

Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America

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Abstract: Latin American democratic institutions are currently under stress due to a weakening of the rule of law, high levels of crime, corruption and impunity and opaque separation of powers. The judiciary remains weak in relation to the military in spite of the transition to democracy. This context negatively impacts compliance with orders issued by the Inter-American Court of Human Rights. This article assesses the Inter-American Court of Human Rights 2012 resolutions on compliance in order to illustrate ongoing problems with judicial independence in cases involving accountability of the military for human rights violations. The article confirms that states are able to publish the Court's decisions but are unable to fully implement orders calling for criminal prosecution of military actors. Furthermore, some states are also failing to implement softer aspects of orders. However, some cases reveal increased Court deference to the national jurisdiction when interpreting compliance. The article concludes that the Court's decisions provide a partly symbolic function and this, in turn, may be affected by larger questions regarding the legitimacy of the Organization of American States (OAS) as a whole.

Keywords: Inter-American Court of Human Rights; Compliance; Reparations; Judicial Independence

I. Introduction

The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights are credited with having strengthened human rights protection within a region marked by a history of military dictatorships, civil wars and anti-terror campaigns.¹ However, compliance by states to the Inter-American

¹ See Monica Pinto, 'The Role of the Inter-American Commission and Court of Human Rights in the Protection of Human Rights: Achievements and Contemporary Challenges' (2013) 20 Human Rights Brief 34.

Court of Human Rights is complicated by the fact that the judiciary within the region remains weak.² There is a persistent lack of rule of law, high levels of corruption and impunity, as well as dilemmas relating to institutional fragmentation and separation of powers.³ Latinobarometro's 2011 report calculated that only 29 % expressed trust in judicial institutions and only 33 % trust the police.⁴ This article presents the Court's 2012 resolutions on compliance in order to illustrate the dilemmas of implementation within a context characterised by a judiciary that continues to lack independence in relation to the military, despite transition to democracy. The 2012 compliance orders are discussed according to the following categories: investigation and punishment of the military; holistic reparative measures in cases of massacres; payment of financial compensation; training of state agents; dissemination and awareness campaigns; provision of psychological assistance or medical treatment, and interaction with national law.

II. Background of the Inter-American Court of Human Rights

The Inter-American Court of Human Rights was created during the epoch of dirty wars and forced disappearance. The *raison d'être* of the Inter-American Court is fundamentally different from its European counterpart, as the foundation of well-functioning democracies was lacking in the former region. Hence, the Inter-American Court is motivated by an orientation towards democracy-building, rather than the notions of deference and margin of appreciation that guide the European Court of Human Rights. Cases submitted by state parties to the American Convention on Human Rights who have accepted the contentious jurisdiction of the Inter-American Court of Human Rights undergo an average of

2 See William C Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Praeger 2000).

3 See Juan Carlos Calleros, *The Unfinished Transition to Democracy in Latin America* (Routledge 2009).

4 Regarding the role of civil society, only 31 % considered that their country-mates obeyed the law, and only 38 % believed that their country mates are aware of their obligations and duties. The single most important problem within the region is security of the population, given extremely high rates of crime, including robbery, narcotics, homicide, rape, kidnapping, and extortion. Latinobarometro states that Latin America is both the most violent region in the world and has the highest levels of inequality. Latinobarometro Report 2011, available at <www.latinobarometro.org/latino/latinobarometro.jsp>

6.7 years processing time.⁵ There is a 1 to 2.5 year delay in terms of compliance by the state, resulting in the Court's characterisation as 'lacking effective and timely solutions'.⁶ Article 68(1) of the American Convention sets forth that 'The State Parties to the Convention undertake to comply with the decision of the Court in any case to which they are parties.' Hence, states are expected to ensure domestic implementation of judgments by all relevant branches and bodies of the state, in conformance with the principle of *pacta sunt servanda* as well as that of guarantee of effectiveness of human rights obligations (*effet utile*). Further, Article 65 of the American Convention states that the Court shall inform the General Assembly of cases of non-compliance:

To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.

Judge Cançado Trindade, former President of the Inter-American Court of Human Rights, has noted that the Court is an international tribunal, not a conciliatory organ that seeks to persuade states to implement its decisions.⁷ In his opinion, it cannot "pragmatically" accept partial implementation of its orders; rather it is essential to maintain a principled approach to compliance because the protection system exists in order to safeguard the interests of victims. Hence, his view is that non-compliance with an order of the Court would constitute an additional violation of the American Convention.⁸

Nevertheless, in practice the OAS generally does not pursue coercive mechanisms to enforce the Court's judgments. Although the Court sends reports of non-compliance to the OAS General Assembly, there is little discussion because

5 The following states have accepted the jurisdiction of the Inter-American Court: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay.

6 Fernando Basch, Leonardo Filippini, Ana Laya, Mariano Nino, Felicitas Rossi and Barbara Schreiber, 'The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions' (2010) 12 SUR, International Journal on Human Rights 8.

