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Bi-Level Remedies for Human Rights Violations

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Much attention has been devoted in recent years to ensuring effective remedies for violations of human rights.[1] For example, several new treaties at the global level add complaint mechanisms for individual victims suffering from infringements of existing human rights conventions.[2] In Europe, doctrinal and institutional reforms since 2004 have sought new ways of inducing states to prevent repetitive violations.[3] In Africa, a human rights court authorized to give binding decisions has slowly come into existence and delivered its first major substantive judgment in 2013.[4]

In 2005, the General Assembly adopted the 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 ("the Basic Principles and Guidelines").[5] The Basic Principles and Guidelines illustrate the wide range of remedies potentially available in international human rights law, including cessation of continuing violations; restitution to the extent possible; compensation for physical or mental harm, lost opportunities, moral damage, and consequential costs; rehabilitation through medical, psychological, legal, or social ser-

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1. *See, e.g.*, ANTÔNIO AUGUSTO CANÇADO TRINDADE, THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE (2011); DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (2d ed. 2005) [hereinafter SHELTON 2D ED.]; THE HANDBOOK OF REPARATIONS (Pablo de Greiff ed., 2006).

2. *E.g.*, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Dec. 19, 2011, U.N. Doc. A/RES/66/138, entered into force Apr. 14, 2014; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Dec. 10, 2008, U.N. Doc. A/RES/63/117, entered into force May 5, 2013; Optional Protocol to the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, U.N. Doc. A/61/611, entered into force May 3, 2008.

3. *See, e.g.*, Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125 (2008).

4. *See* Tanganyika Law Society et al. v. United Republic of Tanzania, App. Nos. 009/2011, 011/2011 (Afr. Ct. Hum. & Peoples' Rts. June 14, 2013). The Court found that Tanzania's prohibition of independent candidatures in presidential, parliamentary, and local government elections violated the African Charter of Human and Peoples' Rights. It "directed [the state] to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken" and gave the individual applicant the further opportunity to make submissions concerning compensation and other reparation. *Id.* at 55–56.

5. G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005), Annex.

vices; measures of satisfaction, including verification and public disclosure of the truth, recovery of the remains of deceased victims, public apologies, judicial and administrative sanctions against perpetrators, commemorations and tributes to the victims; and guarantees of non-repetition, including institutional reforms of military and security forces and the judiciary, trainings, codes of conduct, and reviewing and reforming legislation.[6] The Basic Principles and Guidelines describe these forms of reparation, in appropriate cases, as obligations of states.[7]

The International Court of Justice ("ICJ") has also engaged with the specifics of human rights remedies in its 2012 judgment ordering payment of compensation in the *Ahmadou Sadio Diallo* case.[8] The ICJ indicated that it had taken into account the remedial practice of other international courts, tribunals, and commissions, including the regional human rights courts.[9] Judge Greenwood, concurring, emphasized that "each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions."[10] Judge Yusuf, partly dissenting, cited the Basic Principles and Guidelines as defining "the types of compensable damage due to victims of human rights violations"[11]; seemingly, he viewed the Basic Principles and Guidelines as providing a template for reparation of all human rights violations, not only gross violations, and for reparations orders at the international level in addition to reparations programs at the national level. Judge Cançado Trindade went further, extolling the contributions of the Inter-American Court of Human Rights ("the Inter-American Court") and its "victim-centered" international remedies, which he linked to a jus cogens imperative for the realization of justice.[12]

While the dialogue among international courts and tribunals is certainly welcome, one may doubt whether a trend toward a universal system of human rights remedies applying uniformly at both the national and international levels is either likely or desirable. International courts and tribunals differ from national authorities in their powers, structure, resources, and context, and they also differ from one another. Ordinarily, the goal of international human rights institutions is to induce action at the national level for the remediation of past injuries and the prevention of future injuries. Unlike domestic courts, international human rights tribunals lack coercive

6. *Id.* ¶¶ 19–23.

7. *Id.* ¶ 15.

8. Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, 2012 I.C.J. Rep. 324 (June 19). The case involved violations of the International Covenant on Civil and Political Rights and the African Charter of Human and Peoples' Rights by the Democratic Republic of the Congo, raised as a matter of diplomatic protection by the Republic of Guinea on behalf of a Guinean businessman.

9. *Id.* ¶ 13; *see id.* ¶¶ 18, 24, 33, 40, 49, 56.

10. *Id.* ¶ 8 (Declaration of Judge Greenwood).

11. *Id.* ¶ 4 (Declaration of Judge Yusuf).

12. *Id.* ¶ 55 (separate opinion of Judge Cançado Trindade).

powers to compel obedience to their orders.[13] Instead, international tribunals employ a variety of methods, none of which are infallible, to induce national remediation. Directly ordering a comprehensive set of remedies, as the Inter-American Court has often done, is not the only option.

This article therefore diverges from the predominant approach of the U.S. academic literature on international remedies for human rights violations. The U.S. literature on that subject has focused primarily on the comprehensive remedial practice pursued by the Inter-American Court, favored as the fullest and therefore the best foundation for further development.

For example, Dinah Shelton's major study of remedies for human rights violations, first published in 1999, surveyed the range of forms of remedy that national courts and international tribunals could order in cases involving rights of individuals and in those involving interstate litigation. The basic conclusion of the study was that the full range of options should be available to international human rights tribunals and that treaties should not be narrowly construed to constrict the remedies that international tribunals can use to accomplish full reparation for victims. While much of her analysis concerned methods of calculating monetary awards, Shelton called attention to the emerging willingness of the Inter-American Court to order states to perform specific actions and the broad language of the American Convention on Human Rights that bolstered the Court's discretion.[14] In contrast, she regretted the practice of the European Court of Human Rights ("ECtHR"), which at that stage had limited itself to declaring violations and ordering payment of money and had left to the states the choice of other remedial measures.[15] She favored a wider interpretation of the article on "just satisfaction" in the European Convention on Human Rights that would give the ECtHR more authority to order specific remedial conduct.[16] In general, she argued, "[s]tates need guidance and direction on the measures necessary to afford redress to those whose rights have been violated and who have sought relief, often at considerable risk to themselves and their

13. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273, 285 (1997).

14. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 172–76, 297–302 (1999) [hereinafter SHELTON 1999].

15. *E.g.*, *id.* at 154–55, 181–82, 295–97. Shelton's second edition updated her analysis and documented the further expansion of the Inter-American Court's remedial practice, adding an appendix that detailed its remedial orders in cases through 2004. *See* SHELTON 2D ED., *supra* note 1, at 288–89, 468–77. She also greeted the ECtHR's occasional employment of specific remedial orders, characterizing the release order in *Assanidze v. Georgia* as a "considerable breakthrough." *Id.* at 284.

16. SHELTON 1999, *supra* note 14, at 151, 295. In her second edition, Shelton also criticized the disfavoring of broad remedies of "satisfaction" in the International Law Commission's 2001 Draft Articles on State Responsibility and drew on Inter-American Court opinions in distinguishing human rights obligations from ordinary instances of state responsibility. *See* SHELTON 2D ED., *supra* note 1, at 87–91, 97–100; *see also* Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833 (2002).

families," and international tribunals, as the "forum of last resort" for the victims, should provide it.[17]

Thomas Antkowiak has extolled the Inter-American Court as the remedial leader that other human rights systems should follow, while recommending further refinements to its practice.[18] He has argued, for example, that the Court should tailor its orders more closely to the situation of the case and the requests of the victims rather than repeating the elements of previous orders; that orders are sometimes too vaguely worded and should be more specific; and that the Court awards too little compensation per capita in cases with numerous victims.[19] He has also suggested that the Court return to a separation of the merits phase and the remedial phase in order to give the parties an opportunity to negotiate the remedy.[20] James Cavallaro and Stephanie Brewer have also offered constructive criticism on how the Court might increase the likelihood of compliance with its innovative remedial orders by aligning them with local human rights advocacy campaigns and structuring its own proceedings in a manner that generates publicity that supports the reforms.[21] In her treatise on the Inter-American Court, Jo Pasqualucci described its expanding practice of reparations as "perhaps its most important contribution to the evolution of international human rights law."[22]

A seeming exception that actually confirms the concentration on Inter-American remedies could be seen in Laurence Helfer and Anne-Marie Slaughter's 1997 exploration of the effectiveness of supranational adjudication.[23] The article analyzed the adjudicatory practices of the ECtHR and the European Court of Justice in order to derive a checklist of features contributing to their effectiveness that could be used for evaluation and improvement of other human rights adjudicatory bodies. This analysis, however, gave no attention to the remedial elements of ECtHR judgments (which at the time were limited to monetary remedies and declarations of violation) and did not explore how the remedial practice of the European courts did or did not contribute to compliance with their judgments. A decade later, after ECtHR practice had evolved, Helfer briefly examined some issues relating to its remedial choices, and cited Shelton in endorsing the view that the ECtHR

17. SHELTON 1999, *supra* note 14, at 182.

18. *See* Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008) [hereinafter Antkowiak, *Remedial Approaches*]; Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT'L L. 279 (2011).

19. Antkowiak, *Remedial Approaches*, *supra* note 18, at 392–99.

20. *Id.* at 402–07.

21. James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 795, 813–14, 824–25 (2008).

22. JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 289 (2003). It is, of course, unremarkable that a treatise on the Inter-American Court would focus on the contributions of the Inter-American Court.

23. Helfer & Slaughter, *supra* note 13.

"should identify appropriate non-monetary remedies in its judgments whenever such remedies will restore applicants to the *status quo* prior to the violation."[24] Similarly, a 2010 article on the ECtHR by Ingrid Nifosi-Sutton critiqued it for continuing to rely on monetary remedies in cases involving inhumane conditions of detention of prisoners rather than explicitly ordering reforms and concluded that the ECtHR "should be inspired by the Inter-American Court of Human Rights, which has not hesitated to require demanding reparations such as the provision of health care services or food to redress violations."[25]

A genuine exception to the Inter-American focus appears in Sonja Starr's article applying Daryl Levinson's theory of "remedial deterrence" to the practice of international human rights tribunals.[26] The theory, derived from U.S. constitutional practice, warns that overly strong remedial doctrines may induce judges to avoid finding violations by narrowing substantive rights or by erecting procedural obstacles to their vindication. Starr illustrated this phenomenon in the practice of the international criminal tribunals (viewed as a category of human rights tribunals) while speculating on its application to the European and Inter-American systems.[27] Starr argued that the conventional insistence on "full" reparation for human rights violations may sometimes be counterproductive to the realization of human rights.

Empirical studies, meanwhile, have attempted to examine the causes for differential rates of compliance with regional court remedies. In a comparative article, Darren Hawkins and Wade Jacoby showed that both the ECtHR and the Inter-American Court experience partial compliance with their remedial orders, although the deficit in Europe is more often a matter of delay, and the deficit in the Americas persists, especially for certain types of orders.[28] The Ph.D. dissertation of Andreas von Staden, focused on the ECtHR, explored in fuller detail the sometimes grudging compliance of liberal democracies with its judgments.[29] A paper by Jeffrey Staton and

24. *See* Helfer, *supra* note 3, at 146–49, 153–54 (citing SHELTON 2D ED., *supra* note 1).

