IMPROVING THE PRESENT TO REPAIR THE PAST: A PROPOSAL TO REDEFINE THE GUIDING PRINCIPLE OF REPARATION FOR GROSS VIOLATIONS OF HUMAN RIGHTS

CHARLOTTE VERDON*

* J.D., New York University School of Law, 2021. Master in Economic Law, Sciences Po, 2018. An earlier version of this note was presented during NYU's 17th Annual International Law and Human Rights Emerging Scholarship Conference, on April 24th, 2020. I am grateful to Professor Pablo de Greiff and Jackie Dugard for their useful feedback and words of encouragement. I also want to thank all the editors of the *Journal of International Law and Politics* for their hard work and, in particular, Adam Tanne, Andrew Van Duyn, and Anna D'Agostino, whose comments and suggestions significantly improved this note. Special thanks to Molly Kwon Brossman and Ahmed Yacout for reviewing early drafts.

I. Introduction

In recent years, claims for reparations for historical crimes have sparked intense debate, most recently in the United States regarding slavery.[1] This note does not aim to as-

1. In the aftermath of George Floyd's death, widespread antiracist demonstrations across the United States and the world have led to renewed calls for reparations for slavery as a vehicle to reduce racial inequality in the United States. *See, e.g.*, Jamie Ehrlich, *Democratic Lawmakers Call for Vote on Bill to Study Reparations*, CNN (June 10, 2020), https://www.cnn.com/2020/06/10/politics/reparations-congress-bill-vote/index.html [https://perma.cc/FQ85-RBA6] (reporting on proposed legislation that would establish a commission to study the consequences and impacts of slavery and make recommendations for reparations); Arif Hyder Ali, *International Law Demands Reparations for American Slavery*, Wall St. J. (June 9, 2020), https://www.wsj.com/articles/international-law-demands-reparations-for-american-slavery-11591744294 [https://perma.cc/VSB4-PKEW] (arguing that international law would require the award of reparations for slavery); David Brooks, Opinion, *How to Do Reparations Right*, N.Y. Times (June 4, 2020), https://www.nytimes.com/2020/06/04/opinion/united-states-reparations.html

sess the validity those claims nor the desirability of reparations for historical crimes in general.[2] Instead, it sheds light on an

---

[https://perma.cc/YWQ3-4RBR] (advocating for the distribution of reparations money to black neighborhoods in the wake of the killing of George Floyd); Dustin Gardiner, *Bills on Slavery Reparations, Affirmative Action Advance in California Assembly*, S.F. CHRON. (June 3, 2020), https://www.sfchronicle.com/politics/article/Bills-on-slavery-reparations-affirmative-action-15315707.php [https://perma.cc/SZM2-VVZG] (reporting on a Californian bill including a component of reparations in combating racial inequalities); Matthew J. Belvedere, *BET Founder Robert Johnson Calls for $14 Trillion of Reparations for Slavery*, CNBC (June 1, 2020), https://www.cnbc.com/2020/06/01/bets-robert-johnson-calls-for-14-trillion-of-reparations-for-slavery.html [https://perma.cc/DNU7-HA8T] (highlighting Johnson's call for a wealth transfer to acknowledge an uneven playing field); *see also The Pros and Cons of Reparations*, FREAKONOMICS RADIO, at 4:08–5:04 (July 22, 2020), https://freakonomics.com/podcast/reparations-part-2/ [https://perma.cc/QS4Z-MC6N] (presenting a recent slavery, segregation, and discrimination reparations resolution passed by the city of Asheville, North Carolina). More recently, the U.N. High Commissioner for Human Rights, Michelle Bachelet, called on countries to "make amends for centuries of violence and discrimination, including through formal apologies, truth-telling processes, and reparations in various forms." *UN Human Rights Chief Calls for Reparations to Make Amends for Slavery*, GUARDIAN (June 17, 2020), https://www.theguardian.com/world/2020/jun/17/un-human-rights-chief-calls-for-reparations-to-make-amends-for-slavery [https://perma.cc/DH5A-PQKX]. Calls for reparations for slavery are not new in the United States. *See* Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ [https://perma.cc/NK5N-YN8P] (last visited Oct. 12, 2020) ("In the 20th century, the cause of reparations was taken up by a diverse cast that included the Confederate veteran Walter R. Vaughan, who believed that reparations would be a stimulus for the South; the black activist Callie House; black-nationalist leaders like 'Queen Mother' Audley Moore; and the civil-rights activist James Forman. The movement coalesced in 1987 under an umbrella organization called the National Coalition of Blacks for Reparations in America (N'COBRA). The NAACP endorsed reparations in 1993. Charles J. Ogletree Jr., a professor at Harvard Law School, has pursued reparations claims in court."). For a brief overview of the history of slavery reparations claims in the United States, see Manisha Sinha, *The Long History of American Slavery Reparations*, WALL ST. J. (Sept. 20, 2019), https://www.wsj.com/articles/the-long-history-of-american-slavery-reparations-11568991623 [https://perma.cc/2KBY-L7PH].

2. To be sure, the question of what form of reparation is appropriate cannot be totally separated from the question of the desirability of reparations. This note is premised on the view that reparations for historical crimes are desirable, whether they can be grounded in legal or moral arguments. However, this view is far from unanimous. For an overview of the debate on reparations for slavery, see, for example, ALFRED L. BROPHY, REPARATIONS:

aspect of the reparation debate that has received less media coverage: what type of reparations should be awarded. The importance of this question should not be underestimated, as the answer could impact the question of whether reparations should be awarded at all. After all, a frequent objection to reparations for slavery in the United States is that financially assessing the damages caused by wrongs that occurred centuries ago is an impossible task.[3] Accordingly, some U.S. reparationists claim that reparations should seek to mitigate present inequalities through measures tailored to improve the socioeconomic conditions of descendants of slaves rather than merely consisting of cash compensation.[4] In other words, these advocates argue that the present conditions of the victims' descend-

---

PRO & CON (2006); *The Pros and Cons of Reparations*, *supra* note 1. For a comprehensive discussion on reparations for historical crimes more generally, see REPAIRING THE PAST? INTERNATIONAL PERSPECTIVES ON REPARATIONS FOR GROSS HUMAN RIGHTS ABUSES (Max du Plessis & Stephen Peté eds., 2007).

3. *See, e.g.*, Corey Williams & Noreen Nasir, *AP-NORC Poll: Most Americans Oppose Reparations for Slavery*, AP NEWS, Oct. 25, 2019, https://apnews.com/76de76e9870b45d38390cc40e25e8f03 [https://perma.cc/8HH4-GD7N] (noting the doubt among black poll respondents that a fair amount could be determined); Breeanna Hare & Doug Criss, *Six Questions About Slavery Reparations, Answered*, CNN (Aug. 15, 2020), https://www.cnn.com/2020/08/15/us/slavery-reparations-explanation-trnd/index.html [https://perma.cc/F4VW-KG3N] (stating that the evaluation of compensation is the "most contested part" of the debate on reparations for slavery in the US); Brooks, *supra* note 1 ("There's a wrong way to spend that money: trying to find the descendants of slaves and sending them a check. That would launch a politically ruinous argument over who qualifies for the money, and at the end of the day people might be left with a $1,000 check that would produce no lasting change.").

4. *See, e.g.*, 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 [https://perma.cc/YMP8-EKZR] (providing alternative examples for reparations such as "zero-interest loans for prospective black homeowners, free college tuition, [and] 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."). *See also The Pros and Cons of Reparations*, *supra* note 1, at 4:34–4:50 (presenting the Asheville, North Carolina reparations program as an example of one that does not contain a "cash payment" component, but rather a "holistic affirmative action program," directing money to affordable housing, education, health, etc.).

ants, and not the past injury, should be the benchmark to assess of the forms of reparation to be awarded.

Under international law, a State responsible for the violation of human rights has an obligation to provide reparations to victims.[5] International human rights law might therefore provide for an adequate legal basis to claim reparations for historical crimes like slavery, which is universally considered a gross violation of human rights.[6] Yet international law does not necessarily lend itself to creative claims for reparations in the form of socioeconomic measures.[7] The principle that governs reparation under international law, *restitutio in integrum*, aims to restore the injured individual to the status quo ante.[8] This

5. Indeed, there is a "growing consensus among international lawyers that victims of human rights abuses are entitled to reparations." Pablo de Greiff, *Justice and Reparations*, *in* THE HANDBOOK OF REPARATIONS 451, 455 (Pablo de Greiff ed., 2006). This is most notably enshrined in a soft law instrument, the United Nations 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, adopted by the General Assembly in 2005. G.A. Res. 60/147, annex (Dec. 16, 2005) [hereinafter Van Boven Principles]. Such an obligation is also enshrined in various international instruments. 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; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 41, Nov. 4, 1950, 213 U.N.T.S. 221 (more commonly known as the European Convention on Human Rights).

6. *See infra* note 16 and accompanying text.

7. Other aspects of international law represent major impediments to successful claims of reparations for historical crimes, most notably the principle of inter-temporal law and the non-retroactivity of human rights treaties, issues of proof, the unaccountability of non-State actors in the human rights context, some courts' unwillingness to revisit facts that occurred centuries ago, and issues of standing, or, in the extra-judicial context, the issue of the definition or identification of victims. For an overview of the various legal obstacles to reparations claims, see REPAIRING THE PAST? INTERNATIONAL PERSPECTIVES ON REPARATIONS FOR GROSS HUMAN RIGHTS ABUSES, *supra* note 2; *see also* Francesco Francioni, *Reparation for Indigenous Peoples: Is International Law Ready to Ensure Redress for Historical Injustices?*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 27, 42 (Federico Lenzerini ed., 2008) (listing the principle of non-retroactivity of the law, statutes of limitations, and political obstacles as "barriers to reparation").