7 Antonio Augusto Cançado Trindade, *El Ejercicio de la función judicial internacional: Memorias de la Corte Interamericana de Derechos Humanos* (Belo Horizonte 2011) 37.

8 *Ibid.*, 27.

states are reluctant to have their own human rights situations brought to light. In short, there are no real international sanctions for failure to comply with the Court. This is further complicated by the fact that many states lack a national permanent mechanism for implementation of orders by the Inter-American Court of Human Rights.⁹

As the Inter-American Court of Human Rights makes decisions that seek to support state-building, democracy, transitional justice, and empowerment of vulnerable individuals and groups, it runs the risk of clashing with existing power structures. This complicates compliance, in particular when the order calls for prosecution of actors connected to the military or security institutions. One study confirmed that the majority of remedies ordered by the Court were victim oriented, addressing symbolic, monetary, or non-monetary economic reparations, or the restitution of rights (61 %), as opposed to only 15 % calling for investigation and sanction of perpetrators of human rights.¹⁰ The first category enjoyed total compliance in 47 % of cases, whereas the latter category revealed a 24 % compliance rate (this proved true across the board for all the countries from Argentina to Venezuela, with the exception of Mexico that complied with 67 % of orders to investigate and punish).¹¹ As pointed out by Morse Tan, ‘[i]n most cases, impunity reigns, and the State power structure lacks the means or the will to bring the perpetrators of human rights violations to justice.’¹²

The next section reviews the Inter-American Court of Human Rights 2012 resolutions monitoring compliance with judgments to demonstrate that the limitations with respect to compliance with orders of criminal prosecutions (as well as “softer” orders) are linked to the ongoing lack of judicial independence in relation to the military and security institutions.

III. Resolutions Monitoring Compliance with the Inter-American Court of Human Rights 2012

In 2012, the Inter-American Court of Human Rights issued sixteen resolutions monitoring compliance with decisions. The average time of issuance of the com-

9 *Cançado Trindade* (n 7) 30.

10 *Basch et al.* (n 6), examining 462 remedies adopted between June 2001 and June 2006.

11 *Ibid.*

12 *Ibid.*, 11.

pliance order from the date of the actual violation was 20.9 years and the average time since the decision on the merits was ordered was 6.5 years, indicating delays in attaining accountability. The 2012 resolutions underscore dilemmas relating to investigation and punishment of the military. The compliance orders confirm that the region continues to struggle with securing efficiency and independence/impartiality of the judiciary, in particular in relation to the military. However, the Court indicates progressive faith in the national system by deferring to national law where deemed appropriate.

Investigation and Punishment of the Military

Orders calling upon states to investigate and prosecute the military or police responsible for torture, enforced disappearance, or the right to life tend to address events that took place one to two decades earlier, a fact that signals a strong likelihood of difficulty in achieving implementation. Democratic transition within Latin America was marked by formal or informal elite pacts that limited the possibility of the national judiciaries to pursue accountability of military and security actors.¹³

The case of *Caballero Delgado and Santana v Colombia*, Resolution Monitoring Compliance with the Judgment, IACtHR (27 February 2012), involved the 1989 detention and enforced disappearance of two union/community activists by the Colombian Army, resulting in violations of the rights to life and personal liberty. The Court indicated that the state did not fulfil its obligation to investigate and punish those responsible for the disappearance and presumed death of the victims in accordance with the decision issued in 1995. Colombia is marked by a state of complete unaccountability of its military and security personnel for human rights violations.¹⁴

Similarly, the case of *Juan Humberto Sanchez v Honduras*, Resolution Monitoring Compliance, IACtHR (20 February 2012), which involved the 1992 kidnapping, torture and execution of a man believed to be linked to the Farabundo Martí National Liberation Front (FMLN) by the Honduran Army, resulting in claims of violations of the rights to humane treatment, life, personal liberty, fair trial, and judicial protection. The Court declared that the state had not complied with its 2003 order to investigate and impose criminal sanctions on those responsible, or to create a record of detainees and to provide compensation. The length

13 See *Calleros* (n 3) 40.

14 *Ibid.*, 130.

of time between the case and the 2003 decision and 2012 order of compliance indicates a complete lack of political will to pursue prosecution, thereby revealing the continued weakness of the judiciary in the face of the Army, in spite of transition to democracy.

Another paramount case is that of *Garibaldi v Brazil*, Resolution Monitoring Compliance, IACtHR (20 February 2012), involved the failure of the state to investigate the murder of land rights activists during an extrajudicial eviction of landless workers in 1998. The case raised violations of the rights to judicial guarantees and judicial protection. The Court declared that the state had complied with its 2009 order to provide compensation, but had not conducted the investigation and criminal proceeding against those responsible for the violations. This underscores the failure of the judiciary to demonstrate effectiveness in relation to ensuring that marginalised persons are guaranteed access to justice. Note the separate opinion by Judge Ad Hoc Roberto De Figuerido Caldas:

36. The Court found that the Brazilian State had violated Articles 8(1) and 25(1) of the Convention, and the States members of the inter-American human rights system should heed this ruling, in the sense of reforming their judicial bodies to adjust the processing of cases to the duration required by the norms and by the citizens of the Americas, transcending this stage of chronic non-compliance with legal time limits by the courts and by the rest of the system, such as the police, in the instant case, whose investigation took more than 60 times the legal 30-day time limit to conclude the inquiry.