25. Ingrid Nifosi-Sutton, *The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: A Critical Appraisal from a Right to Health Perspective*, 23 HARV. HUM. RTS. J. 51, 73 (2010). Parenthetically, the ECtHR has since issued pilot judgments regarding inadequate conditions of detention in Russia and prison overcrowding in Italy, and made specific recommendations of general measures needed regarding the health of detainees in Turkey. *See* Ananyev v. Russia, app. nos. 42525/07 et al., Eur. Ct. H.R. (2012); Torreggiani v. Italy, app. no. 43517/09, Eur. Ct. H.R. (2013); Gülay Çetin v. Turkey, app. no. 44084/10, Eur. Ct. H.R. (2013).

26. Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 694 (2008).

27. *See id.* at 730–37. Starr noted that an "in-depth assessment of other international courts beyond the international criminal tribunals exceeds this Article's scope." *Id.* at 732.

28. Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights*, 6 J. INT'L L. & INT'L REL. 35 (2010).

29. Andreas von Staden, Shaping Human Rights Policy in Liberal Democracies: Assessing and Explaining Compliance with the Judgments of the European Court of Human Rights (Nov. 2009) (unpublished Ph.D. dissertation, Princeton University), *available at* http://search.proquest.com/docview/304990051.

Alexia Romero argued that the Inter-American Court uses vague language in some of its remedial orders in order to compensate for lack of relevant information, but that such vagueness then correlates with noncompliance.[30] Alexandra Huneeus has diagnosed the low compliance rate with nonmonetary remedial orders of the Inter-American Court as being aggravated by the Court's insufficient efforts to enlist cooperation from national judges and prosecutors; while rejecting the idea that the Court should emulate the ECtHR's restraint, she suggests that the Court delegate a greater degree of remedial discretion to the national high courts,[31] as well as allocate tasks to particular institutions in its orders and include judicial actors as interlocutors in its compliance proceedings.[32] David Baluarte investigated empirical data as a source of advice to victims' advocates, arguing that they should use data on compliance with particular kinds of Inter-American Court remedies to inform the sets of measures that they propose to the Court in particular cases.[33]

This article seeks to widen the angle of view. It analyzes three principal strategies by which international tribunals, adjudicating human rights disputes between an individual victim and a state, issue remedial rulings intended to produce concrete remedial results on the national level.[34] As defined later, these are a direct remedy approach, a monitoring approach, and a supervised negotiation approach. I first isolate them heuristically as separate models, in order to examine their relative strengths and weaknesses. Then I turn to the reality of hybrid models, which combine aspects of the pure models.

The analysis is not framed as an effort to find the remedial approach that is best for the interests of the complaining party in the case, regardless of the costs it imposes on others, including other individuals with adverse interests

30. Jeffrey K. Staton & Alexia Romero, Clarity and Compliance in the Inter-American Human Rights System (Feb. 12, 2011) (paper presented at the APSA Annual Meeting), *available at* http://paperroom.ipsa.org/papers/paper_26179.pdf.

31. Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 Cornell Int'l L.J. 493, 525 (2011). In particular, Huneeus invokes an Argentine legal scholar's critique of the Court as too rigid in requiring prosecution of individual perpetrators of human rights violations. *See* Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers*, 23 Am. U. Int'l L. Rev. 195 (2007). She rejects, however, the idea that the Inter-American Court should "[g]o European" by granting national authorities as much remedial discretion as the ECtHR does. Huneeus, *supra* note 31, at 519.

32. Huneeus, *supra* note 31, at 522–23. Huneeus also makes other suggestions that do not relate directly to remedial practice.

33. David C. Baluarte, *Strategizing for Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative for Victims' Representatives*, 27 Am. U. Int'l L. Rev. 263 (2012). Relatedly, Baluarte also wrote with Christian de Vos a study for the Open Society Justice Initiative comparing the implementation procedures and success of the European and Inter-American Courts, the African Commission on Human and Peoples' Rights, and the Human Rights Committee. Open Society Justice Initiative, From Judgment to Justice: Implementing International and Regional Human Rights Decisions (2010).

34. This article will not address international criminal tribunals, which prosecute individuals rather than states, and which do not rely exclusively on the responsible state to enforce their judgments.

in the subject matter of the dispute and potential complaining parties in unrelated cases. For that reason, the interests of the tribunal itself, which must allocate resources across its docket, and the legitimate interests of the state, which has duties to its other members, are explicitly taken into account. Given this diversity of perspectives, no simple model is unambiguously best for every situation. Nonetheless, the inquiry begun here sheds light on factors that should be relevant to establishing the framework for decisions on remedies in particular institutional settings. Such factors would assist drafters engaged in designing powers and procedures for a new international tribunal, and existing tribunals considering remedial strategies within the limits of their authority.

I. Three Models Of Remedial Action for an International Human Rights Tribunal

From the actual remedial practice of international human rights institutions, one can abstract three highly contrasting remedial strategies, which will be described here as the basis of separate models. All three models presuppose a human rights treaty that enables individual victims of violations of rights under the treaty to bring proceedings against the responsible state before an international tribunal. This tribunal may be a court or other adjudicatory body; the discussion will include models in which the tribunal has power to issue binding orders and models in which the power to bind is not assumed. The tribunal may have a simple structure, using the same personnel to make merits decisions and remedial decisions, or a complex structure assigning different roles to different components. For each of the models it is assumed that the tribunal has already found a violation of the treaty, and that the tribunal's remaining task is to achieve a remedy for the violation.[35]

The first model, described here as the "direct remedy model," meaning "direct international remedy," involves a tribunal that possesses and exercises the binding authority to specify fully and in detail the particular set of remedial actions that the government officials at the national level are obliged to carry out as a result of the finding that the individual's right has been violated. The second model, described here as the "monitoring model," meaning "monitoring of a national remedy," involves a tribunal that leaves the specific choice of remedial action to the appropriate officials at the national level; the tribunal articulates parameters to indicate the range of the national officials' remedial discretion. In the third model, described here as the "negotiation model," meaning "facilitated negotiation of a national remedy," the tribunal's remedial practice focuses on creating a framework within which the victim and the national officials, and possibly other

35. Thus, the analysis will not address issues raised by friendly settlements that avoid decisions on the merits.

stakeholders, will negotiate a mutually satisfactory remedy at the national level.

Within each of these models, another important distinction should be mentioned: that between remedies intended to benefit the individual victim and remedies of a systemic nature intended to prevent future violations of the rights of others by the same state. A remedial approach could focus narrowly on the needs of the particular individual who suffered a violation of a right in the past, without attempting to specify the more general implications of the tribunal's conclusions for the laws, institutions, and practices of the responsible state; or it could expressly take on the task of overseeing broader reform as a continuation of the adjudication of the case.[36] Both options are included within each model.

The models are introduced here as pure forms in order to isolate their features, but they can also be considered as options for a tribunal to employ in a particular case, separately or in combination. I will have more to say about hybrid forms later, in Part III.

A. Direct International Remedy

In this first model, the international tribunal adjudicates the violation of an international human rights treaty and then selects a remedy that the state is obliged to implement. The content of the remedy is defined at the international level; the treaty might expressly address the range of permissible remedial orders, or the tribunal could develop its own remedial jurisprudence as a matter of treaty interpretation. That jurisprudence would involve some combination of principles and discretion, to be exercised in accordance with the tribunal's own judgment. This discretion is not subject to control by the state that committed the violation. The state's obligation to respect the tribunal's choice of remedy derives from the provisions of the treaty that empower the tribunal to resolve disputes.

The tribunal's authority extends to detailed particulars of the remedy, which further complicate the tribunal's responsibility. For example, if the chosen remedy includes an award of monetary damages, international law determines the quantum of damages. The tribunal decides on the elements of harm to be compensated; on the standards for proving or estimating the value of the harm; on whether deductions should be made for other payments by the state or by third parties; and on the payment schedule, the currency, and any interest rate—all as a matter of international law. The tribunal evaluates the victim's evidentiary showing and calculates the size of the award.

36. Orders for broader reform are sometimes described as "guarantees of non-repetition," ensuring that the past violation will not be repeated. This ambiguous phrase may cloud the distinction between ensuring that the same victim will not face a future repetition of the violation and ensuring that similar conduct will not result in violation of the rights of other individuals who are not parties to the case.

It is also the tribunal that decides in the first place whether to award damages or a different remedy. The tribunal may limit itself to affording a declaratory remedy finding a violation, or to requiring the state to make a public apology. If the state had deprived the individual of tangible property, the tribunal could decide to order restitution of the property rather than damages, or to order restitution along with an appropriate quantity of interim damages. Again, the choice of the appropriate remedy will be made by the tribunal, applying its own international standards of appropriateness.

The example of tangible property, however, may raise an additional consideration: to return possession of the property to the victim, the state may need to dispossess another private holder who was not a party to the proceeding in which the tribunal found a violation. This situation amounts, of course, to merely one illustration of the ways in which a human rights claim by an individual against a state may implicate the rights of third parties. The tribunal might deal with this problem by expanding its proceeding to permit the intervention of a third party to discuss the propriety of the restitution remedy. Instead, it might choose to phrase its remedial order in the alternative, directing restitution if certain conditions are satisfied, and specifying a substitute award of compensatory damages if those conditions fail.

Remedial orders may also require governments to perform other specific, non-monetary actions, such as the release of a prisoner, the transfer of custody of a child, reinstatement in a job or official position, or the abandonment of a construction project. Implementation of these remedies may implicate the rights of third parties,[37] and in order to determine whether these remedies are appropriate, a tribunal may need to consider additional information beyond the evidence that originally led to the conclusion that the rights of the victim had been violated.

The need for additional information and the need to consider the interests of third parties may be magnified if the tribunal shifts its attention from a remedy benefitting the particular victim to a systemic reform of the laws or institutions that brought about the violation. Sometimes the reasoning that demonstrates the violation points unequivocally to the single means by which similar violations in the future could be prevented. More often, there are multiple possible avenues for intervention, and further knowledge of the factual situation and the legal system in the state would be useful in predicting which if any of these avenues is likely to be effective and to respect the rights of all interested persons.

37. For example, human rights tribunals have often stressed the obligation of states to prosecute perpetrators of severe human rights violations such as enforced disappearance, torture, or extrajudicial execution. In the prosecution of alleged perpetrators, procedural violations may occur that call into question the validity of a resulting conviction, and the accused may in turn seek a remedy. In this context, the choice between release and retrial as a remedy has obvious implications for the rights of the original victims.

When more than one remedy is conceivable, the tribunal's selection may be made partly on the basis of general remedial rules or principles and partly on the basis of unstructured case-specific discretion. It would benefit the transparency of the system for the tribunal to be open about these factors, articulating the rules or principles it applies and revealing when it is exercising discretion, rather than merely announcing its chosen remedy without any explanation. The direct remedy model starkly raises the question of whether the victim has the right to demand a particular remedy, and if not, what role the victim's preferences regarding the remedy should play in the tribunal's remedial decision.

