# USING THE PRESENT TO REPAIR THE PAST: THE IACHR'S FIRST STEP TOWARDS A REHABILITATIVE MODEL OF REPARATIONS FOR HISTORICAL CRIMES

CHARLOTTE M. VERDON*

## I. INTRODUCTION

A common criticism of reparation claims for historical crimes such as slavery contends that assessing the damages caused by wrongs that occurred years or centuries ago is much too tenuous, if not impossible.[1] Nonetheless, descendants of victims often continue to suffer the lingering consequences of past crimes; for example, the effects of slavery are still felt today in American society in the form of structural inequality.[2] Accordingly, some so-called "reparationists"[3] in the United States claim that reparations should not merely aim to compensate for past injuries, but rather, should seek to mitigate present inequalities through the improvement of the socioeconomic conditions of descendants of slaves.[4]

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1 In the United States particularly, the debate on reparations for slavery raised varied reactions. *See, e.g.*, Doug Criss, *People Are Again Talking About Slavery Reparations. But It's a Complex and Thorny Issue*, CNN (Apr. 15, 2019), https://www.cnn.com/2019/04/14/politics/slavery-reparations-explainer-trnd/index.html (stating that the evaluation of compensation "may be the most contested part" of the debate on reparations for slavery in the United States); Corey Williams & Noreen Nasir, *AP-NORC Poll: Most Americans Oppose Reparations for Slavery*, ASSOCIATED PRESS, Oct. 25, 2019, https://apnews.com/76de76e9870b45d38390cc40e25e8f03 (indicating that black poll respondents question how a fair amount of reparations could be determined).

2 In 2001, the report from the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance acknowledged that "Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of [slavery and colonization] and continue to be victims of their consequences." World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, at 11–12, U.N. Doc. A/CONF.189/12 (Sept. 8, 2001). The report also highlighted that "these structures and practices have been among the factors contributing to lasting social and economic inequalities in many parts of the world today." *Id.* at 12. In the United States more specifically, the median white family was forty-one times wealthier than the median African American family in 2016. Courtney E. Martin, Opinion, *Closing the Racial Wealth Gap*, N.Y. TIMES (Apr. 29, 2019), https://www.nytimes.com/2019/04/23/opinion/closing-the-racial-wealth-gap.html. In 2014, the unemployment rate of "prime-age black men" was nearly double that of white men, partially due to the mass incarceration of black men. *The Wage Gap Between White and Black Men Is Growing Wider*, ECONOMIST (July 7, 2018), https://www.economist.com/united-states/2018/07/07/the-wage-gap-between-white-and-black-men-is-growing-wider. A "vast majority" of the forty-seven million Americans who identify as "black" or "African American" are descendants of slaves. Patricia Cohen, *What Reparations for Slavery Might Look Like in 2019*, N.Y. TIMES (May 23, 2019), https://www.nytimes.com/2019/05/23/business/economy/reparations-slavery.html.

3 Ali A. Mazrui, *Global Africa: From Abolitionists to Reparationists*, 37 AFR. STUD. REV., no. 3, 1994, at 1, 1.

4 *See* Sheryl Gay Stolberg, *At Historic Hearing, House Panel Explores Reparations*, N.Y. TIMES (June 19, 2019), https://www.nytimes.com/2019/06/19/us/politics/slavery-reparations-hearing.html?module=inline ("Advocates for reparations . . . emphasize that it does not necessarily mean the government would be writing checks to black people . . . . Rather,

International law does not seem to lend itself to such creative instruments for reparations.[5] The principle of reparation in international law is aimed at the reestablishment of the status quo ante.[6] This implies that there needs to be a demonstrable direct link between the crime perpetrated and the reparations awarded.[7] Ordering measures to improve present socioeconomic conditions as reparations for past crimes does not seem to square with this requirement.