37. Delays are among the most serious judicial errors committed by the State, and must be compensated according to international law. Procedural promptness engenders fluidity and respect in social relations, appropriate to the level of development to which the nations of the Americas aspire.¹⁵

In like manner, the Case of *El Amparo v Venezuela*, Resolution Monitoring Compliance, IACtHR (20 February 2012), involved the murder of 14 fisherman in 1988 by military and police agents during an operation, raising claims of violations of the rights to life, humane treatment, fair trial, equal protection and judicial protection. The Court stated that the state was not fulfilling its obligation to inform the Court of the measures taken to comply with the 1995 judgment. The

¹⁵ *Garibaldi v Brazil*, Judgment, IACtHR (23 September 2009), separate opinion by Judge De Figuerido Caldas.

Court called on the state to continue the investigation into the events to which this case refers and to punish those responsible, however the sheer scale of time elapsed between the event to the decision on the merits renders compliance unlikely. The transitional pacts that render the military and police beyond the reach of the national courts present a real challenge to the Inter-American Court. In part, the value of the decisions remain symbolic and perhaps oriented towards recognition of the “right to truth” for the victims, despite the inability of actually attaining actual prosecution. As long as formal or informal pacts remain, the military will remain beyond the reach of the judiciary and compliance with the Court will be impossible.

The Inter-American Court suffers lower rates of compliance when it acts like a criminal court regarding orders to conduct domestic criminal investigation, prosecution, and punishment of perpetrators of human rights violations.¹⁶ Antkowiak concludes that of the fifty-four judgments that have demanded investigation and prosecution, only one has been deemed fulfilled (*Castillo-Paez v Peru*, Judgment, IACtHR, 3 November 1997).¹⁷ He duly criticised the Court for requiring the prosecution of “all” those responsible for crimes, including any accessories, in cases that implicate numerous perpetrators.¹⁸ He also remarks that:

Latin American criminal justice systems often have feeble conviction rates. Moreover, those responsible for abuses were, at times, high-ranking military officials or influential state agents. Many are still powerful, even decades after the crimes, and fiercely defend their impunity. As a result, individuals who have assisted state investigations, including family members of victims and their attorneys, have withstood attacks upon their lives. Not every scenario before the Court has involved societal powerbrokers or officials in the armed forces. But nearly all of these cases point to breakdowns in investigative capacity, resources, and the will of governments to prosecute sensitive cases from the past. These are problems that reveal structural fissures in Latin American states; as long as this is the case, a broad order to investigate and prosecute will not be resolved without concerted and sustained efforts.¹⁹

16 Morse Tan, ‘Compliance Theory and the Inter-American Court of Human Rights’ (2005) *Bepress Legal Series* 3, 10-11; and Thomas M Antkowiak, ‘An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice’ (2011) 47 *Stanford J. Int’l L.* 279 .

17 *Ibid* 303.

18 Thomas Antkowiak, ‘Remedial Approaches to Human Rights Violations: The Inter American Court of Human Rights and Beyond’ (2008) 46 *Columbia Journal of Transnational Law* 351.

19 *Antkowiak*, (note 16) 304.

Staton found there to be a strong effect of bureaucratic quality on resistance to IACHR orders, as well as mixed effects of independent judiciary.²⁰ Similarly, Poertner concludes that compliance with the Inter-American Court is shaped by the strength of domestic judiciaries and bureaucratic capacity.²¹ Basch et. al and Huneeus both note that the Court experiences greater non-compliance if an order invokes action from both the executive and the judiciary. Whereas executive action alone experiences a higher rate of implementation, actions requiring compliance by the national justice system, eg regarding criminal investigations, due process safeguards, nullification of sentences and reinstatement of judges, result in excessive delays or non-compliance by judges or prosecutors.²² Orders that require actions by public ministries and the legislature are also subject to non-compliance, this includes calls for law reform, such as the repeal of an amnesty law, or other institutional reform. This is because this type of order requires the attainment of consensus in diverse political forces.²³ The Inter-American Court is not deferential to the state: it orders judges to receive instruction on gender rights, the Chilean legislature to change the law on freedom of expression, and the Guatemalan courts not to apply the death penalty.

Huneeus notes that even when there has been regime change, although the executive and legislature may have new officials, the judiciary often has the same judges as in the authoritarian era who may be loathe to pursue prosecutions or may even be corrupt. She recommends strengthening the transnational judicial dialogue on human rights in order to help judges and prosecutors assume responsibility for compliance. She remarks that:

Compliance is of particular salience in the Inter-American setting: a human rights court that presides over a region where the rule of law is, by many

20 Jeffrey K Staton and Alexia Romero, 'Clarity and Compliance in the Inter-American System' (12 February 2011), paper available at <<http://saopaulo2011.ipso.org/paper/clarity-and-compliance-why-states-implement-orders-inter-american-court-human-rights>>. Of interest, Staton claims that only half of the Court's orders to investigate criminal actions may be considered "vague", thereby indicating that the Court seeks to issue clear instructions in spite of the fact that the domestic situation may be uncertain.