8. *See* Factory at Chorzów (Ger. v. Pol.), Merits, Judgment, 1927 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) ("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.").

implies a direct link between the past injury and the form of reparations awarded, a difficult line to draw in the context of historical wrongs. Although it is often convincingly argued that the structural inequality of African Americans in the United States is at least partially the result of slavery,[9] the causal link between present socioeconomic conditions and past crimes might be too tenuous to convince a court of law.[10] As the Inter-American Court of Human Rights (IACHR or the Court) reasoned in *Aloeboetoe v. Suriname*:

> Every human act produces diverse consequences, some proximate and others remote . . . . 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.[11]

---

9. In 2001, 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*, ¶ 13, U.N. Doc. A/CONF.189/12 (Sept. 8, 2001). It 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.* ¶ 14. In the United States more specifically, the median white family was on average forty-one times wealthier than the median African American family in 2019. Courtney E. Martin, Opinion, *Closing the Racial Wealth Gap*, N.Y. TIMES (Apr. 23, 2019), https://www.nytimes.com/2019/04/23/opinion/closing-the-racial-wealth-gap.html [https://perma.cc/EDK8-SSQ2].

10. 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) ("[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.").

11. Aloeboetoe v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 48 (Sept. 10, 1993).

In addition, it might be impractical or infeasible to identify and quantify individual losses that occurred centuries ago and trace them to victims' descendants. The passage of time also necessarily dilutes the causal link between historical crimes and present socioeconomic inequalities, as other intervening causes may have arisen.

This note argues that the difficulty in reconciling socioeconomic measures with the reparation principle of *restitutio in integrum* does not mean that such new forms of reparation are unsound, but rather provides another reason to retire *restitutio in integrum* as the sole guiding principle of reparation for gross violations of human rights. This principle is both theoretically and practically inadequate: It focuses on the backward-looking aspect of human rights reparation, which should instead also be forward-looking, aimed at empowering victims and shaping a more just future. As such, this note seeks to normalize the award of socioeconomic measures to victims' communities as a form of reparation for gross violations of human rights.

This departure would come as a natural and effective progression in the realm of reparations, as indicated by early successes in the implementation of such a forward-facing perspective. Over the years, the IACHR has developed a robust jurisprudence concerning the reparation of gross violations of human rights and is widely considered a "leading example" in that domain.[12] Of particular relevance, the Court has recently and on multiple occasions awarded community-wide socioeconomic measures as one form of reparation for gross violations of human rights. Using this innovative development as a case study, this note argues that socioeconomic measures awarded to victims' communities are an appropriate complementary form of reparation for gross and systematic violations of human rights, as they help fulfill the forward-looking goals of reparative justice.

---

12. Gabriella Citroni & Karla I. Quintana Osuna, *Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES, *supra* note 7, at 319. For an overview of the reparations awarded by the Court in cases of gross violations of human rights up until the early 2000s, see Douglas Cassel, *The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights*, *in* OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS 191, 191–223 (K. De Feyter et al. eds., 2005).

Section II of this note discusses the goals of reparation in the context of human rights and presents the principle of *restitutio in integrum*. It argues that this principle is not suited for the reparation of gross violations of human rights and that, in practice, reparations programs, transitional justice mechanisms, and human rights courts have already moved away from a rigid application of the principle. Section III analyzes four cases in which the IACHR awarded socioeconomic measures as a form of reparation for gross violations of human rights. These cases provide the most striking example of how human rights courts have departed—albeit not explicitly—from *restitutio in integrum*. Section IV assesses the value of socioeconomic measures in light of the goals of reparation, arguing that they should be more frequently awarded in cases of gross human rights violations.

II. *RESTITUTIO IN INTEGRUM*: AN INADEQUATE PRINCIPLE FOR THE REPARATION OF GROSS VIOLATIONS OF HUMAN RIGHTS UNDER INTERNATIONAL LAW

Under international law, reparations to victims of gross violations of human rights must be "adequate" and "effective."[13] It is thus essential to understand what constitutes a gross violation of human rights and what reparations are considered adequate and effective.

A. *What Are Gross Violations of Human Rights and What Does It Mean to Repair Them?*

There is no universally accepted definition of "gross" or "systematic" violations of human rights.[14] Even the main soft law instrument that speaks to this issue, the United Nations' 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 (Van Boven Principles), does not provide a

13. Van Boven Principles, *supra* note 5, princ. 11(b).

14. *See* Roger-Claude Liwanga, *The Meaning of "Gross Violation" of Human Rights: A Focus on International Tribunals' Decisions over the DRC Conflicts*, 44 DENVER J. INT'L L. & POL. 67, 70–71 (2015). The term "gross" is often used interchangeably with "flagrant," "grave," "massive," "systematic," and "serious" violations of human rights in international instruments and international tribunals' case law. *Id.* at 69.

definition. However, in the 1993 Final Report, Special Rapporteur Theo van Boven hinted that the word "gross" indicated not only the seriousness of the violations, but related also to the type of human right being violated.[15] Descriptively, human rights literature usually understands this category to encompass torture, arbitrary detentions or executions, enforced disappearances, apartheid or systematic discrimination, genocide, slavery or forced labor, and deportation or forced displacement of a population.[16] A common feature of these crimes is that they all constitute serious offenses to basic notions of the rights to life, personal integrity and safety, liberty, self-determination, and equality. They violate civil and political rights and, due to the inherent indivisibility and interdependence of all human rights, these violations almost always necessarily undermine economic, social, and cultural rights as well.[17]

Perhaps a more important common denominator is that gross violations frequently occur on a massive scale as a result of deliberately adopted and systematically enforced policy choices, even if the violations occur sporadically over a short period of time. Gross violations of human rights are most often driven by ideology and perpetrated by armed organizations, sometimes affiliated with a State and sometimes not.[18] They frequently target a group or identity rather than a particular individual. In addition, because they are often perpe-

---

15. Theo van Boven (Special Rapporteur), Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms , ¶ 8, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993) [hereinafter *Van Boven Report*].

16. *See* Liwanga, *supra* note 14, at 70–71 (noting that scholar Stanislav Chernichenko suggested that the listed crimes should be included in the definition of gross violations of human rights); *see also Van Boven Report*, *supra* note 15, ¶ 13, (stating that gross violations of human rights include at least "genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.").

17. *Van Boven Report*, *supra* note 15, ¶ 12.

18. Luke Moffett, *Transitional Justice and Reparations: Remedying the Past*, *in* RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 377, 386 (Cheryl Lawther, Luke Moffett & Dov Jacobs eds., 2017).

trated by ruling political or military groups, such violations are usually accompanied by long periods of impunity and are thus more likely to leave intergenerational wounds. The ensuing collective injury is thus different from and greater than the sum of individual injuries. Accordingly, the healing of these injuries must reflect the unique nature of the wrongs, and "individual reparations may not be feasible, desirable, or sufficient."[19]

B. *The Inadequacy of* Restitutio in Integrum *to Repair Gross Violations of Human Rights*

Gross violations of human rights have been described as inherently "irreparable."[20] However, this fatalistic characterization should be avoided, as it might discourage reparation efforts. Furthermore, this qualification is based on only a partial understanding of what reparation means in the context of human rights. The literature devoted to the reparations for gross violations of human rights identifies two main goals of reparation: The first, derived from legal principles, is to try to restore the injured party to its pre-injury state.[21] In that sense alone, gross violations are indeed irreparable, as it is impossible to bring the dead back to life or erase the psychological and physical effects of years of torture, for instance. The second goal of reparation, derived from psychology, is to "make good" for injuries done to others by improving their present and future living conditions.[22] However, the principle of *restitutio in integrum* is inherently backward-looking and unsuited for victims several generations removed from the injury in question.

---

19. Heidy Rambouts et al., *The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights*, *in* OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS, *supra* note 12, at 460.

20. *E.g. Van Boven Report*, *supra* note 15, ¶ 131.

21. Brandon Hamber, *Narrowing the Micro and Macro: A Psychological Perspective*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 5, at 567.

22. *Id.* at 563. Interestingly, the term for German reparations to Holocaust victims was "*wiedergutmachung*" which translates into the more encompassing notion of "making good again." Ariel Colonomos & Andrea Armstrong, *German Reparations to the Jews After World War II: A Turning Point in the History of Reparations*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 5, at 393.

1. *The Impossible Restoration of the Status Quo Ante*

The principle of *restitutio in integrum* embodies only the first definition of reparation. In *Chorzow Factory*, the Permanent Court of International Justice (PCIJ) famously established 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."[23] The court expressed a preference for "[r]estitution in kind," but when that was not possible it would award the "payment of a sum corresponding to the value which a restitution in kind would bear."[24] Those two forms of reparation, restitution and full compensation, are similar in that they both aim to make the victim (at least financially) whole, in the strictest sense possible. The PCIJ also referred to damages for "loss sustained which would not be covered by restitution in kind or payment in place of it," but it did not envisage any other form of reparation than monetary compensation for such loss. This principle of *restitutio in integrum* generally guides both the IACHR and the European Court of Human Rights in determining what constitutes "fair and adequate compensation."[25]

This principle of reparation, which favors restitution in kind or monetary compensation,[26] is well-tailored to reparations for loss that can easily be returned or monetized, such as the expropriation of an investment as in *Chorzow Factory*.[27] However, *restitutio in integrum* is less suited to gross human rights violations.[28] Indeed, this principle may be prohibitively difficult to implement. First, it is practically impossible to put a

---

23. Factory at Chorzów (Ger. v. Pol.), Merits, Judgment, 1927 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

24. *Id.*

25. De Greiff, *supra* note 5, at 455.

26. Factory at Chorzów, Merits, Judgment, 1927 P.C.I.J. (ser. A) No. 17, at 47.

27. *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.").