The Inter-American Court of Human Rights (IACHR) has nevertheless attempted to navigate these theoretical limitations in several cases concerning "gross violations" of human rights.[8] Through these decisions, it moved beyond a strict adherence to the traditional reparations framework by awarding reparations in the form of measures geared towards ameliorating the present-day socioeconomic conditions of the victims' communities. This annotation will first address the shortcomings of the traditional reparation framework in international law in Part II. Then, in Part III, the annotation will present three cases in which the

they say, the government could offer various types of assistance—zero-interest loans for prospective black homeowners, free college tuition, community development plans to spur the growth of black-owned businesses in black neighborhoods—to address the social and economic fallout of slavery and racially discriminatory federal policies that have resulted in a huge wealth gap between white and black people."). Another example is the conclusion of the Regional Conference of the Americas that reparations for slavery "should be in the form of policies, programmes and measures . . . designed to rectify the economic, cultural and political damage which has been inflicted on the affected communities and peoples." World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Report of the Regional Conference of the Americas*, ¶ 70, U.N. Doc. A/CONF.189/PC.2/7 (Apr. 24, 2001).

5 Other aspects of international law represent major impediments to successful claims of reparations for historical crimes, notably statutes of limitation and the principle of intertemporal law; these issues are beyond the scope of this annotation. For an overview of the various legal obstacles to such reparations claims, see generally REPAIRING THE PAST?: INTERNATIONAL PERSPECTIVES ON REPARATIONS FOR GROSS HUMAN RIGHTS ABUSES (Max du Plessis & Stephen Peté eds., 2007).

6 *See* Factory at Chorzów (Ger. v. Pol.), Merits, Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) ("[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.").

7 *Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n 31, 92, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

8 Roger-Claude Liwanga, *The Meaning of "Gross Violation" of Human Rights: A Focus on International Tribunals' Decisions over the DRC Conflicts*, 44 DENV. J. INT'L L. & POL'Y 67, 68 (2015). In the context of violations of human rights, international instruments and international tribunal case law often use the term "gross violations" interchangeably with "flagrant," "grave," "massive," "serious," and "systematic" violations. *Id.* at 69. "There is no universally accepted definition of the term 'gross violation' of human rights," but scholars usually understand this category to encompass acts of torture, arbitrary executions, enforced disappearances, arbitrary detentions, apartheid, systematic discrimination, genocide, slavery or forced labor, and deportation or forced displacement of a population. *Id.* at 70–71 (citing Stanislav Chernichenko, Definition of Gross and Large-Scale Violations of Human Rights as an International Crime, at 14, U.N. Doc. E/CN.4/Sub.2/1993/10 (June 8, 1993); TAKHMINA KARIMOVA, WHAT AMOUNTS TO 'A SERIOUS VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW'? 12 (Geneva Academy, Academy Briefing No. 6, 2014), https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf).

IACHR awarded socioeconomic measures as reparations for gross violations of human rights.[9] Finally, Part IV will then argue that the IACHR's attempt to reconcile these measures with the traditional reparation principle is both theoretically and normatively unsatisfying.

## II. *FACTORY AT CHORZÓW*: AN UNSUITABLE FRAMEWORK FOR REPARATIONS OF HISTORICAL GROSS VIOLATIONS OF HUMAN RIGHTS

### A. *The Principle of Reparation Under International Law: Reestablishing the Status Quo Ante*

The Permanent Court of International Justice (PCIJ) famously formulated the principle of reparation in international law in the *Factory at Chorzów* case, stating that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[10] This principle also applies in the context of gross violations of human rights.[11] It entails a causal link between the injury and the wrongful act,[12] as well as directness or foreseeability of the damage, which excludes the reparation of damage that is "too indirect, remote, and uncertain to be appraised."[13]

This principle of reparation, which favors restitution in kind or monetary compensation,[14] is particularly tailored to reparations for loss that can easily be returned or monetized, such as the expropriation of an investment, as was the case in *Factory at Chorzów*.[15] However, this framework is much less suited to repair historical gross human rights violations. First, it is difficult to put a price on the injury caused by human rights violations such as torture, slavery, or genocide. Human rights violations often create permanent cultural, psychological, and physical losses that would make the goal of reestablishing the status quo ante

9 The presentation of these cases in no way purports to be an exhaustive account of the IACHR's practice of awarding socioeconomic measures as reparations for human rights violations. These cases were selected because of the extensiveness of the court's justification and/or because the facts of the cases lend themselves to an adequate comparison with typical claims of reparations for historical crimes, such as those relating to slavery in the United States. *See infra* Part III.

10 *Factory at Chorzów*, 1928 P.C.I.J. (ser. A) No. 17, at 47.