B. Monitoring of a National Remedy

In the second model, after the tribunal has found a violation, the tribunal does not fully specify the remedy that the state must provide. There may be two different reasons for this practice: either the treaty does not authorize the tribunal to specify the remedy in detail, or the tribunal has chosen categorically not to exercise such authority. I include them both within the model. Instead, the tribunal emphasizes that the treaty already obliges the state to provide a remedy for human rights violations, in qualified terms such as "an effective remedy." The tribunal has authority to monitor the state's compliance with this consequential obligation, as well as with the state's other treaty obligations. Upon finding a violation, the tribunal may perform its monitoring function *ex ante* by identifying, if possible, the minimum elements that must be present for the remedy to be effective, or it may perform the function *ex post* by waiting for the state to choose a remedy and then reviewing whether that remedy would be effective. The tribunal could also suggest to the state a particular effective remedy, but the state would remain entitled to substitute a different remedy, so long as that alternative is also effective.

The following example from a U.N. treaty body serves to illustrate an application of the monitoring model.[38] After Denmark rejected H.'s application for asylum as not credible, H. submitted a communication to the Committee Against Torture, arguing that returning him to Afghanistan would expose him to risks of torture from both the government and the Taliban, in violation of Article 3 of the Convention Against Torture.[39] The Committee denied H.'s request for interim measures (the equivalent of a preliminary injunction). Later, in its decision of November 2012,[40] the Committee re-

38. This article, however, does not claim that the Committee Against Torture or other U.N. treaty bodies adhere fully to all the details of the pure monitoring model as I define it. The pure monitoring model is an abstraction derived from their practice.

39. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

40. K.H. v. Denmark, Decision Adopted by the Committee, 49th Sess., Oct. 29–Nov. 23, 2012, Comm. No. 464/2011, U.N. Doc. CAT/C/49/D/464/2011 (Nov. 23, 2012).

jected his arguments concerning the Taliban, but found that the Danish authorities had not adequately investigated the evidence supporting his claim concerning government forces, and that under those circumstances Article 3 prohibited his return. Instead of recommending a remedy, it invited Denmark to inform it within 90 days of the steps that it had taken to accord with the decision. In the follow-up dialogue, it turned out that Denmark had already returned H. to Afghanistan after the denial of the request for interim measures. By April 2013, Denmark had located H. in Afghanistan, facilitated his return to Denmark, and granted him a residence permit. The Committee then closed the follow-up dialogue with a finding of a satisfactory resolution.[41]

In the monitoring model, the state's obligations regarding the tribunal's remedial determinations derive, in whole or in part, from the state's own pre-existing treaty obligation to afford a remedy,[42] and may or may not also be traced to the provisions of the treaty regarding resolution of disputes by the tribunal. The degree to which the treaty makes the tribunal's decisions binding affects the weight attributable to the tribunal's evaluation of the effectiveness of various remedies.

I assume in this model that the treaty requires the state to provide an effective remedy, but not to provide the most effective remedy.[43] It would also be important to inquire into the character of the individual's right to an effective remedy: is the right absolute, nonderogable, and without exception, or is the right to an effective remedy subject to limitations or exceptions? If the right to a remedy is subject to limitations or exceptions that are pertinent to the particular case, then the state may not be obliged to provide a remedy after all, and the tribunal may need to restrict itself to finding a violation.[44]

In exceptional cases, the tribunal may conclude that an effective remedy necessarily requires repeal of legislation or some other type of systemic reform without which the particular victim will remain exposed to further violations. More frequently, however, a more narrowly focused remedy would fully compensate and protect the victim. The victim's own right to an effective remedy does not entail an additional right to a remedy solely for the benefit of unrelated future victims.

41. Rep. of the Comm. against Torture, 49th & 50th Sess., Oct. 29–Nov. 23, 2012, May 6–31, 2013, U.N. Doc. A/68/44, at 198; GAOR, 68th Sess., Supp. No. 44 (2013).

42. Some elements of an effective remedy may also be traceable to a state's obligation to cease violating a substantive right, if the violation is ongoing.

43. Indeed, it is not clear that the notion of the "most effective remedy" makes sense. In many situations, no remedy is perfect and there is always more that the state could do to increase the effectiveness of any particular remedy.

44. I also assume here that the tribunal's interpretations of the right to an effective remedy should apply consistently as between cases that are brought before the tribunal and cases that remain at the national level. Consistent application may not mean identical treatment if the tribunal can justify any differences it creates.

Nonetheless, a tribunal employing the monitoring approach may have other reasons for speaking to the issue of systemic reform. The tribunal's finding of a treaty violation in the particular situation implies that the state would also violate the same substantive obligation under the treaty if it repeated its conduct in similar circumstances with regard to similarly situated individuals. Instead of leaving that logical conclusion implicit, the tribunal could point out to the state that the treaty obliges it to avoid or prevent such future violations of the rights of others. In making this observation, the tribunal is not creating a new obligation for the state through the exercise of remedial authority; it is only making explicit a pre-existing obligation, perhaps construed in light of its analysis in the case at hand. If the tribunal says more about *how* the state should conduct itself in order to prevent future violations of the rights of others, the tribunal would appear to pass beyond the monitoring of the remedy provided to the individual victim, and to engage in monitoring of the general human rights performance of the state; the tribunal may be authorized to perform such a general monitoring task and might even be authorized to perform it in conjunction with the decision of individual cases. In some instances, the additional observations of the tribunal concerning the means of preventing a future violation may be so clearly grounded in its prior jurisprudence that it is only stating an obvious legal conclusion flowing from the current finding of violation.

C. Facilitated Negotiation of a National Remedy

In the third model, the tribunal views its role in the remedial phase as setting the framework within which the victim and the state will negotiate a remedy to be provided at the national level for the violation found at the merits phase.[45] The tribunal's finding of a treaty violation validates the claim of the victim and empowers the victim in the negotiation by bringing external pressures to bear on the state to reach a mutually satisfactory resolution. The tribunal's contributions to the negotiation might also include suggestions regarding the scope of the remedy or indications of interested third parties who should be involved in the negotiation; and the tribunal may later examine whether failed or successful negotiations have complied with the framework it specified.

Several factors, taken alternatively or together, may justify the focus on negotiation.[46] First, the parties may know best what their own interests are

45. Given that the subject of this article is remedies after findings of violations, the description of the negotiation model will not deal with the possible involvement of the tribunal in negotiations aimed at settlement prior to a decision on the merits.

46. *See, e.g.*, Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991) (discussing a negotiation model of litigation at the national level); Antkowiak, *Remedial Approaches*, *supra* note 18, at 403 (adapting such a model to international human rights courts). It should be noted, however, that both of these articles address a model in which the court is empowered to impose a remedy if the negotiations do not succeed; the present article treats that combination as a hybrid model. *See infra*.

and what indirect consequences various remedial measures would cause at the national level. Second, remedies requiring active performance by the state may be more effectively implemented if the officials responsible for implementing them are involved in their design. Third, negotiation may also provide an opportunity for the participation of other interested individuals or groups who could not take part in the tribunal's procedure, and thus produce a better overall solution. Last but not least, a tribunal may conclude that, as in domestic litigation, whatever precise remedy it might have ordered would remain subject to negotiation and settlement between the parties. Studies of international litigation *between* states also show that a judicial decision often supplies a starting point rather than the eventual endpoint for resolving a dispute.[47]

The tribunal may explicitly or implicitly impel the parties to negotiate, and its authority to do so may derive from the dispute resolution provisions of the treaty or from elsewhere in the treaty. International tribunals, both within and outside the human rights field, sometimes explicitly direct states to negotiate. These instructions may result from treaty provisions in which states expressly undertake to negotiate,[48] or from the terms of the submission of the dispute to the tribunal.[49] In other instances tribunals have derived the obligation to negotiate from substantive undertakings.[50]

Alternatively, the instruction to negotiate a remedy may be implicit. For example, a remedial conclusion that tells the state to provide compensation to the victim but that does not specify the amount or the elements of the compensation could be understood as calling upon the parties to negotiate in good faith regarding the amount of compensation to be paid.

The negotiation contemplated by this third model may concern the situation of the particular victim, or it may concern the more general legal and institutional regime affecting all those similarly situated. While the remedy for the particular victim may or may not significantly implicate the interests of others, the broader project of legal or institutional reform inevitably has impact on many others. Therefore, a tribunal would have reason to encourage the inclusion of a range of relevant stakeholders, and not just the original parties, in negotiation over a broad reform.

The tribunal may limit itself to stimulating the negotiations, or it may reserve the opportunity to intervene if the negotiations do not take the

47. *See* Laurence Boisson de Chazournes & Antonella Angelini, *Between Saying and Doing: The Diplomatic Means to Implement the International Court of Justice's* Iuris Dictum, *in* DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT (Laurence Boisson de Chazournes et al. eds., 2013).

48. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 263–65, 267 (July 8) (invoking Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons).

49. *See* Gabčikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, 12, 83 (Sept. 25); Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), 2007 I.C.J. 659, 692–93, 763 (Oct. 8).

50. *See, e.g.*, Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 62 (Nov. 28, 2007).

proper course. Either at its own initiative or at the request of a party, the tribunal may apprise itself of the progress made and may attempt to unblock or reorient the negotiations by resolving subsidiary disputes over the parameters of the remedial goal or the structure of the negotiating process. In the pure version of the negotiation model, however, the tribunal aims to induce a consensual resolution at the national level and not to impose a remedy of its own choice. Admittedly, one potent tool for inducing a consensual resolution would be to warn the parties that the tribunal will impose its own direct remedy if the negotiations do not succeed; I would describe that approach as a hybrid form of the negotiation and direct remedy models, to be discussed later, rather than a pure example of the negotiation model. This hybrid approach is not available to tribunals that lack the authority to impose a direct international remedy, while they may be authorized to employ the negotiation model.

The oversight of the ongoing negotiations may be performed directly by the tribunal, with the same composition as the original decision, or it may be delegated to a particular member who participated in the decision, or to a different unit within the tribunal. I should recall here that I am using the term "tribunal" broadly, as including international bodies with complex organizational structures. For example, a human rights court could include both judges and an administrative secretariat or registry, and supervision of the negotiations might be delegated by the court to a specialized unit of the secretariat, subject to the court's review. Pushing the definition a bit further, one may consider the Council of Europe as one regional human rights "tribunal," with the ECtHR and the Committee of Ministers (including the Department of Execution of Judgments in the Council's Secretariat)[51] regarded as sub-units that play complementary roles in providing international oversight of the negotiations that follow certain judgments issued by the ECtHR.

II. Relative Advantages and Disadvantages of the Three Models

This section will attempt to sketch the relative advantages of each of the three models in comparison to the other two. Comparison of the models in their pure form should also shed light on comparisons among the various possible hybrid combinations of the models, although the greater complexity of those hybrid versions may introduce additional factors and would require further analysis.

51. *See generally* Elisabeth Lambert Abdelgawad, The Execution of Judgments of the European Court of Human Rights (Council of Eur., Human Rights Files, No. 19, 2d ed. 2008); *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights—6th Annual Report of the Committee of Ministers* (2012) [hereinafter CM Annual Report 2012]; *infra* Part III(A).