21 Mathias Poertner, 'Institutional Capacity for Compliance: Latin American States and the Inter-American Court of Human Rights', paper presented at the Annual Meeting of the American Political Science Association, 30 August- 2 September 2, 2012.

22 Basch et al, (n 6); Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human rights' (2011) 44 Cornell International Law Journal 116.

23 Basch et al, (n 6).

accounts, not fully entrenched, should push for compliance with its own rulings as a way of constructing a rule of law practice and culture.²⁴

However, Hammergren confirms that judicial reform programs in Latin America have proved faulty, as infrastructure such as buildings, equipment, and higher salaries were implemented without any improvement of performance, due to corruption, inefficiency, lack of access to justice by marginalised clients, overload of demands, and lack of judicial independence and accountability.²⁵

Holistic Reparative Measures in the Case of Massacres

The Inter-American Court approaches state responsibility for massacres by designing holistic reparative measures that indicate an interest in linking prevention of future abuses to recognition of past wrongs. These orders are complex because they require action by various institutions, including the legislature, judiciary, army and so on, which prove resistant. The case of *Barrios Altos v Peru*, Resolution Monitoring Compliance, IACtHR (7 September 2012), is perhaps one of the most famous cases. It involved state responsibility for the 1991 murder of persons by death squads acting in reprisal against the *Sendero Luminoso* and ensuing passage of an amnesty law. This prompted claims of violations of the right to life, humane treatment, fair trial, and judicial protection.

The Court declared the amnesty law to be incompatible with the American Convention and declared it to be without effect. The Court concluded that the state had made progress in implementing its 2001 order to investigate and criminally prosecute ex-President Alberto Fujimori and reveal the complex structure of persons involved in the planning and execution of the serious violations of human rights. Nevertheless, the Court expressed concern that some proceedings were incomplete and that the Supreme Court of Justice's proceeding against Vladimiro Montesinos Torres and the members of the Colina Group was critically incompatible with the state's obligations under the American Convention of Human Rights and failed to comply with the judgment. The Supreme Court judgment was insufficient, as a judge proved to lack impartiality and hence diminished the character of the crimes (negating that they were crimes against humanity), as well as the sentence rendered. Hence, the Court determined that

²⁴ Ibid, 119.

²⁵ Linn Hammergren, 'Twenty-Five Years of Latin American Judicial Reforms: Achievements, Disappointments, and Emerging Issues' in *The Whitehead Journal of Diplomacy and International Relations* (Winter/Spring 2008) 89-103.

the state remained in a state of non-compliance with the order to investigate and criminally prosecute those responsible for the violations.²⁶ The judiciary in this case lacked independence/impartiality and proved deferential to the security apparatus — indicating unsuccessful judicial reform.

Similarly, the Case of *Dos Erres v Guatemala*, Resolution Monitoring Compliance, IACtHR (4 September 2012), involved the 1982 massacre of 251 people of the Dos Erres community by the Guatemalan Army (a unit called the Kabiles), resulting in claims of violations of the right to humane treatment, fair trial, judicial protection, and the provisions of the Inter-American Convention Against Torture and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women. It also addressed the right of a child to his family and his name, on account of his abduction in connection with action.²⁷ The Court declared that the state had not managed to investigate and criminally prosecute those responsible for the violations, or pursue disciplinary, administrative, or penal actions against state agents who had obstructed justice, reform the Amparo Law, exhume the bodies of the victims of the massacre to return them to their families, provide human rights courses to the state authorities, distribute the video documentary to victims, their representatives and the universities, create a memorial, provide medical and psychological treatment to 155 victims, create a website to look for children wrongfully abducted, or pay indemnification. The broad span of the remedies ordered is remarkable, but at the core lies the fact that the judiciary remains weak when facing the army, as exemplified by the Constitutional Court's recent overturning of the conviction of former military leader Efraín Ríos Montt on charges of genocide and crimes against humanity.²⁸

Finally, the Case of the *Marpipán Massacre v Colombia*, Resolution Monitoring Compliance, IACtHR (23 November 2012), involved the responsibility of the state for the 1997 massacre of 49 individuals by the Auto-defense Units, which collaborated and enjoyed the acquiescence of state agents. In 2005, the Court found there to be violations of personal liberty, humane treatment, life,

26 The Court also considered the state to be non-compliant with the orders on payment of compensation to the family of the victims, provision of health and educational support, the establishment of a memorial monument, and the recognition of a crime of extrajudicial execution in the national penal law.

27 The Court declared that the state complied with the 2009 order to publically recognise its international responsibility and create a documentary on the Massacre in Dos Erres, as well as pay compensation and costs.