11 The U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law essentially restate the *Factory at Chorzów* principle: "*Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred." G.A. Res. 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶ 19 (Dec. 16, 2005).

12 *Responsibility of States for Internationally Wrongful Acts*, *supra* note 7, at 92.

13 Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905, 1931 (Trail Smelter Arbitral Trib. 1941).

14 With regard to forms of reparation, the PCIJ in *Factory at Chorzów* expressed a preference for "[r]estitution in kind," but when such form of reparation is not possible, the court would award the "payment of a sum corresponding to the value which a restitution in kind would bear." *Factory at Chorzów*, 1928 P.C.I.J. (ser. A) No. 17, at 47.

15 *See* Factory at Chorzów (Ger. v. Pol.), Jurisdiction, Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 29 (July 26) ("[T]he case is therefore one of expropriation . . . .").

impossible. Second, the passage of time and the disappearance of victims, witnesses, and perpetrators make it difficult to estimate the positions in which the victims would have been had the wrongful act not occurred.[16] Finally, the requirement of directness or foreseeability of damage would theoretically bar claims, based on the idea that present inequalities are the remote consequences of past violations.[17]

### B. *Purposes of Reparations: Compensatory vs. Rehabilitative*

The *Factory at Chorzów* standard, though seemingly preclusive of reparations for historical human rights violations, should only be one piece of the puzzle. Reparations can, in fact, be awarded for different purposes, compensatory *or* rehabilitative. As explained above, compensatory measures, because they formally entail imagining the position in which the victims would have been had the wrongful act not occurred, require a causal connection between the crimes and the reparations awarded. Rehabilitative measures, on the other hand, are not limited to reestablishing the past status quo. Rather, they are forward-looking, geared towards promoting the victims' self-empowerment or improving their living conditions,[18] without requiring a strict logical link between measures awarded and the relevant past wrongs. At the individual level, rehabilitative measures often take the form of psychological support,[19] but they could also be directed at the community as a whole.[20] Framing reparations as *rehabilitative* measures, and not compensatory, would thus seem a more appropriate theoretical basis for reparations that address present socioeconomic conditions of the victims' community. The three cases discussing in the following part, despite their nominal reliance on

16 Some reparationists engage in complex counterfactual scenarios in an attempt to identify what share of the gap between the incomes of black and white Americans could be attributed to slavery, but these different assessments lead to a wide range of results. *See* Cohen, *supra* note 2 ("Attaching a dollar figure to a program of reparations resembles a 'Wheel of Fortune' spin, with amounts ranging from the piddling ($71.08 per recipient under Forman's plan) to the astronomical ($17 trillion in total).").

17 *See, e.g.*, Aloeboetoe et al. v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶¶ 48–49 (Sept. 10, 1993) ("Every human act produces diverse consequences, some proximate and others remote. An old adage puts it as follows: ***causa causæ est causa causati***. Imagine the effect of a stone cast into a lake; it will cause concentric circles to ripple over the water, moving further and further away and becoming ever more imperceptible. Thus it is that all human actions cause remote and distant effects.

To compel the perpetrator of an illicit act to erase all the consequences produced by his action is completely impossible, since that action caused effects that multiplied to a degree that cannot be measured.

. . . .

The solution provided by law in this regard consists of demanding that the responsible party make reparation for the immediate effects of such unlawful acts . . . .").

18 Roy L. Brooks, *Reflections on Reparations*, *in* POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES 103, 108 (John Torpey ed., 2003).

19 *See, e.g.*, Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶¶ 106–08 (Nov. 19, 2004) (ordering the state to set up a committee to evaluate and treat the physical and mental conditions of the victims); Río Negro Massacres v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 289 (Sept. 4, 2012) (ordering the state to "provide, free of charge and immediately, to the victims . . . medical and psychological treatment").

20 Brooks, *supra* note 18, at 108.

the *Factory at Chorzów* framework, illustrate a rehabilitative approach to reparations that may be used as a blueprint for future cases.