The discussion assumes that the tribunal has found a violation of a human right, and that the tribunal then makes a remedial disposition in favor of the victim in accordance with the operative model. I will separate the discussion of the effect of the model on the likelihood of compliance from the discussion of the effects of the model if the state does comply. Thus, I will first discuss, on the assumption that the state complies with the remedy, the effects of the particular model for the victim, and for similarly situated third parties, the direct effects of the model on the tribunal itself, and the effects on the state and on third parties with adverse interests. Second, I consider the effect of proceeding under each model on the likelihood that the state will comply with the tribunal's remedial disposition. It should be recognized, however, that different notions of "compliance" are appropriate for the three different models. In the direct remedy model, the state complies by implementing the tribunal's specific order. In the monitoring model, however, compliance requires the state to afford an effective remedy that satisfies any minimum elements the tribunal has identified as necessary to effectiveness, but does not require the state to implement a particular remedy suggested by the tribunal that exceeds the minimum. In the negotiation model, compliance means that the state enters into good faith negotiations within the structure proposed by the tribunal, and that it implements any agreement that is ultimately reached; the kind of compliance assumed here is procedural, rather than requiring arrival at a predetermined substantive outcome. Finally, I will attempt to summarize identifiable advantages and disadvantages of each model. This accounting is preliminary rather than comprehensive, even for the "pure" models, given the broad range of human rights violations, remedial actions, and background situations to which they apply.

A. Effects on the Victim (Assuming Compliance)

The analysis begins, but does not end, with the interests of the particular victim who seeks a remedy.

1. *Quality of the Remedy*

One principal advantage from a direct international remedy is the clarity with which it sets out what the victim is entitled to receive and what the state is obliged to provide. The remedy is chosen by the impartial and expert tribunal, not by the entity that committed the violation. Given the usual requirement that the victim must exhaust domestic remedies, or must show that exhaustion would be futile, before the international tribunal can adjudicate the case, this international remedy is likely to be superior to any remedy that the victim could expect from the state acting alone.[52]

52. There may be exceptional circumstances, however, that increase the likelihood that the state would provide a superior remedy: for example, when the state has undergone a change of regime or when

Under the monitoring model, in contrast, the victim receives only a partial remedial decision from the tribunal, which may specify some minimum elements of an effective remedy but otherwise leaves the choice among effective remedies to the state. The decision also leaves to the state final responsibility to design any systemic reform to prevent future violations. The partial decision produces uncertainty about what remedy the state will provide, and may also result in uncertainty about whether the state's chosen remedy complies with the tribunal's decision.

The uncertainty is even greater in the negotiation model, where the tribunal deliberately refrains from a specific remedy while empowering the victim to work out a successful accommodation with the state. The state's procedural obligation to negotiate in good faith may lead to an agreed remedy, but the content of the agreement depends on the course of the negotiations. It is assumed here, however, that the state will then implement the agreement.

The specificity of the direct remedy can sometimes lead to a disadvantage for the victim, however, to the extent that the tribunal has thereby announced the maximum that the state owes the victim under international law. The tribunal thus leaves the victim no room to argue that a greater remedy is required by the treaty, even if the tribunal has undercompensated the victim by misjudging the extent of the harm or by deliberately choosing not to provide full reparation. Moreover, the tribunal's chosen remedy may be unrealistic or counterproductive under local conditions, and once implemented it may not provide the victim with the benefit that the tribunal expected. The monitoring and negotiation models both afford the victim more room to argue that the state should provide a better remedy than the tribunal has indicated.

The monitoring model imposes no maximum, but may provide a minimum standard for the remedy; the negotiation model produces even greater uncertainty by indicating neither a maximum nor a minimum. In this third model, the victim participates in shaping the remedy, and in responding to concerns by the state and other stakeholders that certain remedial options would be difficult to implement or would unduly impair the rights or interests of others. Thus the victim has the possibility of achieving a more appropriate remedy than the tribunal might have ordered in the direct remedy model, as well as more influence on the choice of remedy than in the monitoring model. Still, the result obtained depends on the victim's success in the negotiations, aided by the support that the tribunal's process affords.

These considerations suggest that (assuming compliance) the direct remedy model provides the most securely advantageous reparation to the individual victim, and the monitoring model does better than the negotiation

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the violation was inadvertent and the state welcomes the tribunal's clarification of the content of the right.

model by ensuring at least a partial remedy. The victim has the chance to improve the remedy in the monitoring and negotiation models, but at greater risk. Rephrasing this in economic terms, it would seem that the direct remedy model offers the highest expected value, while the monitoring and negotiation models have higher variance.

2. *Procedural Costs to Victims*

The procedural costs to the victim vary between the models, partly in the purpose of the expenditures and partly in their timing. The direct remedy model imposes greater procedural cost on the victim at the stage leading up to the entry of the tribunal's remedial order, because the victim must inform the tribunal concerning the harm suffered and the measures likely to redress the harm within the national legal system. The relevant expenditures must be weighed, however, against the decreased procedural cost to the victim at the subsequent stage of implementing the judgment at the national level (decreased because the remedy has been fully specified).

This distribution of costs over time under the direct remedy model contrasts with the distribution under the monitoring and negotiation models, where the tribunal requires less information from the victim at the earlier stage, but leaves more issues concerning the details of the remedy unresolved. In the monitoring model, the costs saved by the victim at the earlier stage may reemerge at the national implementation stage, or even in returning to the tribunal to determine whether the state has complied with the tribunal's order.[53]

Similarly, in the negotiation model some procedural costs to the victim are shifted from the initial proceeding before the tribunal to the later stages of negotiating the remedy, including any possible returns to the tribunal for oversight of the negotiation process. These procedural costs may be higher, particularly if the victim is engaged in multiparty negotiations over a systemic remedy, than the victim's procedural costs in the monitoring model or even in the direct remedy model.

It is hard to say in the abstract which model distributes these procedural costs in a manner more advantageous to the victim, because the answer probably depends on such factors as the relative formality of the proceedings at the various stages, and the novelty of the factual and legal issues to the tribunal, as well as the breadth of the remedy.

B. Effects on Similarly Situated Third Parties (Assuming Compliance)

The precedential effect of the finding of violation should be distinguished from the more specific effects of compliance with the remedial order. In all three models, the finding of a violation has some degree of precedential

53. Even though I am assuming here that the state does comply, it may not be clear to the victim that the state's chosen remedy is adequate.

effect conferring benefits on potential victims, both within the state itself and in other states. The issue to be discussed here is rather the variation across the three models in the additional effects of the remedial order on similarly situated individuals with respect to the same state. (Effects on individuals with adverse interests will be discussed in section D.[54])

Certain types of remedies, such as financial compensation or release of a prisoner, confer no immediate benefit on unrelated individuals. However, tribunals may also order legal or institutional reforms to prevent repetition of the violation, either as a protection for the original victim who faces the same violation again or as a systemic reform on behalf of others. These reforms provide the benefit to be considered here.

The monitoring model, as I have defined it, focuses its actual remedy on the individual victim. When the minimum effective remedy for the victim necessitates a broader reform, the actual remedy will also serve the interests of third parties. If instead the tribunal merely suggests a broader reform as its own preference among the range of effective remedies, then the assumption being made here about compliance does not entail that the state will definitely adopt that broader reform. In such cases, the reform suggestion provides potential benefit to third parties, but more weakly. The tribunal's general admonition to avoid similar violations in the future largely tracks the precedential effect of the finding of violation; it warns of future similar findings and may strengthen internal political forces for change or motivate external pressure. If the tribunal spells out the means necessary to avoid such violations, then that explanation may provide some additional benefit by offering a clearer point of reference for the reform effort.

The direct remedy model, in contrast, empowers the tribunal to make its own choice among effective remedies, and therefore to impose systemic reform, either on behalf of the individual or on behalf of a broader class of future victims. If the tribunal chooses such a reform, its order is mandatory and, on the assumption that the state complies, the benefits accrue to the entire class. The extent of the benefits will depend on how well the tribunal has designed its reform. When the reform is well-designed, the advantage to similarly situated third parties exceeds the less certain advantage available under the monitoring model.

The negotiation model potentially offers benefits to similarly situated third parties, which may be accompanied by procedural costs. The negotiation facilitated by the tribunal may address systemic reform as well as repa-

54. The distinction between third parties with adverse interests and similarly situated third parties is not, however, clear-cut. When a violation has multiple victims, a particular remedy for one victim may disadvantage other victims, for example, by assigning control of a unique asset to the first victim without properly taking into account the parallel interests of the other victims. The direct remedy model has a tendency to produce a form of inequality as between victims who gain access to the international tribunal and other victims, because the tribunal chooses the individual remedy only for the former; the monitoring model tends to produce greater equality among victims from the same state, because the choice among effective remedies is left to the state.

ration for the original victim, and other victims may be invited to participate in the negotiation instead of relying on the original victim to represent their interests. The opportunity to participate in reform negotiations would provide advantages over the monitoring model. Nonetheless, the outcome of this broader negotiation remains uncertain, especially in comparison with the direct remedy model.

C. *Effects on the Tribunal (Assuming Compliance)*

The effects of a model on the tribunal are also important because the time and expense spent in providing a remedy to one victim limit the time and resources available for providing remedies to other victims. The burdens on the tribunal resulting from a model include both the case-specific costs of acquiring and analyzing information concerning the particular dispute, and general "overhead" costs of maintaining the model. One distinct aspect of case-specific cost, whether the tribunal can resolve a dispute all at once or must return to it repeatedly, will receive separate mention here. In this connection, I recall that I am using the term "tribunal" to include complex institutions that have component parts involved in different phases of an individual case, such as one division for adjudication of the remedy and another division for oversight of its implementation.

1. *Case-specific Procedural Costs to the Tribunal*

Comparing the costs of an individual case to the tribunal under different models produces less ambiguity than comparing the costs to the individual, because some models permit the tribunal to shift costs to the national level. For example, under the direct remedy model the tribunal itself quantifies compensation, which requires reception and analysis of more information from the parties than the tribunal would need under the monitoring and negotiation models. More generally, a tribunal affording a direct remedy needs more information about facts relating to the victim, facts concerning conditions in the state, and facts about the state's legal system, in order to evaluate the harm to the victim and to design non-monetary reparative measures. Given that the direct remedy is a binding order and not a mere recommendation, the tribunal needs considerable information to act with appropriate confidence even if the remedy benefits only the individual victim; the needs are even greater if the tribunal is ordering a systemic legal reform, either for the sake of the individual victim, or for the benefit of the wider class of similarly situated victims.

The monitoring approach, in contrast, significantly decreases procedural costs for the tribunal. The tribunal does not need to quantify the harm to the victim. It does not need to collect and analyze detailed information about conditions in the state that would enable it to choose confidently, among an array of conceivable remedies, the one remedy that it will require.