28 Will Grant, 'Guatemala annuls Ríos Montt's Genocide Conviction' *BBC News* (Online 21 May 2013) <<http://www.bbc.co.uk/news/world-latin-america-22605022>>

children's rights, a fair trial, and judicial protection. The state was ordered to investigate to 'establish the liability of the masterminds and direct perpetrators of the massacre, as well as those whose collaboration and acquiescence allowed the massacre to be committed.' Further, the Court ordered the state to establish an official mechanism to identify the victims who were executed and disappeared, as well as their next of kin. The next of kin were to be provided with adequate treatment, including medication. The Court called upon the state to carry out an investigation to identify those responsible for the massacre, in order to complete prosecution and to pay both pecuniary and non-pecuniary damages. It also called upon the state to provide security to the next of kin, as well as other former inhabitants of Mapiripán, who were displaced, so they may be able to return to Mapiripán, should they wish to do so. The state was also instructed to erect a monument in remembrance of the massacre. Finally, the state was ordered to implement permanent education programs on human rights and international humanitarian law within the Colombian Armed Forces, at all levels of its hierarchy. The state had failed to comply with this expansive order full scale: from investigation and prosecution to aspects relating to medical and psychological treatment. In this vein, Elin Skaar discusses the importance of prosecution for gross human rights violations:

Ideally, punishment creates accountability, restores justice and dignity to the victims of abuse, establishes a clear break with past regimes, demonstrates respect for democratic institutions (particularly the judiciary), reestablishes the rule of law, contributes to reconciliation, and helps ensure that similar atrocities will never happen again. If hideous crimes go unpunished, people in newly democratic countries will be unable to trust the state in general and the legal system in particular. At worst, state violence may resume.²⁹

However, Skaar concludes that the possibility of punishment is essentially a political question, accentuating the fact that judicial independence is a rarity in such cases.³⁰ This is confirmed by the 2012 compliance resolutions on massacres.

29 Elin Skaar, *Judicial Independence and Human Rights in Latin America: Violations, Politics and Prosecution* (Palgrave 2011) 6.

30 *Ibid.*, 7.

Payment of Financial Compensation

In spite of the fact that the payment of financial compensation is usually deemed to be the type of order most likely to be complied with, the Inter-American Court does have cases in which this is problematic. The Case of *Mejía Idrovo v Ecuador*, Resolution Monitoring Compliance, IACtHR (26 June 2012), addressed the state's failure to comply with a 2002 order by the national Constitutional Tribunal declaring unconstitutional Executive Decrees that suspended and discharged the individual from the army. The case raised violations of procedural guarantees, effective judicial protection and equal protection of the law,³¹ and the Tribunal called for reparations. The Court declared that the state had not yet complied with its order to provide financial compensation for material and non-material harm, as well as costs incurred; accordingly it would continue to monitor this. The non-compliance indicates resistance of the executive branch to the judiciary in relation to a case involving the military; it therefore correlates with the concern regarding overriding formal or informal pacts that render accountability of the military difficult.

An intriguing dilemma was raised by the next of kin, who alleged that media attention on the award of compensation would result in victimisation. The case of *Caso Radilla Pacheco v Mexico*, Resolution Monitoring Compliance, IACtHR (28 June 2012), addressed the forced disappearance of a man in 1974 by the army; the relevant rights included inter alia, life, personal dignity, judicial protection, and judicial guarantees.³² The parties raised concern that the media had reported the payment of compensation and they therefore feared a risk of re-victimisation. The Court did not consider the state responsible for the media reports and noted that the decision itself was public. The intriguing element of this case is that compliance with a compensation order within a context plagued by ongoing crime, violence,

31 The Court confirmed that the state complied with its 2011 order to publish the official summary of the Judgment in the Official News and a newspaper of wide national readership, as well as publication on an official web site.

32 The Court called upon the state to adopt all necessary measures to implement the orders issued in 2009 in an effective and timely manner: calling for provision of compensation, reports on reparations and the investigation, identification, judgment and sanction of those responsible, and amendment of legislation (code of military justice and Federal Criminal Code) to bring them in line with the American Convention and the Convention Against Enforced Disappearance (an example of strengthening of law). In addition, the Court called for provision of a plaque commemorating victim, provision of psychological assistance to family, dissemination of Court jurisprudence on the limitation of criminal jurisdiction, training on preventing disappearance, as well as the location of Mr. Rosendo Radilla Pacheco or his remains. The Court noted that the state had managed to publish the decision in the Official Gazette, however, the remaining aspects of the order had not been implemented within three years.

corruption, and “unrule” of law was then characterised as rendering the victims more vulnerable to abuse, thereby questioning the legitimacy of the system.