## III. HOW REPARATIONS CAN LINK PAST AND PRESENT: THREE EXAMPLES

In Latin America, indigenous and tribal peoples are infamously frequent victims of atrocities linked to colonization and internal armed conflicts, during which they are often specifically targeted by their respective states.[21] In most of Latin America, indigenous peoples face inequality, poverty, and racial discrimination.[22] In the three cases considered in this part, the victims were members of a tribal or indigenous people. In *Aloeboetoe*, the victims were Maroons, specifically from the Saramaka tribe in Suriname.[23] In *Plan de Sánchez Massacre* and *Río Negro Massacres*, the victims were all members of the Maya indigenous people in Guatemala.[24]

These three cases all involve "gross violations of human rights"[25]—such as summary executions, rapes, or forced displacements—that a state army committed.[26] They also all involve violations affecting more than

21 For example, as explained in *Río Negro Massacres*, Guatemala, under its "National Security Doctrine," had designated the Mayan indigenous people as an "internal enemy"; the IACHR later found that the Mayan people were in fact "the ethnic group most affected" by violations of human rights during the Guatemalan internal conflict. *Río Negro Massacres*, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 58.

22 *See* WORLD BANK, INDIGENOUS LATIN AMERICA IN THE TWENTY-FIRST CENTURY 58 (2015), http://documents.worldbank.org/curated/en/145891467991974540/pdf/98544-REVISED-WP-P148348-Box394854B-PUBLIC-Indigenous-Latin-America.pdf ("[T]he gaps separating indigenous households from non-indigenous households have either stagnated or increased over much of the past decade on most accounts."); *id.* at 9 ("[Twenty-four] percent of all indigenous people live in extreme poverty . . . ."); *id.* at 59 ("[I]n the Latin American countries for which data are available, the proportion of indigenous households living in poverty today still doubles the proportion of non-indigenous households living in poverty, is 2.7 times as high for extreme poverty, and is three times as high for people living on less than US$1.25 a day . . . ."); *id.* at 75 ("Indigenous Latin Americans experience discrimination more frequently than other groups in their respective countries.").

23 Aloeboetoe et al. v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 17 (Sept. 10, 1993).

24 Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 2 (Nov. 19, 2004); *Río Negro Massacres*, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 65.

25 *See supra* note 8 and accompanying text.

26 In *Aloeboetoe*:

> "[M]ore than 20 male, unarmed Bushnegroes **(Maroons)** had been attacked, abused and beaten with riflebutts by a group of soldiers. A number of them had been wounded with bayonets and knives and were detained on suspicion of belonging to the Jungle Commando, a subversive group. Some 50 persons witnessed these occurrences.
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> . . .
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> . . . [T]he soldiers allowed some of the Maroons to continue on their way, but that seven of them, including a 15-year old boy, were dragged, blindfolded, into a military vehicle . . . .
>
> . . . The soldiers ordered the victims to get out or forcibly dragged them out of the vehicle. They were given a spade and ordered to start digging. [One of them] was injured while trying to escape, but was not followed. The other six Maroons were killed."

one individual, with the number of persons affected ranging from seven[27] to more than 400.[28] With the exception of *Aloeboetoe*, which was decided six years after the crimes occurred,[29] the cases were decided more than twenty years after the fact.[30] Because of ongoing conflicts and the fact that state agents committed the crimes, victims were often unable to report crimes until many years later.[31] These circumstances meant that the victims were affected not only by the crimes, but also by a culture of impunity that persisted for many years afterwards.[32] Thus, these cases are particularly relevant to the discussion of reparations for historical crimes because they are, by definition, characterized by a long-lasting freeze between the crimes themselves and the claims for reparations.

### A. *Aloeboetoe et al. v. Suriname (1993)*

In *Aloeboetoe*, the IACHR expressly stated that reparations should only redress the "immediate effects" of the crimes.[33] However, when awarding financial compensation for the direct moral damages, the court noted that this compensation would "include[] an amount that will enable the minor children to continue their education until they reach a certain age."[34] The court thus took into account these costs as part of an equitable evaluation of the moral damages,[35] awarding a lump sum payment to all the victims expressly "*bearing in mind the economic and social position*

*Aloeboetoe et al.*, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶¶ 2–5. The seventh victim managed to escape later, but died of his injuries. *Id.* ¶ 6.