28. A notable exception is gross violations of human rights relating to the right to property, such as forced displacement or land grabs, particularly in the indigenous context. In those cases, restitution of the ancestral land is indisputably an appropriate form of reparation, though it might not be entirely sufficient, as it might not account for the damage done to the community's social fabric.

price on the injury caused by human rights violations such as torture, slavery, or genocide.[29] Financial compensation for such atrocities is sometimes even perceived as immoral.[30] Indeed, some victims of mass violations refuse compensation from the perpetrator State because they consider it "blood money."[31] This was the case for certain victims of the Holocaust who opposed reparations from Germany to Israel.[32] This is particularly problematic when the repairing State has limited resources compared to the number of survivors, limiting the amount of compensation to an insultingly low price far from the ideal of "full reparation."[33]

The issue of limited financial resources is not merely theoretical for developing States, who must often balance their duty to provide reparations for violations of human rights with their duty to fulfill the basic needs of their citizens, which also constitute human rights obligations.[34] For instance, in

---

29. As Pablo de Greiff explains, "no amount of money . . . [can] make up for the loss of a parent, a child, a spouse . . . [or] adequately compensate for the nightmare and the trauma of torture." De Greiff, *supra* note 5, at 465; *see also* Rama Mani, *Reparation as a Component of Transitional Justice*, *in* OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS, *supra* note 12, at 77 (stating that it is not easy "to estimate an appropriate monetary or non-material compensation for the deep emotional damage and trauma of victims which defy measurement.").

30. *See* Glenn C. Loury, *Transgenerational Justice – Compensatory Versus Interpretative Approaches*, *in* REPARATIONS: INTERDISCIPLINARY INQUIRIES 87, 87 (Jon Miller & Rahul Kumar eds., 2007) (stating, in relation to reparations for slavery, that "[i]f one understands by reparations the receipt of financial transfers as compensation for historical crimes, my answer to this question is a resounding, 'No.'").

31. Martien Schotsmans, *Victims' Expectations, Needs and Perspectives After Gross and Systematic Human Rights Violations*, *in* OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS, *supra* note 12, at 131; Mani, *supra* note 29, at 77.

32. Colonomos & Armstrong, *supra* note 22, at 396.

33. Schotsmans, *supra* note 31. *See also* Debra Satz, *Countering the Wrongs of the Past: The Role of Compensation*, *in* REPARATIONS: INTERDISCIPLINARY INQUIRIES, *supra* note 30, at 189–90 ("Given the total funds available, and the presence of competing contemporary aims, governments have typically chosen an allocation to victims that involves less than full compensation . . . . [which] raises problems of its own. . . . it runs the risk that as a partial payment it will not heal but only open wounds. This means that practically speaking, financial compensation programs will need to be coupled with other forms of countering past wrongs that serve to reinforce the dignity of victims, repair the broken relationships and promote civic trust.").

34. *See infra* Section III(D).

Aloeboetoe v. Suriname, Suriname expressed that the "standards of compensation put forward by the [Inter-American] Commission [on Human Rights] were not in line with the current social and economic reality in Suriname" and that, while the State intended to "correct the erroneous path followed in the past by former governments" and "to demonstrate to the Court and to the international community the seriousness of [its new president]'s intentions with regard to the protection of human rights," this could not be used as a pretext to "impose on the country compensations in the millions that will only impoverish it further."[35]

Moreover, human rights violations often create permanent cultural, psychological, and physical losses that obviate the goal of reestablishing the status quo ante. Often, reparations for gross violations of human rights are made many years after the atrocities occurred. The passage of time and the disappearance of victims, witnesses, and perpetrators make it difficult to estimate in what positions the victims would have been had the wrongful act not occurred.[36] Beyond practical impossibility, *restitutio in integrum* under certain circumstances might also be wholly inappropriate or undesirable.[37] In some cases of gross human rights violations, there might not be a more advantageous status quo ante to reestablish, as was the case for South Africans who had always lived under apartheid.[38] . If slavery in the United States had never occurred, Africans

35. Aloeboetoe v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 34 (Sept. 10, 1993).

36. Some reparationists engage in complex counter-factual scenarios in an attempt to identify what share of the gap between black and white income could be attributed to slavery, but these different assessments lead to a wide range of results. *See, e.g.*, 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 [https://perma.cc/58SK-D378] ("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)."); *The Pros and Cons of Reparations*, *supra* note 1, at 6:12–7:13 (describing different calculations of cash reparations for slavery in the trillions of dollars); Dalton Conley, *Calculating Slavery Reparations*, *in* POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES 117, 119 (John Torpey ed., 2003) (presenting different estimates of reparations due to African Americans for slavery).

37. Rambouts et al., *supra* note 19, at 452.

38. *Id.* at 457.

would not have been brought to the United States in the first place. Inventing a hypothetical situation in which victims and their descendants would have lived would be impossible, if not absurd. In the context of post-conflict societies, the root causes of mass atrocities are failed political systems,[39] to which return is certainly undesirable.[40] Further, victims themselves may not understand the principle of *restitutio in integrum*. As William Schabas observed, this principle derives purely from the Western legal framework and does not necessarily correspond to victims' understandings of reparations outside this context. Schabas encountered such a cultural disconnect in his work on human rights violations in Sierra Leone.[41] Finally, *restitutio in integrum* favors reparation at the individual level, such as through the award of individual compensation, and is therefore not suited to address collective injuries, especially when the violations in question specifically targeted a group as a whole.[42]

As such, the consensus in human rights literature is that *restitutio in integrum* is inherently unsuitable for the reparation of gross human rights violations.[43] In his concurring opinion in *Bamaca*, IACHR Judge García Ramirez noted that "[f]ull restitution – which implies full return – is conceptually and materially impossible" in cases of murders and deprivation of freedom.[44] He proposed to abandon "once and for all" the reference to *restitutio*, which can serve as a point of departure or an "ideal horizon" for reparations, but cannot correspond to an attainable objective.[45] It is meaningless, he added, to insist that reparation require, as much as possible, full restitution. This argument is echoed by scholars who question the validity of

---

39. *Id.* at 458 (citing Krishna Kumar, *The Nature and Focus of International Assistance for Rebuilding War-Torn Societies*, *in* REBUILDING SOCIETIES AFTER CIVIL WAR: CRITICAL ROLES FOR INTERNATIONAL ASSISTANCE 1–39 (1997)).

40. *Id.*

41. William A. Schabas, *Reparation Practices in Sierra Leone and the Truth and Reconciliation Commission*, *in* OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS, *supra* note 12, at 299.

42. Rambouts et al., *supra* note 19, at 460.

43. For instance, Pablo de Greiff considers the principle to be patently inapplicable. De Greiff, *supra* note 5, at 471.

44. Cassel, *supra* note 12, at 213 (citing Bámaca Velásquez v. Guatemala, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 1 (Feb. 22, 2002) (Concurring Opinion of Judge García Ramirez).

45. *Id.*

restitutio in integrum, noting that while it offers a "comfortable prospect of an ideal situation," in practice it proves "hardly capable of providing any normative guidance for the purpose of establishing a clear and unequivocal standard of reparation."[46]

In another IACHR case, Judge Cançado Trindade explained in a separate opinion that the legal concept of reparations originated from analogies to private law remedies, such as the concepts of material damage, moral damage, and elements of *damnum emergens* and *lucrum cessans*.[47] Due to their origin, these concepts were highly influenced by patrimonial economic interests, disregarding "the most important aspect of the human person[:]" its condition as a "spiritual being."[48] As such, the transposition "pure and simple" of private law concepts at the international level inevitably generates uncertainties.[49] Judge Cançado Trindade thus concluded that the existing criteria for determining reparations are not adequate or sufficient for violations of international human rights law.[50]

2. *A Broader View of Reparations*

Not only is *restitutio in integrum* materially impossible in the context of human rights, it also completely ignores the second meaning of reparation, which is to "make good" for injuries done to others.[51] While the first goal of restitution is essentially backward-looking, focused on the restoration of what has actually been lost, the second is more forward-looking and is not theoretically limited by the extent and nature of the past injury. In that respect, reparations for violations of human rights must differ from the strictly legal process of repairing damages under domestic law. Gross violations of human rights, as the result of institutional policy choices systematically targeting groups on a large scale, affect not only individuals, but entire communities and even society as a whole. Adequate reparations for such atrocities must therefore account for their

---

46. Rambouts et al., *supra* note 19, at 452.

47. Loayza Tamayo v. Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 42, ¶¶ 6–7 (Nov. 27, 1998) (Joint Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu-Burelli).

48. *Id.* ¶ 8.

49. *Id.*

50. *Id.* ¶ 10.

51. Hamber, *supra* note 21, at 563.

broader impact on society, such as the destruction of community ties.[52]

In this context, reparations are needed less to reestablish the status quo ante for direct victims than to promote societal and historical reconciliation. Reparations should serve as a basis to rebuild communities' trust and move society towards a more equitable future.[53] As such, they should be geared towards promoting victims' self-empowerment[54] and reintegrating "the marginalized and isolated into society so that they can contribute to the future rebuilding of the country."[55] For Pablo de Greiff, reparations for gross violations of human rights must necessarily be understood as a political project aiming to promote civic trust and social solidarity in a forward-looking perspective.[56] Reparation is "basically synonymous with the entire project of moral regeneration," entailing elements of "legal and other institutional transformations to legitimize a new political, social, and economic order."[57] By focusing solely on returning individual victims to their pre-violation situation, *restitutio in integrum* offers neither the collective nor the transformative component of reparation needed to adequately repair gross violations of human rights.

In sum, the principle of *restitutio in integrum* is ineffective in fulfilling both functions of reparations for gross human rights violations: it is incapable, by definition, of bringing back the status quo ante. And it disregards the goal of society-wide reconciliation. It is therefore not surprising that reparations for certain historical crimes and gross violations of human rights contain elements that do not fit within this principle.

---

52. Moffett, *supra* note 18, at 387.

53. Mani, *supra* note 29, at 74.

54. Roy L. Brooks, *Reflections on Reparations*, in POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES, *supra* note 36, at 108.