The tribunal focuses on ensuring that the state provides an effective remedy. The tribunal may need a certain amount of general information in order to specify minimum elements of an effective remedy or to tentatively suggest a particular remedy; and it may later need more information pertaining to the effectiveness of the remedy that the state has chosen, if the victim challenges that remedy as insufficient. But the procedural costs to the tribunal are less than in the direct remedy model. Moreover, in the monitoring model, the tribunal does not exercise discretion to impose a systemic remedy; it either provides a general reminder of the need to avoid similar violations, or makes recommendations, which may be general or detailed, regarding means for preventing future violations.[55]

The procedural costs to the tribunal under the negotiation model depend on the intensity with which the tribunal engages in oversight of the negotiation, as well as whether it is facilitating an individual remedy or a systemic remedy. Leaving responsibility for the specification of the remedy to the parties saves the tribunal the costs of gathering and evaluating some of the relevant information. But structuring the negotiation, ensuring that significant stakeholders are included, and examining the progress of the negotiation if additional interventions are requested would require the tribunal to assimilate case-specific information at a later stage. These costs are likely to exceed the procedural costs of the monitoring model, and in difficult cases may even exceed the costs of the direct remedy model.

2. *Finality*

The direct remedy model gives the tribunal, as it gives the victim, the advantage of finality. Once a specific remedy has been ordered, the tribunal has completed its resolution of the dispute. The case may or may not return to the tribunal for a determination of whether the state has complied with the remedy, but the tribunal has not intentionally left remedial issues open. Unlike the monitoring model and the negotiation model, the direct remedy model does not contemplate renewed engagement by the tribunal with the process of choosing the remedy.

The monitoring model does not provide the tribunal with this kind of finality, because the victim may return to the tribunal (perhaps to a different component of the tribunal) for an ex post evaluation of the remedy chosen by the state.

A tribunal that engages in active oversight of negotiations under the third model lacks the advantage of finality afforded by the direct remedy model, even more than the monitoring model does. There may be some cases that settle easily, but others will require repeated attention.

55. In some cases, however, the tribunal may conclude that avoiding future repetitions of the violation with regard to the same victim requires wider legal reform, and then the minimum effective remedy for the individual will entail a systemic remedy.

3. *Law-Generating Effort*

In the direct remedy model, the tribunal also incurs general costs in order to develop a remedial jurisprudence that justifies its highly specific remedial choices. That jurisprudence may include both rules and methods of exercising discretion.

The law-generating effort involved in the direct remedy model exceeds the effort involved in the monitoring model, where the tribunal needs to develop a remedial jurisprudence focused on the treaty requirement of an effective remedy, and may also need to develop guidelines for suggesting particular remedies. To some extent the effort of developing standards for the effectiveness of remedies overlaps efforts that the tribunal is already making in order to monitor the state's compliance with that treaty requirement. The degree of overlap should not be exaggerated, however, given that novel situations may raise issues of effectiveness that the tribunal has not previously considered either in its general monitoring capacity or in adjudicating individual cases.

A tribunal employing the negotiation model does not need to engage in the effort made in the monitoring model, because it leaves the choice of remedy to negotiation by the parties. Instead, the tribunal may need to develop a second-order jurisprudence of facilitated negotiation. These second-order principles would address the process of negotiation, not the substance of the reparative measures and reforms that the parties will ultimately adopt. The tribunal may not need to invent these practices if it can adapt practices applied by similar bodies to its own context, updating them with changing experience. Moreover, the tribunal could oversee negotiation on an ad hoc basis, rather than juridify its supervision, accepting the risk of inconsistency (and objection).[56] If the tribunal does take a rule-governed approach to active oversight of negotiation, the rulemaking effort may be considerable, and perhaps comparable to the effort required under the monitoring model to adopt first-order rules concerning the effectiveness of remedies, or even to the effort required under the direct remedy model to adopt first-order rules concerning remedies ordered by the tribunal itself.

4. *Reduction of Future Litigation*

The benefits of each model for similarly situated third parties may result in benefits to the tribunal, if they reduce the number of similar cases brought to the tribunal in the future, because similar violations do not occur or because they are remedied at the national level. The tribunal would then have more time to deal with different kinds of violations.

56. The supervision of negotiation may be less visible than the decision of cases, and in some tribunals may be delegated to different units, which should nonetheless count as the tribunal for the purpose of the present analysis.

In the direct remedy model, if the tribunal orders a systemic remedy, and the systemic remedy is well chosen, then compliance with the systemic remedy works in favor of the tribunal. If the systemic remedy turns out to be less effective, the good effects on the tribunal would decrease, and if the systemic remedy is counterproductive, the tribunal may receive more litigation (at least if the failure does not discourage victims from seeking the help of the tribunal). Even without a systemic remedy, an individual direct remedy might decrease pressure on the tribunal's docket if national actors can predict that the tribunal would order an equivalent remedy in similar cases; clear and predictable remedies may deter future violations and may facilitate settlement or equivalent remedies at the national level without resort to the tribunal.

In the monitoring model as defined here, compliance with recommendations for systemic reform is not assumed, and so there is less likelihood that future litigation will decrease.[57] The precedential effect of the ruling on the merits, and the effort of the state to respect its general obligations under the treaty, may result in a broader reform, but these benefits are contingent. The state might actually choose a more effective remedy in the monitoring model than the tribunal would have ordered in the direct remedy model, and on such occasions the tribunal may be better off. The guidance provided by the tribunal's remedial decision may also induce national courts to provide effective remedies for violations that do occur, and victims may have less reason to seek a remedy from the tribunal.

Similarly, in the negotiation model, the assumption of procedural compliance does not necessarily mean that an effective systemic remedy will be agreed upon, even if the tribunal calls for negotiations toward one; it is assumed, however, that a negotiated agreement will be implemented. The inclusion of other interested parties in the negotiation may help a negotiated remedy avoid the risk of error involved in an imposed direct remedy, but the state may have insufficient incentive to agree to a genuinely effective remedy. The likelihood of preventing future violations and similar cases before the tribunal depends on the outcome of the negotiations.

It would seem then that a direct systemic remedy, if ordered and complied with, provides the strongest basis for predicting a reduction in similar litigation. The negotiation model has higher variance but may sometimes produce even better results for the tribunal. The monitoring model, as defined here, holds the weakest promise of such reduction.

D. Effects on the State and Adverse Third Parties (Assuming Compliance)

The final perspectives to be considered are those of the state and of third parties with interests adverse to the interests of the victim. The effects of a

57. In the unusual cases where the minimum effective remedy for the individual requires legal reform, however, the assumption of compliance would have stronger consequences.

model on the state are important in at least two ways.[58] First, the state is the primary guarantor of the human rights of all its members, and the costs for the state in providing the remedy to one victim, like the costs for the tribunal, decrease the resources available for protecting the rights of others, or for serving other local interests that are consistent with their human rights. Second, the state—or more accurately, the regime in power—may have less legitimate interests at stake in the remedial process, such as maintaining a monopoly on political power, or serving other goals clearly antithetical to its human rights obligations, and may consider impairment of those interests as costs. The former category of costs is highly relevant to the evaluation of the model on the assumption that the state complies with the remedy. Both categories will be relevant to the later consideration of the effects of the models on compliance.

The human rights and other legitimate interests of adversely situated individuals also deserve consideration in comparing the models. Adverse parties may have illegitimate interests, too, but they usually have less ability than the state to obstruct compliance.

1. *Quality of the Remedy*

From the perspective of the state and adverse parties, one leading disadvantage of the direct remedy model relative to the others is that it gives the tribunal greater opportunity to make erroneous binding decisions that overcompensate the victim, whether in monetary or non-monetary terms.[59] This disadvantage may be magnified if the tribunal orders a systemic remedy going beyond an individual remedy. The monitoring and negotiation models leave more of the specification of the remedy in the hands of the state or in the joint hands of the state, the victim, and other stakeholders, respectively.

From the perspective of the state and adverse third parties, the monitoring model presents lesser risks of over-remediation than the direct remedy model.[60] The tribunal may still misjudge the requirements of an effective remedy for the victim in the particular situation. However, when the tribunal in the monitoring model openly chooses among remedies it considers effective, it will be suggesting rather than mandating the one it selects. Any recommendation the tribunal makes about a systemic reform will also be tentative (except when legal reform is a necessary element for an effective

58. The discussion here considers the costs to the state that is the respondent in the case, in its capacity as respondent. A fuller analysis would include the incremental costs to states as sources for the financing of the tribunal, and the benefits to other states from a respondent state's compliance with its obligations.

59. This is the counterpart of the victim's concern that specifying a maximum international remedy would provide erroneous under-compensation.

60. These lesser risks of over-remediation in the monitoring model may still exceed the risks in the negotiation model, in which the tribunal does not even define a minimum floor for the negotiated remedy.

remedy for the victim), and compliance with such recommendations is not assumed here.

The negotiation model has two distinct advantages over the other models from the perspective of the state and adverse third parties. First, it avoids the risk that the tribunal will erroneously *impose* harmful remedies. It may, however, create some risk that the tribunal will structure the negotiation in a manner that obstructs agreement or that ultimately induces the parties to accept a substantively flawed remedy. Second, the negotiation model is capable of addressing the inclusion of stakeholders in the negotiation, and therefore can enable adverse third parties to have their interests taken into account.

2. *Participation of Third Parties*

For the interested third parties, the direct remedy model may increase the likelihood of error by denying them participation before the tribunal. The state may not express their particular concerns about a proposed remedy and they may be excluded, de jure or de facto, from the proceedings on the victim's case. The direct remedy model does not inevitably exclude interested third parties from remedial proceedings, but international tribunals vary in their procedures, and their remoteness in geographical, linguistic, and cultural terms can pose significant barriers.

The monitoring model does not ensure the participation of third parties, either. The degree of danger to their interests will be affected by whether their concerns relate to the tribunal's determination of the minimum effective remedy, or only to the tribunal's tentative suggestion of a particular remedy.

The negotiation model focuses the tribunal's attention on ensuring an appropriate party structure for the negotiations. Admittedly, the original parties may misinform the tribunal, or the tribunal may otherwise err in the way it structures the negotiations. But the negotiation model has the greater potential to avoid this category of problem.

3. *Procedural Costs to the State and Third Parties*

For the state, which is necessarily a party to the tribunal's proceeding, the procedural costs shift as between the models. Under the direct remedy model, these costs are concentrated in the first stage before the tribunal. Under the other models, more of the costs shift to the implementation stage at the national level, where the state bears them partly as litigant and partly as decision-maker. The net effect of these shifts is uncertain and depends significantly on choices made by the state.

For adverse third parties, in contrast, intervention at the international level may be impossible or may impose high procedural costs. If the third parties are not excluded altogether, then the procedural costs of participa-

tion may be lower in the monitoring model than in the direct remedy model. Learning about the proceeding and how to participate may be difficult, but it would presumably take less effort for a third party to dissuade the tribunal from calling for a harmful remedy in the monitoring model, given that the tribunal is under less pressure to specify the elements of the remedy. Once more, for third parties, any procedural costs in the direct remedy model are concentrated at the international level, while in the monitoring model the distribution of procedural costs between the first and later stages shifts, with uncertain net effect. A similar shift occurs in the negotiation model, but this third model may create a different kind of procedural cost for third parties, to the extent that they take advantage of the opportunity to participate in the negotiation.