27 *Id.* ¶¶ 5–6. During the Plan de Sánchez massacre, on market day, a group of approximately sixty persons wearing military uniforms and carrying assault rifles gathered the young women and girls of the village to be "abused, raped, and murdered"; the older women, boys, and men were gathered in a different place, where they were executed. *Plan de Sánchez Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 49(2). Around 268 people died. *Id.* The Río Negro massacres concerned five massacres that occurred in several villages of the Río Negro community over two years, killing over 400 people. *Río Negro Massacres*, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶¶ 68–81.

28 *Río Negro Massacres*, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶¶ 68, 70, 79–81; *see Plan de Sánchez Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 49(2) (around 268 people were executed).

29 The events underlying the *Aloeboetoe* case took place in 1987, and the IACHR rendered its judgment on reparations in 1993. *Aloeboetoe et al.*, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶¶ 2, 116.

30 In *Plan de Sánchez Massacre*, the events giving rise to the case occurred in 1982, and the IACHR rendered its decision on reparations in 2004. *Plan de Sánchez Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶¶ 49(2), 125. In *Río Negro Massacres*, the underlying events occurred in 1980 and 1982, but the case was decided only in 2012. *Río Negro Massacres*, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶¶ 68–81, 324.

31 For example, in *Plan de Sánchez Massacre*, the survivors could not "seek justice" for the events until 1992, ten years after the crimes. *Plan de Sánchez Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 49(5).

32 Impunity can be defined as "the absence or inadequacy of penalties and/or compensation for massive and grave violations of the human rights of individuals or groups of individuals." El Hadji Guissé (Special Rapporteur Pursuant to Sub-Comm'n Res. 1996/24), *Final Rep. on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights)*, ¶ 20, U.N. Doc. E/CN.4/Sub.2/1997/8 (June 27, 1997).

33 *Aloeboetoe et al.*, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 49.

34 *Id.* ¶ 96.

35 *See id.* ¶ 87 ("[A]s for the moral damages, the [IACHR] based these on 'principles of equity.'").

*of the beneficiaries*."[36] The court did not further delve into whether such a position was causally linked to the massacre.

The IACHR further stated that these education goals would not be met "merely by granting compensatory damages,"[37] and that it was "also essential that the children be offered a school where they can receive adequate education and basic medical attention."[38] Noting that, "[a]t the present time, this is not available in several of the Saramaka villages," the court thus ordered Suriname "to reopen the school at Gujaba and staff it with teaching and administrative personnel to enable it to function on a permanent basis as of 1994."[39] Further, it ordered Suriname to take "the necessary steps . . . for the medical dispensary already in place there to be made operational and reopen that same year."[40]

### B. *Plan de Sánchez Massacre v. Guatemala (2004)*

Over a decade later, in *Plan de Sánchez Massacre*, the IACHR decided that "non-pecuniary" in this case included not only the pain and suffering of the direct victims and their descendants, but also the "harm of objects of value that are very significant to the individual" and non-pecuniary alteration of the "living conditions of the victims."[41] The court found that there was no precise value that could be attributed to this type of damage, but it could nevertheless be compensated through "performing acts or implementing projects with public recognition or repercussion."[42]

The IACHR thus ordered "other forms of reparation" directed at this "non-pecuniary damage."[43] The court emphasized the importance of these measures in light of the "extreme gravity" of the acts and the "collective nature" of the injury.[44] The court, noting the damage caused by the massacres to the members of various communities, ultimately concluded that the state must maintain and improve roads between these communities and the municipal capital; maintain a sewage system and supply of water; recruit staff for primary and secondary education; and establish a health center.[45]

### C. *Río Negro Massacres v. Guatemala (2012)*

In *Río Negro Massacres*, the IACHR decided that, in order to entirely repair the damage that the state had done, financial compensation had to be accompanied by measures of satisfaction "in order to redress the harm comprehensively,"[46] considering both the "grave and massive human

36 *Id.* ¶ 91 (emphasis added).
37 *Id.* ¶ 96.
38 *Id.*
39 *Id.*
40 *Id.*
41 Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 80 (Nov. 19, 2004).
42 *Id.*
43 *Id.* ¶ 93.
44 *Id.*
45 *Id.* ¶ 110.
46 Río Negro Massacres v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 272 (Sept. 4, 2012).