55. Naomi Roht-Arriaza, *Reparations in the Aftermath of Repression and Mass Violence*, *in* MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 121, 121–22 (Eric Strover & Harvey M. Weinstein eds., 2004).

56. De Greiff, *supra* note 5, at 466. *See also* Moffett, *supra* note 18, at 382 ("Reparations in times of transition can be both backward and forward looking, in the sense that they attempt to redress past violations as well as to prevent future re-occurrence.").

57. Catherine Lu, *Justice and Reparations in World Politics*, *in* REPARATIONS: INTERDISCIPLINARY INQUIRIES, *supra* note 30, at 193.

C. *Moving Away from the* Restitutio in Integrum *Dogma*

In the context of reparations for gross human rights violations, *restitutio in integrum* has faced not only theoretical critiques, but also practical modification and rejection. Indeed, several reparations programs have challenged the dogmatism of *restitutio in integrum* by awarding measures that do not purport to restore a counterfactual status quo ante.

1. *Symbolic Measures and Guarantees of Non-Repetition*

Perhaps as an acknowledgment of the inherent shortcomings of restitution and compensation as forms of reparation for gross violations of human rights, the Van Boven Principles also list satisfaction and guarantees of non-repetition as ways to achieve "full and effective reparation."[58]

Satisfaction is a catch-all form of reparation that traditionally encompasses acknowledgment of responsibility and an apology.[59] Under Van Boven Principle 22, satisfaction measures mostly consist of symbolic actions, which can be seen as serving the more forward-looking and reconciliatory goal of reparation. Such symbolic measures include searching for the disappeared or killed and reburying them, thus allowing survivors to properly mourn; official declarations or judicial decisions recognizing the existence of the wrongful acts; apologies and acknowledgment of responsibility; judicial and administrative sanctions against perpetrators; tributes and commemorations to victims; or inclusion of an accurate account of the vio-

---

58. Van Boven Principles, *supra* note 5, princ. 18. The principles also mention rehabilitation as a form of reparation, i.e. medical and psychological care to the victims. Van Boven Principles, *supra* note 5, Principle 21. One could argue that rehabilitation measures do not fall under the traditional *restitutio in integrum* principle either, as they are concerned with the present and future well-being of victims. However, rehabilitation measures essentially aim to erase the direct individual injury caused by the violations of victims' human rights. Therefore, rehabilitation attempts to restore victims to the physical and psychological situation in which they would have been had the wrongful act not occurred. As such, this note does not consider rehabilitation measures to constitute a challenge to the paradigm of *restitutio in integrum*.

59. *See* G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, art. 37(2) (Jan. 28, 2002) ("Satisfaction may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality.").

lations in international human rights law trainings .[60] As an interesting example, in *Plan de Sánchez Massacre v. Guatemala,* the Court ordered Guatemala to organize a public ceremony in the village of Plan de Sánchez during which Guatemalan officials would recognize the State's responsibility and formally apologize.[61] The IACHR also frequently orders the publication of its judgments, which it considers to be a measure of reparation in itself.[62]

Symbolic measures can therefore offer the public recognition that victims need to mend their wounds and reinstate their dignity.[63] As one author explains, "justice and historical memory" are linked with the "psychological and psychosocial reparation of victims"[64]—and as such they could also be described as measures of rehabilitation. But apologies and commemorative statutes have a limited reparative value; they are by themselves "unlikely to meet the standard of fair and appropriate reparation" and should be used only as a supplement to more tangible redress.[65] Often, they can be perceived as empty gestures, and they do little concrete to reintegrate marginalized groups into society or give them socioeconomic tools to access equal conditions of citizenship. As such, their transformative and reconciliatory value can also be underwhelming.

Guarantees of non-repetition mainly consist of institutional reforms which aim to prevent the reoccurrence of the

---

60. Van Boven Principles, *supra* note 5, princ. 22.

61. For an overview of the type of symbolic measures awarded to indigenous communities in several IACHR cases, see Citroni & Quintana Osuna, *supra* note 12.

62. Cassel, *supra* note 12, at 195. *See, e.g.*, Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 103 (Nov. 19, 2004) (ordering the publication of relevant portions of the decision in Spanish and the Maya Achi language); *see also id.* at 95 n.270 (citing other cases in which publication of the decision was ordered).

63. *See* Rambouts et al., *supra* note 19, at 464 ("Symbolic reparation measures embody such public recognition of mass victimhood and present a constant reminder that such violations of human rights should never happen again").

64. Nieves Gómez, *Indigenous Peoples and Psychosocial Reparation: The Experience with Latin American Indigenous Communities*, *in* REPARATIONS FOR INDIGENOUS PEOPLES, *supra* note 7, at 154; *see also* Hamber, *supra* note 21, at 565 (explaining that symbolic measures "can be profoundly meaningful to victims or survivors at a psychological level.").

65. Rambouts et al., *supra* note 19, at 464–65.

wrongful acts by eliminating the conditions that brought them about in the first place.[66] For instance, the Court has ordered States to enact legislative reforms to prevent the violation of several types of human rights, such as forced disappearances, amnesty laws, or violations of indigenous right to land ownership.[67] By their very purpose and nature, guarantees of non-repetition are not concerned with the reestablishment of the status quo ante, but rather fulfil the forward-looking goal of promoting reconciliation and civic trust in transitioning societies. However, because such institutional measures by themselves do not solely benefit the victims' group, they have a very low reparative capacity.[68] Similar to symbolic measures, they also fail to promote the socioeconomic empowerment necessary for victims to reestablish their dignity and regain civic trust.

2. *Socioeconomic Measures as a Form of Reparation*

The Van Boven Principles are silent on the possibility of awarding policies of socioeconomic improvement as measures of satisfaction or guarantees of non-repetition. Yet the idea is not entirely unprecedented, as several examples of reparations programs include measures designed to improve the socioeconomic conditions of the recipients.

a) *German Reparations to Israel for the Holocaust*

Reparations for the Holocaust constitute the first major contribution to the debate on reparations for human rights crimes. In many ways, Holocaust reparations set the tone for the wave of reparations for human rights crimes that unfolded

---

66. Van Boven Principles, *supra* note 5, princ. 23. For example, in Moiwana Community v. Suriname, a case which involved the massacre and forced displacement of an indigenous community, the Court ordered Guatemala to provide guarantees of safety for displaced victims who returned to their original land. Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 212 (June 15, 2005). For a broader overview of symbolic measures and guarantees of non-repetition typically awarded by the Court, see Cassel, *supra* note 12, at 203–07.

67. Cassel, *supra* note 12, at 205.

68. De Greiff, *supra* note 5, at 469.

throughout the twentieth century.[69] German reparations to Holocaust victims explicitly included the aim of improving their socioeconomic conditions. A rehabilitation fund was created with the express purpose of resettling Jewish victims in Palestine.[70] Reparations were thus assessed against the present needs of the victims and clearly did not purport to reestablish a status quo ante, since the victims did not live in Israel prior to the Holocaust. Under the 1952 Reparations Agreement Between Israel and the Federal Republic of Republic of Germany, Germany's payments to Israel were to be invested in capital goods crucial to the latter's industrial development.[71] The money was then used to foster economic development in Israel more generally. As such, German reparations to Israel aimed at addressing the present socioeconomic needs of the new community and did not rely on notions of *restitutio in integrum*.

b) *Examples from Transitional Justice Contexts*

Some examples of reparations made in the transitional justice context have also moved away from the rigid goal of *restitutio in integrum* in favor of the more forward-looking goals of reparation by improving victims' present socioeconomic conditions. For example, in South Africa, the Truth and Reconciliation Commission (TRC) stressed the importance of developing a reparations plan that would improve the quality of life of victims and their dependents.[72] In its report, the TRC acknowledged that:

> [I]f we are to transcend the past and build national unity and reconciliation, we must ensure that those whose rights have been violated are acknowledged through access to reparation and rehabilitation. While such measures can never bring back the dead, nor adequately compensate for pain and suffering,

69. *See* John Torpey, *Introduction: Politics and the Past*, *in* POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES, *supra* note 36, at 3 ("A widespread Holocaust consciousness . . . has been the water in which reparations activists have swum, defining much of the discourse they use to enhance their aims.").

70. Richard M. Buxbaum, *A Legal History of International Reparations*, 23 BERKELEY J. INT'L L. 314, 342 (2005).

71. *Id* at 400.

72. *Id.*

> they can and must improve the quality of life of the victims of human rights violations and/or their dependents.[73]

As such, the TRC implemented "community rehabilitation measures," which notably included the construction of appropriate local treatment centers, the building and improvement of schools, provision of housing, and access to water.[74]

Similarly, in addition to providing financial compensation to victims, in 1988, Rwanda set a up the National Fund for Assistance to Survivors of Genocide and Massacres, tasked with identifying the needs of victims and helping them reintegrate socially.[75] Established only for the benefit of "needy" victims, it offered reparations through assistance in education (payment of school fees), housing (construction of houses) and health (distribution of medical cards).[76]

In Morocco, an Equity and Reconciliation Commission was set up in 2004 to address past political repression, which included forced disappearances, arbitrary detention, and torture of dissidents.[77] After finding that some communities had suffered collective violence, the commission recommended that reparations include a "community dimension" in the form of symbolic measures and socioeconomic development programs, such as income-generating cooperatives, in addition to compensation and other individual measures of reparation.[78]

In sum, these examples offer important illustrations of how reparations can achieve the forward-looking goals of promoting reconciliation and moral regeneration of society

---

73. Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 5, at 195–96.

74. *Id.*

75. Stef Vandeginste, *Victims of Genocide, Crimes Against Humanity, and War Crimes in Rwanda: The Legal and Institutional Framework of Their Right to Reparation*, *in* POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES, *supra* note 36, at 264.