E. Effects on Compliance

The preceding discussion has assumed, however, that the state will comply with the tribunal's remedial decision, at least in the sense relevant to the model. It is time to discuss how the three models can affect the likelihood that the state will comply.[61]

The starting point is the tribunal's finding that the state has violated the human rights treaty, and often the state will accept the clarification of its obligations and the consequent need for a remedy. But the tribunal lacks coercive powers to compel state officials to provide a remedy, let alone any particular kind of remedy.

Scholars have explored a variety of factors that influence the likelihood that a state will comply with its human rights obligations in general and with the decisions of an international human rights tribunal in particular.[62] Some positive factors involve pressure from other states, such as specific material incentives or more diffuse reputational effects;[63] other positive factors are internal to the state, such as legal structures facilitating the implementation of international obligations,[64] and domestic constituencies empowered by the obligation.[65] Perceptions of the decision's legitimacy aid compli-

61. While this section focuses on likelihood of compliance, it should be clear in the larger context that likelihood of compliance is merely one element relevant to evaluating a remedial model, and not the only element. This article does not argue that tribunals should limit themselves to remedies that maximize the likelihood of compliance.

62. *See, e.g.*, Hawkins & Jacoby, *supra* note 28, at 41–43; BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 112–55 (2009). This article will not enter the social science debate about which factors best predict compliance.

63. *See, e.g.*, Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 904 (2005).

64. Huneeus, *supra* note 31, at 511–12.

65. SIMMONS, *supra* note 62, at 125–26.

ance,[66] and difficulty of implementation, including issues of ambiguity, complexity, and financial cost, weaken it.[67]

In the direct remedy model, the specificity of the remedy can make compliance more likely by making clear to the state what it must do to comply. The direct remedy model also makes clear to outsiders what compliance would involve, and thereby facilitates pressure to comply. In contrast, the discretion left to the state, or to the state and other negotiating parties, in the monitoring and negotiation models complicates the state's decision on whether and how to comply.

On the other hand, the tribunal's specific remedial choice may provoke resistance. Sometimes a state would object strongly to any genuinely effective remedy for a given violation, and then none of the models would achieve compliance. But even a state that fully accepts the need to correct a violation may object to particularly intrusive remedies. The objection may arise from the accurate perception that the chosen remedy sacrifices other interests to a greater extent than was strictly necessary for effectiveness; the direct remedy model gives the tribunal discretion to insist on such a remedy. Resistance may also arise within the state as a result of top-down imposition of a remedy on officials who could have been co-opted if their concerns had been addressed at an earlier stage. Or the problems with the remedy may be deeper: the tribunal may, for example, have inadvertently chosen a remedy that fits poorly into the state's legal system, violates the rights of nonparties, depends for its success on the voluntary cooperation of private actors, divides a coalition needed to support implementation, or demands change more rapidly than can be feasibly accomplished.

A state may also contest the tribunal's authority to adopt a particular *type* of remedy, particularly if it is novel or rare.[68] For example, the tribunal may have changed from ordering monetary compensation to ordering specific conduct, or from individual remedies to systemic remedies, without clear textual authorization or settled practice. Or the tribunal may have adopted a more active approach to overseeing negotiations than it had previously employed. The remedial jurisprudence of tribunals evolves over time, and the success of tribunals in obtaining compliance with evolving standards depends in part on persuading states of their legitimacy.

In the monitoring model, the tribunal's directions regarding the individual remedy may be both less demanding and less precise than the remedial order in the direct remedy model. Lack of clarity may undercut the state's motivation to comply, and it may also result in the state's mistakenly providing an ineffective remedy. Alternatively, the state may welcome the flexi-

66. Helfer & Slaughter, *supra* note 13, at 285.

67. *See, e.g.*, Hawkins & Jacoby, *supra* note 28, at 41–42; Huneeus, *supra* note 31, at 511–13; Staton & Romero, *supra* note 30.

68. Again, it must be recognized that states sometimes resist unwelcome remedial orders that have the clearest possible basis in text and in precedent.

bility that the tribunal has afforded, and rather than resisting, the state may adopt an effective remedy that accommodates its own interests and those of third parties. The tribunal's remedial modesty may avoid errors and decrease the state's resistance. To the extent, however, that the monitoring model does not involve binding orders, even with regard to the minimum effective remedy, the state has more of an opportunity to express disagreement with the tribunal's interpretation of the state's obligations.

The negotiation model requires a different conception of compliance than the direct remedy and monitoring models. It provides less substantive detail about the proper remedy, but may provide more procedural detail about the process of negotiated remediation, which may address both reparation to the individual and systemic reform. The negotiation model thus makes a greater effort to bring about implementation of a mutually satisfactory solution, the content of which will emerge from the process. State compliance consists initially in good faith engagement with the original victim and any other parties identified by tribunal, in accordance with any negotiation structure that the tribunal has indicated. Additional obligations may emerge if the parties do not reach agreement and return to the tribunal for further clarification of their responsibilities. Once agreement is reached, compliance will also be measured by the faithful implementation of the agreement. If agreement cannot be reached, the notion of compliance may depend on determining whose fault caused the impasse, including whether adequate remedial offers were unreasonably rejected.

Against this background, the negotiation model increases the likelihood that the state will satisfy this broadened notion of compliance—which may or may not result in a remedy that the tribunal would regard as effective. However, the model also creates risks that negotiations will break down and the tribunal will be unable to revive them, or that the parties will formally reach an agreement which the state will fail to implement. In some instances, the state may even object to negotiating with the particular victim, for good or bad reasons, and may be more likely to comply with a remedy imposed by the tribunal than with an instruction to negotiate.

F. Summary

The preceding discussion illustrates the complexity of the task of evaluating remedial structures for international tribunals. The costs and benefits of applying one of the models in a particular case will depend on choices made by the tribunal in implementing the model, on the simplicity or novelty of the case, and on the behavior of the parties in response to the tribunal's choices. It should also be kept in mind that the relevant notion of compliance varies across the different models. Still, some characteristic tendencies of the models can be identified.

The direct remedy model offers advantages for victims and similarly situated individuals in terms of the strength of the remedy; the clarity of the

remedy may increase the likelihood of compliance; and compliance with a systemic remedy is likely to relieve the tribunal from similar cases in the future. On the other hand, the direct remedy model tends to impose higher procedural costs on the tribunal and the parties; errors by the tribunal in its choice of a remedy can be highly disadvantageous for the state and third parties; and detailed mandatory remedies may provoke resistance by the state.

The monitoring model may have the least procedural costs for the tribunal and the parties and produce a less burdensome remedy that the state may be more likely to comply with. Its disadvantages include a weaker remedy for the victim, less clarity (which may impair compliance), and less likelihood of avoiding similar cases.

The benefits of the negotiation model depend on the outcome of the negotiations, but it can provide greater opportunity for all interested persons to influence the remedy and produce a remedy that is better for the parties and with which the state is more likely to comply. The negotiation model also tends to decrease procedural costs for the tribunal. The disadvantages include greater uncertainty and the possibility of a weaker remedy, which may not prevent similar cases from arising in the future.

III. "Hybridization" of the Three Models

The foregoing discussion has described the three models as pure and contrasting ideal types. Real tribunals might correspond to one of the types or to a wholly different model, or might unite features that I have allocated to separate models. It is also possible for a single tribunal to avail itself of more than one of the models, as alternatives for different cases, jointly for different aspects of the same case, or as stages of a single remedial process. This section will first use the remedial practice of the regional human rights courts in the Americas and in Europe to illustrate concretely the concept of hybridization. It will then explore abstractly how hybrid remedial models may mitigate some of the disadvantages attributable to the various pure models.

A. Regional Courts as Hybrids

The Inter-American Court of Human Rights comes closest to the pure direct model of remedies, but it also exhibits some elements of the negotiation model. Its judgments attempt to give comprehensive remedies for the violations suffered by the victims, and it follows up its remedial decisions by conducting its own proceedings to monitor compliance, based upon an element-by-element examination of whether the remedial provisions of its judgments are being implemented.[69] The Court exercises its own discretion

69. *See* Baluarte, *supra* note 33, at 263. For an unusual case in which the Court modified a highly specific remedial order as a result of its unexpected consequences, see Case of Miguel Castro Castro Prison

in ordering specific measures that would benefit the victim and general measures that could decrease the likelihood of future violations of the rights of others, without determining that these measures are the only available means of accomplishing those goals. Among others, such measures include:

> (1) money damages and costs, (2) symbolic recognitions of responsibility and apologies, (3) legislative and administrative measures to guarantee non-repetition, (4) investigation, prosecution, and punishment of those responsible, . . . (5) human rights training for public officials, . . . (6) annulling or otherwise revising national judicial or administrative decisions, (7) provision of medical and psychological care to survivors of human rights abuse, (8) return of victims' remains to their next-of-kin, (9) reinstatement to prior employment, (10) scholarships or educational benefits for affected persons, (11) protection of persons at risk, (12) amendment of public records, and (13) the establishment of development funds and other community remedies.[70]

The rate of compliance with these different types of remedies varies; one recent study found an implementation rate of approximately 60 percent for orders to pay money damages or costs, and a 64-percent rate of implementation for symbolic reparations, but a much lower rate for most other specific orders.[71]

Nonetheless, the Court's active exercise of remedial discretion does not preclude all occasion for negotiation. The Court's rules have always permitted the parties to inform it of friendly settlements they have made and to seek the Court's approval of their terms.[72] Earlier in its history when the Court more frequently divided its proceedings by issuing a merits judgment before beginning the reparations phase, it gave the parties an opportunity to negotiate agreements on reparations after the merits judgment;[73] this practice has not been totally abandoned.[74] Negotiation also remains relevant to

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v. Peru, Interpretation of Judgment, Inter-Am. Ct. H.R. (ser. C) No. 181, (Aug. 2, 2008); Cavallaro & Brewer, *supra* note 21, at 768, 824–25.

70. Baluarte, *supra* note 33, at 288–89.

71. *Id.* at 290–305; *see also* Magnus Jesko Langer & Elise Hansbury, *Monitoring Compliance with the Decisions of Human Rights Courts: The Inter-American Particularism*, *in* Diplomatic and Judicial Means of Dispute Settlement, *supra* note 47, at 213, 218 ("State compliance—total compliance, partial compliance, or non-compliance—with a judgment of the Court of San José appears to be largely dependent on the type of remedy or the combination of different remedies ordered by the Court.").

72. *See* Annual Report 1980, art. 42, Rep. Inter-Am. Ct. H.R. (ser. L) No. V/III.3 (1981); Antkowiak, *Remedial Approaches*, *supra* note 18, at 378; Rules of Procedure of the Inter-American Court of Human Rights (2009), arts. 57–58.

