and their compatibility with international human rights instruments were inappropriate to be taken up in an incidental manner and at the reparations stage.

42 *El Amparo* case, Reparations, Judgment of 14 September 1996, Annual Report 1997, pp. 159-177.

43 *Caballero Delgado and Santana* case, Reparation, Judgment of 29 January 1997, Annual Report 1998, pp. 59-81.

44 Note 42, para. 56 at. p. 171.

As mentioned above, Judge Cançado Trindade disassociated himself from the Court's restrictive position as regards non-pecuniary damages in connection with Article 63, para. 1, of the American Convention. He stressed in particular the importance of the obligation of States, pursuant to Article 1, para. 1, of the Convention to *respect* the rights and freedoms and *to ensure* these rights and freedoms to all persons subject to their jurisdiction as well as the duty of States in this respect to take the necessary legislative and other measures in accordance with Article 2. He stated that the Court had focused mainly on "just compensation" as a measure of reparation and that the time has now come to link the element of just compensation with other reparative measures, including legislative measures, resulting from the duty to ensure or guarantee the enjoyment of the rights prescribed by Articles 1, para. 1, and 2 of the American Convention.[45]

It appears from the Inter-American Court's case law on reparations that the Court has gone a long way -with more sophistication than the European Court in Strasbourg- in the development of criteria and judicious practice of awarding pecuniary reparations. In *Aloeboetoe* the Court went a step further but the Court's orders under Article 63, para. 1, were still related to the pecuniary aspects of the award in connection with the injured party. The Court was also ready to stress the duty of the State to carry out further criminal investigations as a reparative measure but the Court has not (yet) shown great willingness to order other non-pecuniary reparations and to give substance to the wording of Article 63, para. 1, of the Convention that "the consequences of the measure or situation that constituted the breach of such right or freedom be remedied." The Court is, it appears, ready to acknowledge the desirability of non-pecuniary reparations and it favours to refer in this respect to its judgments on the merits, but it is not prepared, at least for the time being and notwithstanding Judge Cançado Trindade's strong pleas, to order reparations involving direct legislative and structural socio-political implications. As was indicated by Reisman, the Court focuses on that part of Article 63 in which compliance by the defendent States was more likely to be forthcoming, viz. payment of pecuniary awards, and it prefers to avoid addressing other reparative issues which may bring it into direct confrontation with the leadership of the States concerned.[46]

V. CONCLUDING REMARKS

Reparation to victims of gross violations of human rights is a requirement of justice and, in many situations, it is also an important element in the process of promoting peace and reconciliation. The modalities of reparation are widely ranging and serve as means to remove or to redress the consequences of wrongful acts and to prevent and deter the recurrence of violations. Among these modalities of reparation the monetary or compensatory awards are important means to meet the needs of victims and to highlight the implications of State responsibility.

45 *Caballero Delgado and Santana* case, note 43, Dissenting opinion Judge A.A. Cançado Trindade, para. 13, at. p. 75. See also Manfred Nowak, note 5, referring to the same opinion.

46 W. Michael Reisman, note 15, at pp. 144-145 (discussion).

However, non-pecuniary measures falling under the categories of satisfaction and assurances and guarantees of non-repetition[47] are no less important devices with a view to restore and to repair in a more structural manner, both with regard to individuals and to collectivities. This requires a broad range of policy measures involving the judiciary, the law enforcement system, education and training, etc.

International supervisory bodies in the field of human rights are generally wellaware of the need of broad reparative measures, including preventive policies. Thus, United Nations human rights organs are on record as promoting and recommending such measures and policies. The same applies to regional human rights bodies. However, when it comes to strictly judicial decision-making involving the issuing of legally binding orders to States, the powers belonging inherently to courts represent paradoxically a strength and a weakness. The strength lies in the legally binding character and the general presumption that States will comply with judgments and orders delivered by Courts. In that sense judgments have superior force over "views", "recommendations" and "considerations" expressed or pronounced by quasi-judicial or other monitoring bodies. On the other hand, the weakness expresses itself in the tendency and practice of self-restraint and judicial caution, stemming from the apprehension that respondent States will flout judgments and orders which they regard as disagreeable, thus eroding the Court's authority. Human rights courts are obviously faced with legal and moral dilemmas that have an effect on policy making. But first and foremost the courts are the custodians of the values enshrined in the international instruments under which they have been established. The question remains pertinent whether in matters of reparations, the human rights courts, in addition to awarding compensatory damages, should not embark upon a practice of pronouncing themselves on the need or the desirability of non-pecuniary reparations which commend or even impose themselves. Such pronouncements may not have *per se* binding legal force but hey will carry considerable weight and will contribute to a progressive development of the law and practice in favour of more fundamental reparative justice.

Postscriptum

After finishing this paper, more recent case law developed by the European and Inter-American Courts having a bearing on the subject matter, came to my attention. In particular the Judgment of the Inter-American Court, dated 27 November 1998, on reparations in *Loayza Tamayo v Peru* (20 Human Rights Law Journal, 1999, pp. 194-213) appears to be of considerable significance from the perspective of non-pecuniary reparations. The Court decided on restitution measures and other forms of reparations than compensatory damages, notably that the State Party shall adopt the internal legal measures necessary to adapt the decree-laws on the crime of terrorism and the crime of treason to conform to the American Convention on Human

47 See pp. 654-655 *supra.*

Rights. This judgment opens up -to use wording of Judges Cançado Trindade and Abreu-Burelli- in their joint concurring opinion – "quite a wide horizon in the matter of reparations" and revitalizes the terms of Article 63, para. 1, of the American Convention. The Court's decision to order Perú to reform its national legislation was subsequently used by Perú as one of the arguments of this State Party to withdraw its acceptance of the jurisdiction of the Court (see the enlightening discussion of this issue by Douglas Cassel, *Perú withdraws from the Court: Will the Inter-American Human Rights system meet the challenge?*, 20 Human Rights Law Journal, 1999, pp. 167-175).