76. Heidy Rombouts & Stef Vandeginste, *Reparation for Victims in Rwanda: Caught Between Theory and Practice*, *in* OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS, *supra* note 12, at 332–33.

77. INT'L CENTER FOR TRANSITIONAL JUSTICE, THE RABAT REPORT: THE CONCEPT AND CHALLENGES OF COLLECTIVE REPARATIONS 12 (2009), https://www.ictj.org/sites/default/files/ICTJ-Morocco-Reparations-Report-2009-English.pdf [https://perma.cc/2BSE-J4ZS] [hereinafter ICTJ REPORT].

78. *Id.*

through symbolic or socioeconomic measures. The South African TRC example in particular acknowledged the necessity of awarding socioeconomic measures to address the present conditions of victims in light of the inherent shortcomings of the *restitutio in integrum* paradigm (which "can never bring back the dead, nor adequately compensate for pain and suffering.").[79]

III. Improving the Present to Repair the Past: Four Valuable Examples from the IACHR Case Law

While symbolic measures and guarantees of non-repetition are increasingly normalized in the extra-judicial context, courts have been more reluctant to depart from the legal principle of *restitutio in integrum*, despite its obvious unsuitability to the human rights field. In recent years however, the IACHR has developed a progressive jurisprudence in the domain of reparations for human rights violations and has become the first human rights court to award socioeconomic measures to victims' communities as a form of reparation for gross violations of human rights. These cases redefine adequate reparations in the context of human rights violations and are thus worth carefully analyzing.

A. *Background Analysis*

This note focuses on four paradigmatic IACHR cases in which the Court awarded socioeconomic measures as a complementary form of reparation for gross violations of human rights. It is helpful to identify the common factors in these cases to understand what motivated the Court to order these socioeconomic measures. This note discusses the extent to which these factors are necessary to justify the award of such socioeconomic measures in Section IV.

1. *Gross Violations of Human Rights*

The four cases analyzed all involved summary executions or massacres, rapes, or forced displacements, crimes which all fall under the umbrella term of "gross violations of human

79. Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, *in* The Handbook of Reparations, *supra* note 5, at 195–96.

rights."[80] *Aloeboetoe* concerned the public beating of twenty Maroons from the Saramaka tribe, killing seven, because they were suspected of belonging to a guerilla group.[81] In *Plan de Sánchez Massacre*, approximately 268 people were executed and the majority of women among them were also raped.[82] *Río Negro Massacres* concerned several massacres in which more than four hundred people were killed.[83] Finally, *Xamán Massacre* also concerned the killing of eleven people and injury of twenty-nine more people.[84] In all cases, the atrocities were perpetrated by the State military in the context of an internal armed conflict.

2. *Collective Violations*

All cases involved violations affecting more than one individual, with the number of persons killed ranging from seven

---

80. *See supra* note 16 and accompanying text.

81. In *Aloeboetoe*, "more 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." Some of the Maroons were released, but "seven of them, including a 15-year old boy, were dragged, blindfolded, into a military vehicle." When the vehicle stopped, 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." Aloeboetoe v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 2–5 (Sept. 10, 1993). The victim who managed to escape later died of his injuries. *Id.* ¶ 6.

82. In the Plan de Sánchez Massacre, during market day, a group of approximately 60 persons wearing military uniforms and carrying assault rifles gathered the young women and girls of the village and abused, raped and killed them. The older women, boys, and men were gathered in a different place where they were later killed by a fire set by grenades. Around 268 people died. Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 49(2) (Nov. 19, 2004).

83. The Río Negro Massacres were five massacres that occurred over two years in several villages of the Río Negro community, killing over 400 people. Río Negro Massacres v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶¶ 68–81 (Sept. 4, 2012).

84. Xamán Massacre v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 356, ¶ 37 (Aug. 22, 2018).

(*Aloeboetoe*)[85] to more than four hundred (*Río Negro Massacres*).[86] In addition, the crimes all involved a public or collective aspect, such that they affected the entire community, not only the direct victims. For example, in *Aloeboetoe*, the twenty Maroons suspected by the military were beaten and wounded in front of fifty people.[87] In *Plan de Sánchez Massacre*, villagers were forced to summarily bury the remains of the dead and throw them into common graves, while all survivors were forced to leave the village.[88] The victims in *Xamán Massacre* were killed in public, in the context of a village demonstration against military presence.[89]

3. *Long Periods of Impunity*

With the exclusion of *Aloeboetoe*, which was decided four years after the crimes occurred,[90] the three other cases analyzed were decided more than twenty years after the incident.[91] Because of ongoing conflicts and because crimes were committed by agents of the State, victims were often unable to report crimes until many years later, after a regime change. For example, in *Plan de Sánchez Massacre*, the survivors could not denounce the events until 1992, ten years after the crimes were committed.[92] As such, the lives of victims and their survi-

85. *Aloeboetoe*, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 2–6.

86. *Río Negro Massacres*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶¶ 68–81.

87. *Aloeboetoe*, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 2.

88. Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶¶ 49(2)–49(3) (Nov. 19, 2004).

89. *Xamán Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 356, ¶ 37.

90. The facts took place in 1987 and the court rendered its judgment on reparations in 1993. *Aloeboetoe*, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶¶ 2, 12.

91. In Plan de Sánchez Massacre, the facts occurred in 1982, and the Court rendered its decision on reparations in 2004. *Plan de Sánchez Massacre*, Reparations, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 49(2). In Río Negro Massacres, the facts occurred in 1980 and 1982, but the case was decided only in 2012. *Río Negro Massacres*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶¶ 68, 70, 79– 81.

92. *Plan de Sánchez Massacre*, Reparations, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 49(5).

vors were not only affected by the crimes, but also by the impunity that persisted for many years after the fact.[93]

4. *Indigenous and Tribal Peoples as Victims*

In the four cases considered, the victims were members of a tribal or indigenous people. In *Aloeboetoe*, the victims were Maroons from the Saramaka tribe.[94] In *Plan de Sánchez Massacre*, *Río Negro Massacres* and *Xamán Massacre*, the victims were all members of the Maya indigenous people in Guatemala.[95]

The indigeneity of the victims may have played a role in the Court's decision to award community-wide socioeconomic measures as forms of reparation in these cases. In *Plan de Sánchez Massacre*, the Court indeed considered that "given that the victims in this case are part of the Maya people," an important component of *individual* reparations would include reparations awarded to the community as a whole.[96] Further, in this case, the Inter-American Commission on Human Rights (the Commission), which refers cases to the Court, had stressed that only a "collective perspective grounded in an understanding of the socio-cultural elements of the Maya people, such as its worldview, spirituality, and communal social structure," could determine appropriate reparation measures.[97] However, when awarding collective socioeconomic and symbolic measures, the Court distinguished that such measures were particularly relevant due to the "extreme gravity" of the

93. 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), Comm. on Human Rights, Subcomm. on Prevention of Discrimination and Protection of Minorities, *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).

94. *Aloeboetoe*, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 17.

95. *Plan de Sánchez Massacre*, Reparations, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 2; *Río Negro Massacres*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶65; Xamán Massacre v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 356, ¶ 35 (Aug. 22, 2018).

96. *Plan de Sánchez Massacre*, Reparations, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 86.

97. *Id.* ¶ 90(a).

facts and the "collective nature" of the damages caused,[98] without mentioning the victims' Maya identity. In other words, while the indigeneity of the victims factored into the Court's decision to award collective measures of reparation (expressing that in this particular case the collective reparations would also constitute individual reparations), the Court did not confine the award of this type of socioeconomic measures to the limited context of indigenous rights. In *Aloeboetoe*, the Court accounted for the tribal custom of the Saramaka people to determine who could be considered next of kin entitled to compensation,[99] but the tribal identities of the victims was not mentioned as a factor justifying the award of community-wide socioeconomic measures. Similarly, in the *Río Negro* and *Xamán Massacre* cases, the Court did not highlight the indigeneity of the victims as a specific reason to award such measures of reparation.

B. *Socioeconomic Measures Awarded as Forms of Reparation*[100]

1. Aloeboetoe v. Suriname *(1993)*

When awarding pecuniary damages to the heirs of victims, the Court noted that this compensation would "include an amount that will enable the minor children to continue their

98. *Id.* ¶ 93.

99. *Aloeboetoe*, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 62.

100. Those four cases are not the only ones in which the Court awarded collective socio-economic measures as reparation. It also awarded measures of this type in several other cases relating to indigenous rights, ordering the establishment of a development fund to finance community projects of education, housing, agriculture and health, as well as the provision of basic services, as measures of reparation for the forced displacement of the indigenous community in question. However, in these cases, the Court justified those measures in light of the deprivation of indigenous land, which establishes a much more direct causal link between the violations alleged and the reparations awarded. Sawhoyamaxa Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 224, 230 (Mar. 29, 2006); Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 205, 219 (June 17, 2005); Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶¶ 213–14 (June 15, 2005). As this note presents measures of reparation that do not purport to restore the *status quo ante*, these cases are less paradigmatic (albeit still relevant).

education until they reach a certain age."[101] The Court thus considered these costs as part of the equitable evaluation of moral damages.[102] It awarded the same lump sum payment to all the victims as moral damages, and did so "bearing in mind the economic and social position of the beneficiaries."[103] The Court did not find it necessary to elaborate on whether this economic and social position was causally linked to the massacre in question.

More importantly, the Court further stated that these education goals would not be met "merely by granting compensatory damages;"[104] it was "also essential that the children be offered a school where they can receive adequate education and basic medical attention."[105] Noting that, "[a]t the present time, this is not available in several of the Saramaka villages," the Court held that Suriname was "under the obligation 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."[106] 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."[107]

2. Plan de Sánchez Massacre v. Guatemala *(2004)*[108]

In this case, the Court agreed that "immaterial damages" included not only the pain and suffering of the direct victims and their descendants, but also the "impairment of values important to the people" and non-pecuniary alteration of the "conditions of existence of the victims."[109] The Court found that there was no precise value to be attributed to this type of damage, but that it could nevertheless be compensated

---

101. *Aloeboetoe*, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 96.