73. Pasqualucci, *supra* note 22, at 287.

74. *See* Salvador Chiriboga v. Ecuador, Preliminary Objection and Merits, Inter-Am. Ct. H.R. (ser. C) No. 179, ¶ 134 (May 6, 2008) (merits judgment in an expropriation case, giving the parties six months to negotiate the reparations); *cf.* Salvador Chiriboga v. Ecuador, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 222 (Mar. 3, 2011) (calculating reparations after negotiations failed).

the interstitial details of certain remedies,[75] and in one case the Court ordered the state more broadly to map out, "in consultation with civil society,"[76] policies to reform its treatment of juveniles in conflict with the law.[77] The Court's reparation orders in cases involving the rights of indigenous and tribal communities often involve requirements of consultation and consent, although this may result as much from the substantive law regarding informed consent of indigenous peoples as from the Court's remedial procedures.[78] The Court has also emphasized that it uses its oral hearings on compliance as a vehicle for facilitating agreements between the parties on outstanding remedial issues.[79]

In contrast, the ECtHR could be viewed as engaged in a rich mixture of all three models. The ECtHR's remedial approach has evolved over the years, and can only be sketched here. For several decades, it limited itself to making findings of violation and directing the payment of monetary compensation for pecuniary and non-pecuniary damages (plus litigation costs) as "just satisfaction."[80] The Court sometimes bifurcated its proceedings by announcing a violation and giving the victim and the state the opportunity to negotiate the payment of reparations in light of the finding; if an agreement resulted, the Court would review its fairness before closing the case, and if the dispute continued the Court would determine the amount.[81] (The Court's current rules still provide for this practice in appropriate cases.[82]) During this early period it came to be recognized that the finding of a violation entailed other consequences: to make the individual victim whole

75. *See, e.g.*, Case of the 19 Merchants v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 273 (July 5, 2004) ("The Court considers that the State should erect a monument in memory of the victims. The Court considers that the State and the victims' next of kin must reach an agreement on the choice of the place where the monument is to be erected.").

76. Case of the "Juvenile Reeducation Institute" v. Paraguay, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 340(11) (Sept. 2, 2004).

77. *Id.* at 316–17.

78. *See, e.g.*, Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 341 (June 27, 2012); Case of the Saramaka People v. Suriname, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 185, ¶¶ 11–63 (Aug. 12, 2008); *see generally* Special Rapporteur on the rights of indigenous peoples, *Extractive industries and indigenous peoples*, Human Rights Council, 24th Sess., ¶¶ 26–36, U.N. Doc. A/HRC/24/41 (July 1, 2013).

79. *See, e.g.*, Annual Report 2012, Rep. Inter-Am. Ct. H.R. (ser. L) V/II.147 ("Once again, in the context of these hearings, the Court tries to create agreements between the parties. Thus, it does not merely take note of the information they present, but, in keeping with the principles that inspire it as a Human Rights Court, it suggests alternatives for resolving problems, encourages compliance, brings attention to incidents of non-compliance due to lack of willingness, and encourages all those involved to work together to establish timetables for compliance."); Langer & Hansbury, *supra* note 71, at 227.

80. *See* P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 171, 179–82, 184 (2d ed. 1990).

81. *See id.* at 173–74; Ringeisen v. Austria, app. no. 2614/65, Eur. Ct. H.R. ¶ 18 (1972).

82. Rules of Court, Eur. Ct. H.R., R. 75 (2013); *see, e.g.*, Vassallo v. Malta, app. no. 57862/09, Eur. Ct. H.R. ¶ 54 (2011); Von Hannover v. Germany, (Just Satisfaction—Friendly Settlement), app. nos. 40660/08 et al., Eur. Ct. H.R. ¶ 4 (2005); HELEN KELLER ET AL., FRIENDLY SETTLEMENTS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE 70 (2010) (describing category of "follow-up friendly settlements" on compensation after finding of violation).

(*restitutio in integrum*) as far as possible and to prevent similar violations against others in the future.[83] But the ECtHR did not specify the necessary measures in its remedial orders, and the Court emphasized that states had discretion in the means they chose to address the consequences:

> a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Furthermore, subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment.[84]

Monitoring of the state's choice of remedy was conducted by a different body within the Council of Europe, the Committee of Ministers ("CM"), which determined whether the state had made the required payment and drew its own conclusions about whether the state had adequately addressed the consequences.[85] It has been observed that in the early period, the CM's evaluations of compliance were often highly deferential.[86]

The European practice has changed in several respects since 2004. In a substantial number of cases, the ECtHR directly orders specific individual remedies other than monetary relief in the operative provisions of the judgment, such as release of detainees, provision of medical treatment, or restoring contacts between parent and child.[87] The Court has also included indications regarding individual measures, for the guidance of the state and the CM, in the non-operative portion of the judgment.[88] As far as general

83. *See* Abdelgawad, *supra* note 51, at 10–11.

84. Scozzari and Giunta v. Italy, app nos. 39221/98 et al., Eur. Ct. H.R.¶ 249 (2000) (Grand Chamber) (citation omitted).

85. *See* Murray Hunt, *State Obligations Following from a Judgment of the European Court of Human Rights*, *in* European Court of Human Rights: Remedies and Execution of Judgments 25, 37 (Theodora A. Christou & Juan Pablo Raymond eds., 2005). As mentioned earlier, under a very broad conception of the term "tribunal" one could view the Committee of Ministers and the ECtHR as components of the same regional tribunal, despite the fact that the Committee of Ministers is a political body.

86. *See, e.g.*, Abdelgawad, *supra* note 51, at 36 ("initial practice was relatively timorous"); Fredrik G.E. Sundberg, *Control of Execution of Decisions under the ECHR*, CDL-JU (99) 29 (Dec. 1999) at 6 (referring to wide margins of appreciation for states in choosing individual and general measures).

87. *See, e.g.*, Assanidze v. Georgia, app. no. 71503/01, Eur. Ct. H.R. ¶¶ 49–50 (2004) (Grand Chamber); Aleksanyan v. Russia, app. no. 46468/06, Eur. Ct. H.R. ¶ 52 (2008); Fatullayev v. Azerbaijan, app. no. 40984/07, Eur. Ct. H.R. ¶¶ 52–53 (2010); Ghavtadze v. Georgia, app. no. 23204/07, Eur. Ct. H.R. ¶ 29 (2009); Oyal v. Turkey, app. no. 4864/05, Eur. Ct. H.R. ¶ 22 (2010); Gluhaković v. Croatia, app. no. 21188/09, Eur. Ct. H.R. ¶ 18 (2011).

88. *See, e.g.*, M.S.S. v. Belgium & Greece, app. no. 30696/09, Eur. Ct. H.R. ¶¶ 400–02 (2011) (Grand Chamber) (proper examination of asylum request without delay, while refraining from deporta-

measures are concerned, the Court has developed a technique of "pilot judgments,"[89] now codified in its rules, which employs an individual case as a vehicle for adjudicating a structural or systemic problem that gives rise to multiple violations, and ordering general remedial measures in the operative provisions of the judgment.[90] The formal pilot judgment procedure shades into a practice sometimes known as "quasi-pilot judgments," in which the Court identifies the need for general measures to address a systemic problem and gives broad or more precise indications of how they could or should be designed, but does not formally order them.[91]

Still, in the vast majority of the ECtHR's decided cases, the choice of non-monetary remedies falls to the state under the supervision of the CM; the self-restraint exercised by both the Court and the CM can be understood as an expression of the notion of subsidiarity.[92] The CM has formalized its procedures over the past decade, seeking to provide a greater degree of transparency.[93]

The Department of Execution of Judgments in the Council of Europe's Secretariat bears comparison to the Registry of the Court. The procedures for

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tion); Sejdovic v. Italy, app. no. 56581/00, Eur. Ct. H.R. ¶¶ 126–27 (2006) (Grand Chamber) (retrial or reopening, if requested); Yordanova et al. v. Bulgaria, app. no. 25446/06, Eur. Ct. H.R. ¶ 167 (2012) (repeal or suspension of eviction order); Yakişan v. Turkey, app. no. 11339/03, Eur. Ct. H.R. ¶ 49 (2007) (expedited completion of trial or release from pre-trial detention); Amanalachioai v. Romania, app. no. 4023/04, Eur. Ct. H.R. ¶ 107 (2009) (progressive reestablishment of paternal link).

89. Rules of Court, Eur. Ct. H.R., R. 61 (2014).

90. *See* Broniowski v. Poland, app. no. 31443/96, Eur. Ct. H.R. ¶¶ 188–94 (2004) (Grand Chamber); Rules of Court, Eur. Ct. H.R., R. 61 (2014); Lech Garlicki, *Broniowski and After: On the Dual Nature of "Pilot Judgments," in* Liber Amicorum Luzius Wildhaber: Strasbourg Views 117 (2007). The pilot judgment procedure sometimes involves postponing examination of similar cases pending the adoption of remedial measures, as in the *Broniowski* case itself, but the Court may also conclude that the urgency of the violations requires its continued attention to similar cases. *See, e.g.*, Ananyev v. Russia, *supra* note 25, ¶¶ 236–40 (2012) (pilot judgment regarding inhuman or degrading conditions of detention).

91. *See, e.g.*, Garlicki, *supra* note 90, at 191; Philip Leach, Taking a Case to the European Court of Human Rights 88 (3d ed. 2011); Scordino v. Italy (No. 1), app. no. 36813/97, Eur. Ct. H.R. ¶¶ 237, 240 (2006) (indicating the type of measures the state should take in compensating owners for expropriated property, and drawing state's attention to principles concerning undue delay); Lukenda v. Slovenia, app. no. 23032/02, Eur. Ct. H.R. ¶ 98 (2005) ("encourag[ing]" state to amend legal remedies or adopt new ones to ensure trial within a reasonable time); Cahit Demirel v. Turkey, app. no. 18623/03, Eur. Ct. H.R. ¶¶ 3–4 (2009) (identifying need for general measures to ensure compliance with Art. 5); Yordanova v. Bulgaria, *supra* note 88, ¶ 166 (finding that general measures should include amendments to eviction procedures to ensure proportionality); Kaverzin v. Ukraine, app. no. 23893/03, Eur. Ct. H.R. ¶¶ 180–82 (2012) ("stress[ing]" need to eradicate ill-treatment in custody and effectively investigate each case); İzci v. Turkey, app. no. 42606/05, Eur. Ct. H.R. ¶¶ 98–99 (2013) (discussing means for preventing excessive use of force against demonstrators, including compliance with recommendations of European Committee for the Prevention of Torture).

92. *See, e.g.*, Kronfeldner v. Germany, app. no. 21906, Eur. Ct. H.R. ¶¶ 97–104 (2012); CM Annual Report 2012, *supra* note 51, at 24.