rights violations" in the context of an internal armed conflict[47] and the "collective nature" of the injury.[48] As a justification to order such measures, the IACHR further explained that the "prolonged impunity" and "denial of justice" suffered by victims of grave and massive violations of human rights not only inflicted material damages on the victims, but also altered their "social relationships" and "community dynamics."[49]

The court also noted the "precarious living conditions" in which the displaced victims lived, without further elaborating on the causal nexus between those conditions and the violations found.[50] The court relied on testimony that people in the village lived in "extreme poverty" without access to "potable water," and had a health center that lacked medicine and staff.[51] The IACHR then ordered the reinforcement of the health center's capacity and staff; the implementation of programs of food security and nutrition; the improvement of roads; the construction of systems of sewerage, water treatment, and supply of water; the reconstruction of primary schools; and the supply of electricity at affordable prices.[52]

## IV. THE COURT'S ATTEMPT TO SQUARE THE AWARD OF SOCIOECONOMIC MEASURES WITH THE TRADITIONAL REPARATION PRINCIPLE

Despite the seemingly novel approaches to reparations in these cases, the IACHR never abandoned the *Factory at Chorzów* principle of reparation based on the reestablishment of the status quo ante.[53] Indeed, Article 63(1) of the American Convention on Human Rights, the governing document of the IACHR, incorporates the compensatory *Factory at Chorzów* principle of reparation.[54] In all of the above cases, the IACHR affirmed that reparation of the harm required "whenever possible, full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation."[55] The court has also specified that "reparations must have a causal nexus with the facts of the case, the

47 *Id.*

48 *Id.* Note that "satisfaction" is another form of reparation typically available under international law, along with restitution and compensation. *Id.*

49 *Id.*

50 *Id.* ¶ 284.

51 *Id.* ¶ 86.

52 *Id.* ¶ 284.

53 In *Aloeboetoe*, the IACHR, interpreting Article 63(1), made a specific reference to *Factory at Chorzów*. Aloeboetoe et al. v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 49 (Sept. 10, 1993).

54 "If the [IACHR] finds that there has been a violation of a right or freedom protected by this Convention, the Court shall 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." Organization of American States, American Convention on Human Rights art. 63(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

55 *Río Negro Massacres*, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 248; *see* Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 53 (Nov. 19, 2004) ("[R]eparation . . . requires full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation.").

violations declared, the damage proved, and the measures requested to repair the respective damage."[56]

As such, the purpose of reparation in these cases remains at least formally compensatory, as the IACHR framed the measures awarded as repairing consequences of wrongful acts, and not as ways of rehabilitating victims. The court's reasoning for awarding socioeconomic measures in these cases is thus not an example of clarity—but perhaps the court might have been using two separate theories, as the following sections suggest, to conform these reparations with the formal causality and directness requirements. Each theory, however, has its own shortcomings and does not fully fall within the traditional *Factory at Chorzów* framework.

### A. *Socioeconomic Measures as Equitable Forms of Reparation for Moral Damage*

One possible reading of these decisions that would fit into the traditional model of reparations is that the IACHR used socioeconomic measures only as an equitable way of assessing an unquantifiable, immaterial damage arising directly from gross violations of human rights, at least in cases where the socioeconomic conditions of the victims' community appear unfair to the court.[57]

*Aloeboetoe* provides the clearest example of this view. In that case, the IACHR included the costs of education in its equitable estimate of the moral damages, and ordered the reopening of the school and the maintenance of the medical dispensary of the community.[58] In *Río Negro Massacres*, the IACHR ordered socioeconomic measures to repair the immaterial damage stemming from the impunity of the past crimes, noting the "precarious living conditions" of the victims;[59] this suggests that these measures were perhaps awarded on an equitable basis, and not on a legal basis.[60] It would be preferable to potential claimants, however, that such measures be awarded on a *legal* basis, so as to provide a more compelling ground on which to claim reparations in similar cases, rather than leave the award of such socioeconomic measures entirely to the discretion of the court.

### B. *Socioeconomic Conditions of the Community as Consequences of the Past Wrongful Acts*

Another interpretation of the IACHR's reasoning is that the court was actually relying on a causal link between current socioeconomic conditions of the victims' community and the past crimes. In *Plan de Sánchez Massacre*, the IACHR ordered socioeconomic measures to repair the "non-pecuniary damage" that the victims experienced by way of the

56 *Río Negro Massacres*, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 247.