102. *Id.* ¶ 87 ("As for the moral damages, the Court based these on 'principles of equity.'").

103. *Id.* ¶ 91.

104. *Id.* ¶ 96.

105. *Id.*

106. *Id.* ¶ 97.

107. *Id.*

108. All quotations from this case were freely translated from Spanish.

109. Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 80 (Nov. 19, 2004).

through "the realization of acts" with "public repercussion."[110] The Court thus held that "reparations are not exhausted with the compensation of material and immaterial damages," and that it must add "other forms of reparation," to repair "immaterial damage" that has no pecuniary value.[111] The Court emphasized the importance of these measures in light of the "extreme gravity" of the acts and the "collective character" of the injury.[112]

Without further explanation, the Court concluded that the State had to develop several programs in affected communities, including the maintenance and improvement of the roads between these communities and the municipal capital, a sewer system and water supply, the recruitment of staff trained in intercultural and bilingual primary and secondary education for the communities, and the establishment of a health center in the village of Plan de Sánchez with adequate staff and resources.[113] The Court did not give a more precise definition of the nature of the non-pecuniary immaterial damage it sought to repair. It is also unclear whether the Court found that the lack of economic and social development in these communities was itself a consequence of the violations, which makes it difficult to reconcile the reparations awarded with the purpose of reestablishing the status quo ante.

3. Río Negro Massacres v. Guatemala *(2012)*[114]

The Court deemed that in order to repair the entire damage in this case, pecuniary compensation should be accompanied by, among other forms of reparation, measures of satisfaction that are "especially relevant" for the damages caused.[115] Here, the Court again took into account the "grave and massive human rights violations" as well as the "collective nature" of the injury.[116]As justification for ordering measures of satisfaction, rehabilitation, and assurances of non-repeti-

110. *Id.*
111. *Id.* ¶ 93.
112. *Id.*
113. *Id.* ¶ 110.
114. All quotations from this case were freely translated from Spanish.
115. 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).
116. *Id.*

tion, the Court explained that the "prolonged impunity" and "denial of justice" caused material damages to the victims and their "life project," altering their social relations and community dynamic.[117]

Among the measures of satisfaction awarded in this case, the Court ordered Guatemala to strengthen infrastructure and implement basic services and social programs in the community. Importantly, the Court noted the precarious conditions in which the displaced victims lived, without further elaborating on the causal nexus between those conditions and the violations found.[118] The Court relied on testimony that people in Pacux lived in "extreme poverty," lacked access to potable water, and were served by an understaffed and under-supplied health center.[119] It ordered an increase in the health center's capacity and staff, the design and implementation of food security and nutrition programs, the improvement of roads and avenue,; the construction of sewage and water treatment and supply systems, the reconstruction or improvement of primary schools and the establishment of a bilingual secondary education program, and the guarantee of accessibly-priced electricity.[120]

4. Xamán Massacre v. Guatemala *(2018)*[121]

In this case, the Commission had requested that the Court order the State to build a community health center as a measure of satisfaction. In response, the Court found that the "social and economic vulnerability" of the group was instrumental in its "victimization."[122] The Court thus granted the requested order to establish a health center where the victims

117. *Id.*
118. *Id.* ¶ 284.
119. *Id.* ¶ 86.
120. *Id.* ¶ 284.
121. All quotations from this case were freely translated from Spanish.
122. Xamán Massacre v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 356, ¶ 166 (Aug. 22, 2018) ("La Corte considera que, en la victimización del grupo fue determinante su vulnerabilidad social y económica, razón por la cual, como parte de las medidas de reparación, resulta no solo procedente sino necesario, disponer medidas que, al menos, garanticen condiciones de ciudadanía real, con acceso a la salud y comunicación.") ["The Court considers that the socioeconomic vulnerability of the group was instrumental in its victimization, and for this reason it is not only appropriate but also necessary, as concerns the measures of

and general community would have access to basic health services that would integrate indigenous traditional medicine.[123] The Court also ordered the State to enlarge and pave the road from the village to the highway.[124]

C. *The Court's Attempt to Reconcile the Award of Socioeconomic Measures with the Traditional Reparation Principle*

A few scholars have commented on the unique nature of the aforementioned measures of reparation, but little attention has been given to the Court's reasoning—or lack thereof—in awarding these measures.[125] Yet, despite these novel reparations, the Court never formally abandoned the *Chorzow Factory* principle, nor did it purport to create a new principle of reparation not based on reestablishing the *status quo ante*. In fact, in *Aloeboetoe*, the Court made a specific reference to *Chorzow Factory* when interpreting Article 63(1) of the American Convention on Human Rights,[126] noting that the article "codifies a rule of customary law which, moreover, is one of the fundamental principles of current international law, as has been recognized by . . . the case law of other tribunals."[127]

In all the cases analyzed, the Court affirmed that reparation of the harm required "as much as possible, full restitution (restitutio in integrum), which consists in the reestablishment

---

reparation, to order measures that, at the very least, guarantee conditions of real citizenship, with access to health and communication."].

123. *Id.* ¶ 167.

124. *Id.* ¶ 171.

125. Dinah Shelton described the order to reopen the school as "particularly far-reaching," noting that the school closure was "not a direct consequence of the violation" and was in fact "an independent event unrelated to the case," since "had the state not killed the victims, there still would have been no school." Dinah Shelton, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 391–92 (3d ed. 2015).

126. "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party." American Convention on Human Rights, *supra* note 5.

127. Aloeboetoe v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 43 (Sept. 10, 1993) (citing Factory at Chorzów (Ger v. Pol.), Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, at 29).

of the situation prior to the wrongful act."[128] The Court added that only when such restitution is not possible, it must determine measures "to guarantee the infringed rights" and "repair the consequences produced by the violations."[129] Far from revolutionary, this formulation echoes *Chorzow Factory*'s command to "wipe out all the consequences of the illegal act."[130] In various cases, the Court also reaffirmed that reparations must have a "causal link to the facts of the case, the violations found, the damages recognized, and the measures requested to repair each injury."[131] As such, even these new reparations are at least in theory framed as backward-looking measures repairing the consequences of the past wrongful acts.[132]

There are two lines of reasoning one could attribute to the Court to reconcile these socioeconomic reparations with the causality and directness requirements of the traditional reparation principle. One such reading of these decisions is that the Court used socioeconomic measures only as an equitable way of assessing unquantifiable damage arising directly from the gross violations of human rights when the socioeconomic conditions of the victims' community appear unfair to the Court.[133] *Aloeboetoe* provides the clearest example of this

---

128. Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 53 (Nov. 19, 2004); Río Negro Massacres v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 248 (Sept. 4, 2012).

129. *Plan de Sánchez Massacre*, Reparations, Inter-Am. Ct. H. R. (ser. C) No. 116, ¶ 53; *Río Negro Massacres*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 248; Xamán Massacre, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 356, ¶ 144 (Aug. 22, 2018).

130. Factory at Chorzów (Ger v. Pol.), Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, at 47.

131. *Río Negro Massacres*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 247; *Xamán Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 356, ¶ 144.

132. Xamán Massacre might constitute an exception in this regard, as the court hazily referred to measures addressing the "victimization" of the group." It is unclear in the Court's opinion whether the "social and economic vulnerability" of the victims was considered a consequence of the wrongful acts, or whether the measures were meant as rehabilitation of the victims in a psychological sense, as a way to lift them out of their psychological status of victims. *Xamán Massacre*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 356, ¶ 166.

133. The Court can resort to equity to determine appropriate reparations, according to its own jurisprudence. Aloeboetoe v. Suriname, Reparations

view. In that case, the Court included the costs of education into its equitable estimate of the moral damages, ordering the reopening of the school and the maintenance of the community's medical dispensary.[134]

Another interpretation of the Court's reasoning is that it is actually relying on a causal link between the past crimes and the current socioeconomic conditions of the victims' community. In *Plan de Sánchez Massacre*, the Court ordered the development of several infrastructure improvement, education, and health programs as measures of satisfaction to repair the "nonpecuniary immaterial damage" that consisted in the "alteration of the conditions of existence of the victims."[135] In a similarly cryptic fashion, the Court seemed to suggest in *Río Negro Massacres* that the impunity of the past massacres damaged the community's "life project," "social relations," and "community dynamic,"[136] which in turn would explain the current socioeconomic conditions of the community.

This latter theory would constitute an unprecedented relaxation of the causality requirement for reparations. Under international law, the principle of reparation entails a causal link between the injury and the wrongful act.[137] Further, there is a requirement of directness, or foreseeability, which excludes damage that is "too indirect, remote, and uncertain to be appraised."[138] In the Court's decisions, there is little to no inquiry regarding whether the wrongful acts actually caused the victims' socioeconomic situations. This reasoning would also constitute a significant departure from *Aloeboetoe*'s holding that only "immediate effects" of wrongful acts should be repaired under international law,[139] as the Court would be repairing effects that persisted twenty years after the commission

---

and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 86 (Sept. 10, 1993). (internal citation omitted).

134. *Id.* ¶ 96.

135. Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 80 (Nov. 19, 2004).

136. *Río Negro Massacres*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 272.

137. G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, art. 31 (Jan. 28, 2002).

138. Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1905, 1931 (1941).

139. Aloeboetoe v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 49 (Sept. 10, 1993).

of the crimes. Because the Court failed to engage in a real causality inquiry, this legal theory remains unconvincing and provides no more guidance for potential claimants than if the reparations had been decided solely on the basis of equity.