A contrary case to be taken into consideration is that of *Salvador Chiriboga v Ecuador*, Resolution Monitoring Compliance, IACtHR (24 October 2012), which addressed the case of a family denied just compensation due for expropriation of their property by the state in 1991. In 2008, the Court found the state to be in violation of the rights to property and judicial guarantees. It declared that the state had partially complied with its obligations to pay compensation and interests accrued on the pecuniary damage and non-pecuniary damage. Nevertheless, the state had not yet paid the compensation and interest in full. Expropriation cases are at the core of sovereign exercise of power; hence resistance to implementing compensation ordered by an international body is hardly surprising. This case reveals bureaucratic resistance indicating a de facto signal of lack of legitimacy of the Court order in relation to the national system.³³

Provision of Psychological Assistance or Medical Treatment

The Inter-American Court of Human Rights is recognised as enjoying high rates of compliance (between 40–80 %) with respect to pecuniary compensation and “victim-centred” non-monetary reparation orders addressing victims’ needs for recognition and restoration, public acknowledgment and official apology, symbolic reparations such as commemorations and memorials, non-monetary economic compensation (including access to services or goods), such as community development, housing programs, land cessation, restitution of rights (restoration of job or position, release from detention), release of prisoners, protection of witnesses and victims, preventive actions such as institutional reform, training of police, military, security forces and judges, rehabilitation, psychological support to victims and their family members, medical care and educational opportunities (although the states are delayed in paying for this), amendment of laws, and media programs to promote respect for human rights.³⁴

33 The state had published the official summary of the judgment in a national newspaper but had not yet published the judgment in the Official Gazette

34 Indeed, *Basch et al* point out the remedies ordered by the Court seek to: ‘(M)ake reparations to affected persons or groups, to take measures to avoid repeating detected rights violations, and to give protection to victims and witnesses. . . The objective of making reparations to affected persons or groups predominates. Not only is it the most usual type of remedy, but it is also the one that seems to receive the greatest proportion of state compliance. In particular, the means most frequently employed are measures of symbolic reparations . . . and monetary and non-monetary economic reparations.’ *Basch et al*, (n 6).

These are “activist” remedies (broader than those ordered by the European Court of Human Rights), which seek to generate structural and cultural change within societies and institutions that have oppressed vulnerable groups.³⁵ Orders for provision of psychological assistance or medical treatment usually accompany orders of investigation and prosecution of perpetrators of enforced disappearance, torture, or violation of the right to life.³⁶ Where there is lack of compliance for prosecution, there is also a risk of lack of will to provide assistance to the next of kin. The case of *Vargas Areco v Paraguay*, Resolution Monitoring Compliance, IACtHR (4 September 2012), addressed the 1989 shooting of a child soldier who sought to desert his post in the military, resulting in claims of violation of the rights to fair trial and judicial protection by his family due to the failure of the state to investigate and prosecute those responsible for the murder.³⁷ The Court noted that the state had neither investigated/prosecuted the crime nor provided medical, psychological, and psychiatric treatment to the victim’s family. In sum, provision of medical or psychological support to victims and their families is a form of state recognition of responsibility; hence it is unlikely that states will be forthcoming to implement the softer aspects of orders in cases where the violator was the military.

Training of State Agents, Dissemination of Judgment, and Awareness Campaigns

The Court seeks to promote internalisation of human rights by state actors and society via orders that call for training or awareness campaigns. This type of order is also “softer” than an order calling for prosecution of offenders. Moreover, it is an

35 Antkowiak compares the ECtHR approach to reparations in the case of enforced disappearance as including a declaration of the violation, and a grant of circa 50,000 Euros to next of kin in non-pecuniary damages, as well as any applicable pecuniary damages and costs. In contrast, Antkowiak suggests that the IACtHR would award greater non-pecuniary sums, order the state to apologise, initiate criminal investigations, locate the victim’s remains, publish the judgment in the national newspaper, and provide psychological treatment to the family. He states that the Court has even ‘ordered measures that might not have even been strictly possible in the state’s domestic law, such as the reopening of legal proceedings’. Further, he points out that some states have federal systems in which the criminal justice system is conducted at the state level, complicating enforcement. *Antkowiak* (n 18) 292.

36 See Alexandra R Harrington, ‘Internalizing Human Rights in Latin America: The Role of the Inter-American Court of Human Rights’ (2012) 26 *Temp. Int’l and Comp. L.J.* 17.

37 The Court noted that the state complied with the 2006 order to implement training programs and regular human rights courses for all members of the Paraguayan Armed Forces and to pay interest on arrears for compensation for pecuniary and non-pecuniary damage.

order which seeks to assist the deepening of democratic consolidation. Nevertheless, even these orders are subject to resistance. In the Case of *Bayarri v Argentina*, Resolution Monitoring Compliance 20 June 2012, the Court addressed the case of a man subjected to wrongful criminal prosecution, arbitrary detention, torture, and denial of justice in 1991 (resulting in violations of the rights to humane treatment, personal liberty, fair trial, and judicial protection).³⁸ The Court chastised the state for failing to comply with its 2008 orders dissemination of torture prevention to security forces and justice organs.³⁹ The failure of the state to comply with this order indicates a lack of commitment to reforming security and justice apparatus via human rights education, thereby inhibiting internalisation of these norms and weakening democratic consolidation.