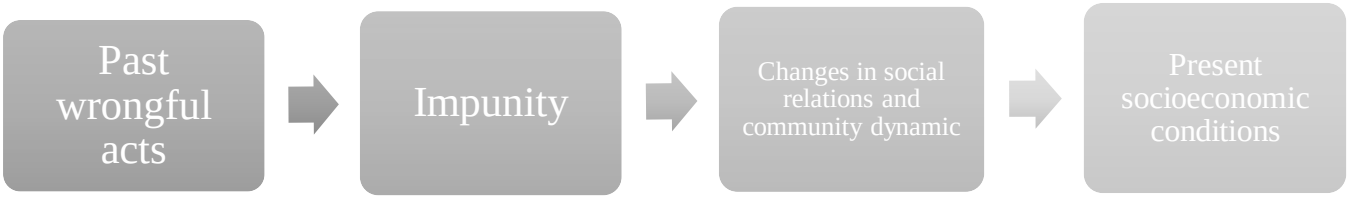
57 The IACHR can have recourse to equity to determine appropriate reparations according to its own jurisprudence. *Aloeboetoe et al.*, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 86.

58 *Id.* at ¶ 86.

59 *Río Negro Massacres*, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 284.

60 Equity is defined as "[t]he body of principles constituting what is fair and right" or "[t]he recourse to principles of justice to correct or supplement the law as applied to particular circumstances." *Equity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

"alterations in their living conditions."[61] Similarly, in *Río Negro Massacres*, the IACHR seemed to suggest that the impunity of the past massacres damaged the community's "social relationships" and "community dynamics,"[62] which in turn could explain the current socioeconomic conditions of the community—though again, the court was not clear on that causal link.




This theory indicates a relaxation of the causality requirement for reparations. There is little to no inquiry into or evidence on whether the wrongful acts actually caused these situations. This reasoning also represents a significant departure from *Aloeboetoe*'s holding that only "immediate effects" of wrongful acts should be repaired under international law,[63] as the court would be essentially repairing effects that persist twenty years after the commission of the crimes. This interpretation provides a *legal* basis for reparations addressing socioeconomic inequalities of victims of gross violations of human rights. However, because the IACHR failed to engage in a real causality inquiry, this *legal* theory remains unconvincing, and provides no more guidance for potential claimants than if it had been decided solely on the basis of equity.

## V. CONCLUSION

The cases presented provide interesting examples of how courts can use the present socioeconomic conditions of the victims' community as a benchmark for repairing past wrongs. The cases also provide yet another example of the IACHR's trailblazing in its award of reparations to victims of gross violations of human rights.[64] However, because the IACHR still insists on sticking to the compensatory principle of reparations, it resorts to dubious causality theories or to principles of equity. Equity is too discretionary to provide a predictable standard for reparation. Tenuous causal links will not pass muster before courts that apply stricter directness and foreseeability requirements for the award of reparations.[65]

61 Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 83 (Nov. 19, 2004).

62 *Río Negro Massacres*, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 272.

63 *Aloeboetoe et al.*, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 49.

64 For an overview of the types of reparations awarded by the IACHR, see generally CLAUDIO GROSSMAN ET AL., INTERNATIONAL LAW AND REPARATIONS: THE INTER-AMERICAN SYSTEM (2018).

65 The causation requirement has blocked claims of reparations for slavery in U.S. courts. *See, e.g.*, Cato v. United States, 70 F.3d 1103, 1109–10 (9th Cir. 1995) ("[The plaintiff Cato] does not trace the presence of discrimination and its harm to the United States rather than to other persons or institutions. Accordingly, Cato lacks standing to bring a suit setting forth the claims she suggests.").

The facts of these cases could not be further from *Factory at Chorzów*. What seems to actually drive the IACHR's decisions in these cases is a combination of the gravity of the human rights violations, the collective character of the violations, the precarious socioeconomic conditions in which the victims or their descendants lived, and, in the cases against Guatemala, a long-standing culture of impunity. These four factors, taken together, provide strong justification for moving away from a compensatory model and towards a forward-looking rehabilitative model of reparation. To do so would facilitate future claims of reparations for historical crimes that aim at addressing present socioeconomic inequalities.