Only the most recent case, *Xamán Massacre*, adopts language that resonates with the forward-looking goals of reparations presented above. In that case, the Court found it necessary to award socioeconomic measures of reparation to "guarantee conditions of real citizenship, with access to health and communication."[140] The Court thus at least implicitly seemed to acknowledge the role that reparations should play to promote victimized communities' civic trust.[141]

D. *Economic, Social and Cultural Rights as Appropriate Guidance for Reparations*

In none of the four cases analyzed did the Court refer to Economic, Social and Cultural Rights (ESCR), as enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[142] While the victims did not claim ESCR violations and the Court did not formally inquire into them, all the measures awarded tended to realize legally recognized ESCR. In a separate opinion in *Plan de Sánchez Massacre*, Judge García Ramirez acknowledged the unavoidable link between reparations for gross violations of human rights and the protection of ESCR. He noted the American Convention on Human Rights contributed to the legal protection of ESCR enshrined in the San Salvador Protocol.[143] As such, it would not

---

140. Xamán Massacre v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 356, ¶ 166 (Aug. 22, 2018).

141. As explained above, the Court's justification to award these measures in this case was rather unclear. It held that the "social and economic vulnerability" of the group was instrumental in its "victimization," but it did not use language suggesting a causal link between the past crimes and said socioeconomic "vulnerability." *See supra* note 130 and accompanying text.

142. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

143. Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 18 (Nov. 19, 2004) (Separate Opinion of Judge García Ramirez, at 18). For the full text of San Salvador Protocol, see Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," Nov. 17, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 1641.

be unreasonable to assume that ESCR literature guided the Court's decision to award the particular socioeconomic measures in these cases. Interestingly, in *Plan de Sánchez Massacre*, the State itself had conceded that measures of reparation could take the form of an obligation for the State to develop social services "in accordance with established international standards."[144] Such language could be a reference to the rights recognized in the ICESCR, in particular the right to an "adequate standard of living"[145] or the right "to the enjoyment of the highest attainable standard of physical and mental health."[146] Suriname and Guatemala, the respondent States in these cases, are both parties to the ICESCR.[147]

Many of the measures awarded in these cases relate to the right to education. Under Article 13 of the ICESCR, full realization of the right to education mandates that "[p]rimary education shall be compulsory and available free to all" and "[s]econdary education in its different forms . . . shall be made generally available and accessible to all by every appropriate means."[148] According to the Committee on Economic, Social and Cultural Rights (CESCR), the body charged with interpreting the ICESCR, the availability component of this right means that "functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party," which requires "buildings" and "trained teachers."[149] In *Aloeboetoe*, the Court noted that no schools were available in the Saramaka villages and ordered Suriname to reopen the school and "staff it with teaching and administrative personnel to enable it to function on a permanent basis."[150] In *Río Negro Massacres*, the Court similarly ordered the reconstruction or improvement of primary

144. *Plan de Sánchez Massacre*, Reparations, Inter-Am. Ct. H. R. (ser. C) No. 116, ¶ 109.

145. ICESCR, *supra* note 140, art. 11.

146. *Id.* art. 12.

147. *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUM. RTS. OFF. HIGH COMM'R, https://indicators.ohchr.org/ [https://perma.cc/5XPC-YAK2] (last visited Nov. 1, 2020).

148. ICESCR, *supra* note 140, art. 13.

149. Comm. on Econ., Soc. & Cultural Rts., Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 13, ¶ 6(a), U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999).

150. Aloeboetoe v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 96 (Sept. 10, 1993).

schools.[151] According to the CESCR, the right to education also demands an element of acceptability, which means that "the form and substance of education, including curricula and teaching methods, have to be acceptable" and culturally appropriate to students.[152] In accordance with this interpretation, in *Plan de Sánchez Massacre*, the Court ordered the recruitment of staff trained in "intercultural and bilingual, primary and secondary education of communities,"[153] while in *Río Negro Massacres*, the Court ordered the establishment of a "bilingual [in Spanish and Maya Achí language] secondary education program."[154]

Other measures ordered tended to realize the right to health. The right to the "highest attainable standard of physical and mental health" is enshrined in Article 12 of the ICESCR.[155] Like the right to education, it also involves an element of availability, which dictates that "[f]unctioning public health-care facilities, goods and services, as well as programmes" such as "clinics and other health-related buildings" and "trained medical and professional personnel" must be "available in sufficient quantity within the State party,"[156] In *Aloeboetoe*, the Court ordered that the village medical dispensary be made operational.[157] In *Plan de Sánchez Massacre*, the Court ordered the "establishment of a health center in the village of Plan de Sánchez with adequate staff and resources,"[158] while in *Río Negro Massacres*, the Court ordered the "reinforce-

151. Río Negro Massacres v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 284 (Sept. 4, 2012).

152. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 13, *supra* note 147, ¶ 6(c).

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

154. *Río Negro Massacres*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 284.

155. ICESCR, *supra* note 140, art. 12.

156. Comm. on Econ., Soc. & Cultural Rts., Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 14, ¶ 12(a), U.N. Doc. E/C.12/2000/4 (Aug.11, 2000).

157. Aloeboetoe v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 96 (Sept. 10, 1993).

158. *Plan de Sánchez Massacre*, Reparations, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 110.

ment of the health center's capacity and staff."[159] The CESCR also specifies that "all health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of . . . minorities and peoples and communities."[160] In *Xamán Massacre*, the Court ordered the establishment of a health center in which medical care would respect "the practices and uses of traditional medicine" and specified that health programs in indigenous and tribal villages would have to be based in community and be complementary of "traditional curative practices."[161]

The Court also ordered measures relating to the right to an adequate standard of living, which itself encompasses the right to adequate food, housing, and water.[162] The CESCR determined that the right to adequate housing entails that beneficiaries "should have sustainable access to . . . safe drinking water, energy for cooking, heating and lighting, sanitation . . . refuse disposal, [and] site drainage."[163] In *Plan de Sánchez Massacre* and *Río Negro Massacres*, the Court ordered the maintenance of the sewer system and water supply, including water treatment.[164] According to the CESCR, "adequate basic infrastructure" must also be available "at a reasonable cost."[165] In *Río Negro Massacres*, the Court ordered the State to supply electricity at accessible prices.[166] Moreover, under the ICESCR, adequate housing "must be in a location which allows access to employment options, health-care services, schools, childcare

159. *Río Negro Massacres*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 284.

160. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 14, *supra* note 154, ¶ 12(c).

161. Xamán Massacre v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 356, ¶ 167 (Aug. 22, 2018).

162. ICESCR, *supra* note 140, art. 11.

163. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant), ¶ 8(b), U.N. Doc. E/1992/23 (Dec. 13, 1991).

164. Plan de Sánchez Massacre v. Guatemala, Reparations, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 116, ¶ 110 (Nov. 19, 2004); *Río Negro Massacres*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 284.

165. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 4, *supra* note 161, ¶ 7.

166. *Río Negro Massacres*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 284.

centres and other social facilities."[167] In *Plan de Sánchez Massacre*, the Court ordered the "maintenance and improvement of the roads" between the villages and the municipal capital,[168] while in *Xamán Massacre*, the court ordered the enlargement and improvement of the road from the village to the highway.[169] It is reasonable to assume that by ordering these measures the Court intended to improve these communities' access to cities where more social and economic services are offered, especially since the Court noted the "extreme poverty" in which the community in *Xamán Massacre* lived.[170] Finally, the right to adequate food also includes the State's positive obligation to engage in activities to strengthen food security.[171] In accordance with such an obligation, in *Río Negro Massacres*, the Court ordered the State to implement programs of food security and nutrition.[172]

In sum, while the Court did not explicitly refer to ESCR in these cases, it adopted measures in each that accorded with the normative contents of such rights as defined by the CESCR, which is a positive outcome. Socioeconomic measures should be awarded as reparations when the victims' community experiences dire socioeconomic conditions. However, such determinations should not be discretionary. They should instead rely on a legal analysis of the economic and social rights situation of the community. The ESCR framework is an appropriate basis for assessing what measures of satisfaction should be awarded as to victims and their descendants. It provides a legitimate legal principle to guide the award of mea-

---

167. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 4, *supra* note 161, ¶ 8(f); *see also id.* ¶ 7 ("Adequate shelter means . . . adequate basic infrastructure and adequate location with regard to work and basic facilities.").

168. *Plan de Sánchez Massacre*, Reparations, Inter-Am. Ct. H. R. (ser. C) No. 116, ¶ 110.

169. Xamán Massacre v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 356, ¶ 171 (Aug. 22, 2018).

170. *Id.* ¶ 86.

171. Comm. on Econ., Soc. & Cultural Rts., Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 12, ¶ 15, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

172. Río Negro Massacres v. Guatemala, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 284 (Sept. 4, 2012).

sures aimed at improving the living conditions of the victims' community. An ESCR framework would also enhance the predictability of reparations for the State and benefit current and future victims by indicating what they could request in the first place.

Overall, these IACHR cases provide interesting examples of how courts can use the present socioeconomic conditions of the victims' community as a benchmark for repairing past wrongs. However, because the Court insists on maintaining the traditional *Chorzow Factory* principle of reparation, it has no choice but to resort to dubious causality theories or principles of equity to order the prospective, community-oriented measures it sees fit. This confirms how inadequate the antiquated principle of restitution is to address those claims. A bolder and more logically cohesive line of reasoning would have been to acknowledge the unsuitability of *restitutio* outright. Then, the Court could justify these awards under the second forward-looking goal of reparations for human rights violations. Regardless, these four examples support the argument that socioeconomic measures guided by the framework of ESCR and directed at the victims' community are an appropriate complement to more traditional forms of reparation when it comes to repairing the irreparable, *faute de mieux*.

IV. An Assessment of the Award of Socioeconomic Measures in Light of the Goals of Reparation for Gross Violations of Human Rights

Having identified the flaws in the *restitutio in integrum* principle, this section assesses if the awards of socioeconomic measures in the IACHR cases help to remedy any of these flaws. This section also identifies the potential downsides of awarding socioeconomic measures as reparation for gross violations of human rights.