Likewise, in the Case of *Vera Vera et al v Ecuador*, Resolution Monitoring Compliance, (27 February 2012) the Court addressed the case of a man who was shot while engaging in armed robbery in 1993 and subsequently died in state custody, raising claims of violations of the rights to humane treatment, personal integrity, life, judicial guarantees, and judicial protection.⁴⁰ The Court called upon the state to disseminate the judgment among prison authorities and medical personnel in charge of persons deprived of liberty. The failure of the state to do so limits the potential impact of the judgment in changing the orientation of state authorities in terms of understanding the protection obligations within the scope of detention.

One particularly compelling case is that of the Case of *Kawas Fernandez v Honduras*, Resolution Monitoring Compliance, IACtHR (27 February 2012), which involved the 1995 assassination of an environmental activist by state agents, and ensuing impunity. This resulted in claims of violations of the right to

38 The Commission found that despite the fact that the Federal National Criminal and Correctional Appeals Chamber of Argentina found it proved that he had been subjected to torture, the Argentine state has not provided an adequate judicial response to Mr. Bayarri in relation to the criminal responsibility of the authors and has not provided any reparation for the violations he suffered, even though 16 years have elapsed since the facts occurred

39 Case of *Bayarri v Argentina*. Preliminary Objection, Merits, Reparations and Costs. Judgment IACtHR, Series C No. 187 (30 October 2008). The state also failed to follow up the order for medical treatment for Mr. Bayarri, elimination of his name from criminal records, and conclusion of the criminal action which gave rise to the violations.

40 The Court concluded that the state complied with its 2011 order to publish the judgment in the Official Gazette and national newspaper with wide circulation (as well as within an official website), and pay compensation for pecuniary and non-pecuniary damages, as well as reimbursement of costs and expenses. The Court sought to examine Ecuador's compliance with the order to take the necessary measures for the mother of Pedro Miguel Vera Vera to know the truth about her son.

life, fair trial, judicial protection, as well as the right to humane treatment in relation to the next of kin.⁴¹ The Court critiqued the state's failure to conduct an awareness campaign on the importance of environmentalists and their impact on human rights, thereby revealing the progressive orientation of the Court in seeking to impact the society's perception of these issues. Nevertheless, there appeared to be a lack of political will within the state to share and support that aspiration.

Full Compliance

The Case of *Lori Berenson Mejia v Peru*, Resolution Monitoring Compliance, IACtHR (20 June 2012), addressed the 1995 detention of Lori Berenson within a prison with inhumane conditions and the ensuing trial by a military court in conjunction with anti-terrorist emergency legislation, culminating in claims of violations of inhumane treatment and the right to fair trial. The Court declared that the state fully complied with the 2004 order to adapt its domestic legislation to the standards of the American Convention, to provide Ms Berenson with medical care and to adapt the detention conditions of the Yanamayo Prison to meet international standards and transfer prisoners on account of health requirements.⁴² What sets this case apart from the others is the high profile of the victim: a US citizen who received an overwhelming amount of media and diplomatic attention. This placed additional pressure on the state and is a likely explanation for its full compliance, underscoring the strength of external pressure on the state in Latin America.

Interaction with National Law

The international system seeks alignment of national legislation with international standards in order to promote the international rule of law. One of the primary contributions of the Inter-American Court of Human Rights is its recognition of the international crime of forced disappearance and its efforts to ensure that states enact implementing legislation.⁴³ The Case of *Heliodoro Portugal v*

41 The Court declared that the state had complied with its 2009 order for payment of compensation and publication of the judgment in the Official Gazette, as well as acknowledging its responsibility publically. Unfortunately, the state had not complied with the Court's order to pursue criminal proceedings, erect a monument of the victim, or provide psychological counseling to her family.

42 *Case of Lori Berenson-Mejía v Peru*. Merits, Reparations and Costs. Judgment, Series C No. 119, IACtHR (November 25, 2004).

43 See Juan Luis Modolell Gonzalez, 'The Crime of Forced Disappearance of Persons According to the Decisions of the Inter-American Court of Human Rights' (2010) 10 Int. C.L.R. 475.

Panama, Resolution Monitoring Compliance, IACtHR (19 June 2012), addressed the forced disappearance of a man by state agents in 1970, resulting in claims of violations of the right to personal liberty and the obligations of the Inter-American Convention on Forced Disappearance of persons and prohibition of torture, as well as the rights to fair trial, and judicial protection of the individual's kin. The Court confirmed that the state had partially complied with the 2008 order to define the offences of forced disappearance of persons and torture, however the law did not include the continuing or permanent nature of the offence, nor did it recognise that prosecution of the offence may not be subject to a statute of limitations (referring to the requirements under the Inter American Convention on Forced Disappearance of Persons). The Court called upon the state to amend the law accordingly.⁴⁴ Full compliance is necessary in order to ensure harmonisation of protection standards within the region hence the Court was unwilling to be "pragmatic" in the case of partial normative compliance.

Although the Inter-American Court has been hesitant to recognise notions of margin of appreciation in a context characterised by weak state institutions, it is interesting that in two cases addressing non-mortal human rights violations the Court recognised the importance of respecting national norms when addressing reparation issues. The Case of *Escher et al. v Brazil*, Resolution Monitoring Compliance, IACtHR (19 June 2012), involved unlawful telephone interception and monitoring by the Military Police in 1999, as well as ensuing denial of justice and reparation, resulting in claims of violations of the rights to fair trial, privacy, freedom of association, and right to judicial protection.⁴⁵ The Court concluded that the state had complied with the investigation of the facts generating the violations, in spite of the fact that the state determined that it was actually not possible to criminally prosecute on account of the violation of privacy as this was proscribed according to the Brazilian penal code.⁴⁶ The Court noted that this type of human rights violation did not amount to a grave violation of human rights (such as torture, summary execution, enforced disappearance, etc), in which prescription would not be permissible. The Court stated that should it invalidate prescription in the case of this violation then the procedure would never be able

⁴⁴ *Heliodoro Portugal v Panama*, Resolution Monitoring Compliance, IACtHR (19 June 2012).

⁴⁵ The Court concluded that the state complied fully with all 2009 orders to pay financial compensation and cover costs to the victims, publish the judgment in the Official News and newspapers, and website.

⁴⁶ *Case of Escher et al. v Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment Series C No. 200 IACtHR (6 July 2009).

to be applied in any case. Hence, it accepted the conclusion of the Brazilian Public Ministry that processing would not be possible according to the law. It determined that it was no longer necessary to monitor compliance, as the case was deemed to be closed.

An analogous case is that of *Baena Ricardo et al v Panama*, Resolution Monitoring Compliance, IACtHR (28 June 2012), involving the arbitrary dismissal of 270 government employees via issuance of a law in 1990 on account of their demonstration for labour rights and alleged participation in a military coup, giving rise to claims of violations of the norms of legality and non-retroactivity of laws, freedom of association and the rights of judicial guarantees and judicial protection. In 2001, the Court ordered the state to continue to adopt the necessary measures to give timely and effective payment of reparation to victims in compliance with the 2001 order (including unpaid salaries and other remunerations as well as moral damages); although noting that discrepancies regarding the amount of reparation should be resolved by the national courts in accordance with national labour law legislation. The Court thus indicates respect for the national jurisdiction, demonstrating that, to a limited extent, there is a degree of increased similarity with the European system.⁴⁷

IV. Conclusion

The 2012 resolutions on compliance confirm that states are able to publish the Court's decisions but are unable to fully implement orders calling for criminal prosecution of all military/security actors responsible for violations. In addition, some states are also failing to implement the softer aspects of orders, such as provision of psychological and medial support to the family of victims. The fact that only one case resulted in full compliance, and that it was one affecting a US citizen, underscores the real effect of external pressure upon the state in Latin America. The decisions may be interpreted as providing language and values to states in order to support efforts to strengthen the rule of law and protect human rights.

⁴⁷ Similarly in the case of *Marpiripan Massacre v Colombia*, Resolution Monitoring Compliance, IACtHR (23 November 2012) the resolution on compliance recognised the state's request to exclude certain individuals from consideration as victims or next of kin as result of the state's investigation, indicating respect for the state's establishment of a credible national procedure to address accountability for massacres.

The Court managed to promote a repeal of amnesty laws in Peru, Argentina and Brazil, however, the actual prosecution of actors remains problematic. Strengthening of the judiciary at the national level is absolutely essential to promote its independence. It is clear that the OAS can do more in this capacity to improve the possibility of compliance and buttress societal support for national justice systems in relation to the military. However, this requires more financing. Hence USAID, the Inter-American Development Bank, as well as bilateral donors who have contributed to judicial reform projects in the past would need to be consulted. As these initiatives take decades it is not surprising that Court decisions may not be implemented efficiently.

Hence, the value of the decisions remains, in part, symbolic and long-term in orientation. This is invariably linked to larger questions regarding the wavering legitimacy of the OAS as the leading regional system.⁴⁸ Some cases involving deference to the national system in certain aspects of measuring compliance may actually increase the Court's legitimacy. In addition, the Court should seek additional donations to expand its internship and visiting professional programs, and contribute to the design of human rights courses in national law schools. Dissemination of the Court's decisions by national lawyers, judges, law professors, and students is essential to changing the legal culture and to improving compliance.

48 In 2012 Venezuela withdrew from the jurisdiction of the Inter-American Court of Human Rights, after it ordered the Supreme Court to reinstate three judges it had removed, underscoring a possible crisis of legitimacy. See <<http://www.ejiltalk.org/venezuela-denounces-american-convention-on-human-rights/>>. The Supreme Court of Venezuela advised Chavez to withdraw from the Inter-American Court. *Apitz- Barbera v Venezuela*, ser. C No. 182, IACtHR (5 August 2008).