A. *Closer to Repairing the Irreparable*

What differentiates the IACHR cases from other human rights cases, and what seems to actually drive the Court's unique award of socioeconomic measures to the victims' communities, is a combination of the gravity of the human rights violations, their collective character, the precarious socioeconomic conditions of the victims' indigenous or tribal commu-

nities, and situations of long-lasting impunity. The presence of these aggravating factors makes the *restitutio in integrum* principle particularly inadequate. These cases are paradigmatic examples of seemingly irreparable crimes, and socioeconomic measures are a sound response to the inherent shortcomings of *restitutio in integrum*. While reparations should aim to restore the situation which would have existed had the harm not occurred, in these cases that goal is an unattainable ideal, and reparations that only aim at reestablishing the status quo ante are bound to be unsatisfactory.

Because such non-traditional measures are by nature collective, they are also more likely to appropriately repair collective violations of human rights affecting an entire community.[173] Collective socioeconomic measures also fulfill the forward-looking goals of promoting civic trust by demonstrating the State's commitment to "build a better future through tangible redress that directly benefits individuals."[174] In a way, especially when they address the root causes of violence,[175] such measures could be understood as guarantees of non-repetition. Moreover, mending dire socioeconomic conditions can contribute to the psychological rehabilitation of victims,[176] an uncontroversial goal of reparations.

Finally, from a victim's perspective, awarding socioeconomic measures could reduce the perception that reparations are inherently unsatisfying or insulting. Socioeconomic measures might even be victims' preferred means of reparation for gross violations of human rights. In Sierra Leone and in Liberia, for instance, when victims were asked about what type of reparations they sought, they most often mentioned adequate housing, education, and medical care before cash.[177]

---

173. *See* Roht-Arriaza, *supra* note 55, at 129 ("Projects, such as the construction of schools and community centers, can provide recognition of the wrong done to a community as a whole and give members of divided communities a focus around which to begin rebuilding the fragile ties among neighbors stretched or broken during the conflict.").

174. Hamber, *supra* note 21, at 573–74.

175. In some cases, the key underlying causes of the violence have been poverty and inequality. Roht-Arriaza, *supra* note 55, at 129.

176. Schotsmans, *supra* note 31, at 129.

177. Schabas, *supra* note 41. *See* ICTJ REPORT, *supra* note 75, at 45 ("[a]ccording to a Liberian participant, 70 percent of victims in his country ask for social services").

B. *The Challenges of Using Collective Socioeconomic Measures as Forms of Reparation*

Although socioeconomic measures provide additional benefits, it goes without saying that courts should not abandon *restitutio in integrum* altogether and award *only* collective socioeconomic measures as reparation for gross violations of human rights. This would risk incentivizing States to use classic poverty alleviation measures as pretext to avoid more burdensome financial reparations. Pablo de Greiff criticized the low reparative capacity of collective development programs, which are not directed towards individual victims and are owed to all citizens "as a matter of right," not as a response to past harms.[178] As explained above, States have core obligations relating to the housing, education, and health of their citizens outside the scope of remedying past wrongs. If socioeconomic measures merely contribute to fulfilling these basic obligations, which would be owed to victims whether or not the harm occurred, they are unlikely to have any symbolic or reparative effect, including at the individual psychological level.[179] Worst, it could also be insulting to the victims in some contexts. For example, the International Center for Transitional Justice (ICTJ) noted in a report that mothers of victims were outraged at the fact that "their children had to die to get [a] school built" in their village.[180]

In response to these shortcomings, Roht-Arriaza proposed that commemorative elements be combined with socioeconomic measures, such as naming a new school or health center after victims.[181] As the ICJT concluded, the answer is "not so much in the content of the project but its design and implementation."[182] In particular, collective reparations should be accompanied by a "clear acknowledgment that mass and systematic human rights violations were committed and an equally clear acknowledgement of the state's responsibility

178. De Greiff, *supra* note 5, at 470; *see also* Rambouts et al., *supra* note 19, at 461 ("States have a general obligation to provide access to primary education; it is for them a primary duty. The source of this obligation lies not in past violations or crimes, but in the fundamental duties of a State.").

179. Hamber, *supra* note 21, at 574–75.

180. ICTJ REPORT, *supra* note 75, at 40.

181. Roht-Arriaza, *supra* note 55, at 130.

182. ICTJ REPORT, *supra* note 75, at 41.

for them," "recognition that the victims' circumstances as a group are different from the rest of the population targeted by development programs or entitled to public services," and "efforts to effectively communicate the meaning of this reparative component to victims."[183] It is therefore important to stress that awards of socioeconomic measures should only be a *complement* to more individualized, traditional types of reparation like financial compensation, restitution, or symbolic measures.

Moreover, when socioeconomic measures target a particular community, especially in post-conflict contexts, they run the risk of fueling ethnic tensions, as they may be perceived as unduly favoring a community over another.[184] This underscores the necessity of evaluating the political and cultural context of a particular country when designing reparations. As Rambouts, Sardaro, and Vandeginste explained, collective reparations for gross and systematic human rights violations can have a lasting impact on the "social architecture of a country," and their effects must therefore be "seriously considered."[185]

Overall, it is crucial that socioeconomic measures be requested and defined by the victims themselves, not paternalistically imposed by courts or States onto communities at the risk of being perceived as yet another act of cultural assimilation. Furthermore, collective reparations can marginalize more vulnerable subgroups within the community, such as women, who might have different needs.[186] In that regard, using the framework of ESCR and, when appropriate, indigenous and gender rights, can help ensure the social and cultural adequacy of reparation measures. It is important to adopt a gender perspective when implementing collective reparations to avoid the exclusion of women from the design of such measures. For instance, collective reparations in Indonesia and Morocco established a separate process of consultation with women before decisions were taken at a broader communal level in order to promote their participation in the process.[187]

Some questions remain unanswered. Who should be entitled to collective reparations? Can these measures be awarded

183. *Id.* at 48.
184. *Id*; *see also* Rambouts et al., *supra* note 19, at 463.
185. Rambouts et al., *supra* note 19, at 463.
186. Moffett, *supra* note 18, at 388.
187. ICTJ REPORT, *supra* note 75, at 54.

as reparations outside the indigenous context? As explained above, these cases fall short of explicitly holding the indigeneity of the victims' community as a determinative factor in awarding collective socioeconomic measures of reparation. There is evidence that community-wide reparations are especially appropriate for indigenous peoples,[188] but no evidence that such reparations would be suitable only in the indigenous context.[189] Indeed, the point of collective socioeconomic measures is to promote the reintegration of a marginalized group into a society divided by past systematic human rights violations targeting that group. Indigenous peoples in Latin America happen to be one of many marginalized groups that have suffered gross violations of human rights in the past. African Americans in the United States are another. But a marginalized group could also be made up of racially diverse political dissidents. As long as individuals suffered gross violations of human rights because of their membership in a particular marginalized group or common identity, and that group is overall marginalized, the nature of that shared identity in itself has no impact on the appropriateness of awarding socioeconomic measures as reparation to promote societal reconciliation.

V. CONCLUSION

When reflecting on the guiding principle of reparations for human rights violations, Judge Cançado Trindade called for a reorientation and development of international jurispru-

188. Indigenous communities are structured around spiritual leaders and ancestral knowledge. "Massacres of indigenous peoples wipe out elderly community members, who customarily would have transmitted their ancestral experience to the younger generations and are the authorities who settle familial and community conflicts." Nieves Gómez, *supra* note 64, at 144. As such, "when serious violations of human rights are committed against indigenous peoples, . . . the entire collectivity and social structure of the community is damaged." *Id.* Thus, the argument for collective reparations necessarily applies with a greater force in the indigenous context. *See also Van Boven Report, supra* note 15, ¶ 14, (stating that the "coincidence of individual and collective aspects is particularly manifest with regard to the rights of indigenous peoples" and therefore that victimized communities should be permitted to claim and receive collective reparation).

189. The IACHR cases examined above fall short of explicitly holding the indigenous identity of the victims' community to be a determinative factor in awarding collective socioeconomic measures of reparation.

dence, urging the adoption of a human rights-based principle.[190] International law only began to consider human rights reparations relatively recently, in the aftermath of World War II. It seems absurd that reparations for human rights violations are governed by a Latin adage that arose under domestic law in a context concerned entirely with the financial satisfaction of wronged parties. The *restitutio in integrum* principle ignores that another fundamental role of reparations for gross violations of human rights is moral regeneration and reconciliation. As Ta-Nehisi Coates wrote in his now famous 2014 "Case for Reparations," reparation for slavery is "more than recompense for past injustices—more than a handout, a payoff, hush money, or a reluctant bribe"— it's about a "*national reckoning that would lead to spiritual renewal.*"[191]

While German reparations to Holocaust victims and transitional justice mechanisms have strived to escape this partially obsolete paradigm, IACHR jurisprudence provides the first and (so far) only example of a judicial body awarding socioeconomic measures as means of reparations explicitly aimed at improving the present conditions of victims, not at reestablishing an imaginary status quo ante. At a time of renewed calls for reparations for historical human rights crimes,[192] the Court's case law constitutes a valuable step towards redefining the principle governing reparations for human rights violations. The normalization of human rights courts awarding socioeconomic measures as reparation for gross violations of human rights could then facilitate the formulation of similar claims for reparations outside the judicial context, such as political calls for reparations to descendants of slaves in the United States.

---

190. Loayza Tamayo v. Peru, Reparations and Costs, Judgment, ¶¶ 12, Inter-Am. Ct. H.R. (ser. C) No. 42, (Nov. 27, 1998) (Joint Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu-Burelli).

191. Coates, *supra* note 1 (emphasis added).

192. Additionally, the International Law Commission recently recommended the addition of the topic of "Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law" to its long-term programme of work. Intn'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, at 345 (2019). It is therefore timely to rethink the definition of reparation for gross violations of human rights.