93. *See* Abdelgawad, *supra* note 51, at 34–36. It is this formalization of the CM process that leads me to include the CM under the concept of the "tribunal" rather than classifying it as a political process external to the tribunal. Other political organs of the Council of Europe, including the Parliamentary Assembly and its Committee on Legal Affairs and Human Rights, more selectively bring political "pressure to bear on governments where worrying delays in complying with judgments have arisen." *Implementation of Judgments of the European Court of Human Rights*, Doc. No. 12455 (2010), at 1; *see also* Leach, *supra* note 91, at 104.

executing the Court's judgments, however, are framed primarily as an interaction between the CM and the state; the beneficiary of the judgment has an ancillary role rather than participating in the proceeding as an equal party with the state.[94] The injured party and the state may have an opportunity to settle the individual measures that satisfy the judgment,[95] and the injured party has the right to submit "communications" concerning the individual measures, which the CM is obliged to "consider."[96] This right of the injured party does not apply to general measures, which become a subject for discussion between the CM and the state. Since 2006, however, the CM has permitted NGOs and national human rights institutions to submit "communications" concerning both general and individual measures.[97] Such external comments may provide important third-party perspectives, while simultaneously counteracting the CM's tendency to be dependent on information provided by the state.[98] The CM may see merit in NGOs' concerns about a draft law, and the CM's dialogue with the state may then resemble a kind of negotiation by proxy on behalf of stakeholders.[99] Ultimately, decisions on the adequacy of general measures will be made by the CM, informed by the analysis of the Secretariat.[100]

Thus, the remedial practice following the finding of a violation by the ECtHR includes elements of all three models, sometimes as options and sometimes in the same case. Some cases evoke the direct remedy model because they involve isolated violations for which compensation is the sole remedy, because the Court's judgment is clear and specific, or because the reasoning makes it evident that only one set of individual and general measures would be appropriate. Other cases leave the state more choices, and the CM engages in unilateral monitoring or oversees a negotiation.

The ECtHR is known to achieve a higher rate of compliance with its judgments than the Inter-American Court.[101] In part, this divergence between the two courts reflects the differing politics of their respective re-

94. *See generally* Agnieszka Szklanna, *The Standing of Applicants and NGOs in the Process of Supervision of ECtHR Judgments by the Committee of Ministers*, *in* 2012 European Yearbook on Human Rights 269 (2012).

95. For example, if the state informs the CM that just satisfaction has been paid, and the injured party does not object within two months, the issue is considered closed. CM Annual Report 2012, *supra* note 51, at 27–28.

96. The CM's 2012 Annual Report refers with regret to "the present prohibition for applicants to address general measures." *Id.* at 19; *see also id.* at 26.

97. CM Rule 9(2). *Id.* at 25–26.

98. *See* Fredrik G.E. Sundberg, *Control of Execution of Decisions under the European Convention on Human Rights—A Perspective on Democratic Security, Intergovernmental Cooperation, Unification and Individual Justice in Europe*, *in* International Monitoring Mechanisms: Essays in Honour of Jacob Th. Möller 465, 478–79 (Gudmundur Alfredsson et al. eds., 2d rev. ed. 2009).

99. For an example, *see* Department for the Execution of Judgments of the European Court of Human Rights, Memorandum, Străin and Others against Romania and Maria Atanasiu and Others against Romania (and 266 similar cases) group, H/Exec(2013)1 (Apr. 10, 2013).

100. CM Annual Report 2012, *supra* note 51, at 28.

101. *See, e.g.*, Open Society Justice Initiative, From Judgment to Justice: Implementing International and Regional Human Rights Decisions 36–40 (2011).

gions, as illustrated by the fact that the simple direct remedy of money damages and costs receives much higher compliance in Europe than in the Americas. Comparisons of compliance are complicated, however, by differences in the remedial practices of the two courts, given that the actual judgments of the ECtHR identify only a portion of the remedy, while the CM determines whether the state's response to the ECtHR judgment is sufficient.[102]

B. Evaluating Hybrid Models

In general, hybrid remedial strategies that call upon two or more of the simple models may compensate for disadvantages of any single model while also imposing additional complications or costs of their own. Given the vast range of possible hybrids, systematic estimation of their relative advantages and disadvantages would not be feasible here. Instead, I will single out one particular hybrid type, which combines the direct remedy model and the negotiation model, and then sketch some characteristic advantages and disadvantages of combining the models, first from the perspective of the various participants and then generally. For the purpose of this discussion, I will assume that the tribunal has been authorized to employ the hybrid strategy, though in reality not all tribunals have the authority to employ every type of remedial strategy.

The hybrid that combines the direct remedy model with the negotiation model, which can be abstracted from the practice of the regional courts, deserves special attention.[103] In this model, the tribunal decides in each case whether to order a direct remedy or to order the parties to negotiate a consensual solution while reserving its power to impose a direct remedy should the negotiations either fail or produce an outcome that is incompatible with the treaty. This hybrid could take various forms,[104] but they all serve to provide stronger incentives for the state to negotiate in good faith than the negotiation model as I defined it earlier.

As with the pure models, one can compare this hybrid model to relevant alternatives—the pure model of direct remedy and the pure model of nego-

102. Amendments to Article 46 of the European Convention made by Protocol No. 14 create the possibility for the CM to seek an interpretation of the Court's judgment or a determination of noncompliance, but these are exceptional procedures for unusual cases.

103. I single out this hybrid for discussion partly because it is grounded in actual practice, and partly because the threat of a direct remedy reinforces an obvious weakness in the structure of the pure negotiation model. I am not suggesting that it provides the best remedial model.

104. For example, the order might contemplate a negotiation exclusively between the original parties or might extend an opportunity to interested third persons to participate. The tribunal or its delegates might actively facilitate the negotiation, passively await its outcome, or make themselves available to resolve interim disputes. The tribunal might also use particular criteria to decide whether to order negotiation or to proceed immediately to a direct remedy; if it orders negotiation, it can either impose fixed time limits or vary the time limits according to the types of cases or in response to the progress of the negotiation.

tiation[105]—first on the assumption of compliance and then by considering its effect on the likelihood of compliance. The appropriate notion of "compliance" for the hybrid model may be understood as compliance with whichever remedy the tribunal eventually approves or imposes.

Assuming compliance, and viewing the situation from the victim's perspective, the tribunal's reservation of power in this model would tend to increase the victim's bargaining power when negotiation is ordered, thus making it more likely for the victim to obtain a more advantageous remedy than in the pure negotiation model. Compared to the pure direct remedy model, negotiation may give the parties the opportunity to adopt solutions that are not within the tribunal's own remedial repertoire. However, an inclusive process of negotiation may bring to light third party perspectives and non-confidential information that would lead the tribunal to impose a remedy less advantageous to the victim than it would have done under the pure direct remedy model. The addition of a negotiation stage may also increase the procedural costs to the victim beyond those incurred in the pure direct remedy model; still, these procedural costs could be less than those resulting from protracted negotiations under the pure negotiation model.

The effects on the tribunal itself include specific procedural costs that depend on the degree of oversight it provides to the negotiations it orders. If the negotiation succeeds, the tribunal may incur less expense in the hybrid model than it would under the pure direct remedy model. But if the negotiation fails, the tribunal bears costs from both stages that may in the aggregate exceed the costs of either pure model. In terms of finality, cases sent to negotiation will return to the tribunal in the hybrid model, either for review or for the imposition of a remedy. The tribunal's law-generating effort increases in the hybrid model because it needs rules or practices for adjudicating direct remedies and for overseeing negotiations, as well as rules or practices for deciding whether to order negotiation and for shifting from negotiation to adjudication. Whether the tribunal benefits from a reduction in similar litigation in the future depends both on the choices made by the tribunal and, if they are invited to negotiate, on the choices made by the parties. If the tribunal insists on negotiations that address the general situation, then the hybrid may be more likely to achieve an outcome that reduces future litigation than the pure negotiation model; even failed negotiations with broader input can inform a better direct remedy than in the pure direct remedy model.

Turning to the perspectives of the state and adverse third parties, the hybrid model gives the state less control over the remedy than the pure negotiation model does, but it also affords more of an opportunity to influence the remedy than the pure direct remedy model does. The procedural

105. For cases in which the tribunal provides a direct remedy without proceeding to a negotiation stage, the hybrid resembles the direct remedy model ex post. The uncertainty about which option the tribunal will choose, however, makes them significantly different ex ante.

costs to the state may be greater in the hybrid than in either of the pure models; the state must return to the tribunal after the negotiation stage for review or to litigate the remedy, and a supervised negotiation may involve greater procedural costs than the state would face in implementing a direct remedy. From the perspective of adverse third parties, the hybrid model may provide greater opportunities to have their concerns taken into consideration than either of the pure models, but not without accompanying procedural costs.

As for the effect of the hybrid model on compliance, the state's consent and commitment to a remedy produced by this model may be weaker than to a remedy produced by the pure negotiation model. However, a negotiated solution impelled by the hybrid model may receive better compliance than one imposed under the pure direct remedy model.

Overall, this hybrid model has distinct advantages over the negotiation model from the perspective of the prevailing victim. It also gives the tribunal more options than either pure model does for adapting its remedial approach to the particular situation, which may increase compliance and decrease its risk of error, though with corresponding costs. The state, on the other hand, may focus on the risks of error in any model that permits the tribunal to impose a direct remedy. That attitude may help explain why some tribunals are not authorized to adopt this hybrid.

More generally, hybrid models that expand the tribunal's remedial choices provide the tribunal with added flexibility, which may yield benefits for the parties. Hybrids increase the potential for the tribunal to choose the remedial approach most appropriate for the particular case, although they do not guarantee that the tribunal will make the best selection. The tribunal might address individual and systemic remedies through different approaches, either by adjudicating damages directly and leaving general measures to negotiation or conversely by urging the parties to settle the damages and focusing its own attention on general reforms. The tribunal might vary its approach depending on the severity of the violation,[106] trusting to negotiation or monitoring for less grave violations, but intervening more directly and specifically when the state's past conduct has been extreme. For a series of similar cases, the tribunal might employ varying approaches in sequence, relying on negotiation or monitoring in early encounters and then shifting to direct remedies as it gains experience in responding to that type of violation.[107] Thus, hybrids may permit the tribunal to reduce its procedural costs in cases where it foresees lower benefits and to employ more costly proce-

106. The basis for evaluating severity in this context could include such factors as the particular right violated, the deliberateness of the violation, and whether the violation was isolated or part of a pattern of similar violations.

107. Conversely, a tribunal's negative experience with fully specifying the remedy for a particular type of violation might lead it to shift (back) to a monitoring or negotiation approach, at least temporarily.

dures in cases where it foresees greater benefits. Flexibility allows the tribunal to adapt not only to different kinds of situations but also to a lack of information about the kind of situation before it.

Added options enabled by hybridization come with costs for the tribunal and the parties, including added uncertainty for the parties. Greater discretion entails a greater need for information and for rules or practices which give guidance not merely for the additional remedial options but also for choosing among them. For both the tribunal and the parties, hybridization therefore adds procedural costs, which may or may not be recouped as costs saved by the right procedural decision, and which may or may not be justified by resulting in an effective remedy for the particular victim or in a general reform that prevents future violations. From the victim's perspective, less determinate monitoring and negotiation options dilute the clarity and power of a direct remedy model. From the state's perspective, adding direct remedies—including specific individual measures, such as release of prisoners or transfers of child custody, and general measures of legal revision—involves rigidity and the risk of errors which may have significant negative consequences. From the perspective of adverse third parties, departure from an inclusive negotiation model may deprive them of participation and influence.

Hybridization in general may also affect the likelihood of compliance. Properly implemented, hybridization should improve overall compliance by increasing the opportunity for employing a remedial approach appropriate to each situation. However, in some cases the addition of options will increase the opportunity for error, and more generally, the visibility of the tribunal's remedial discretion may increase a state's resistance when it dislikes the tribunal's remedial choice.

In short, the range of options available in a hybrid model creates opportunities accompanied by costs and risks. The tribunal has the challenge of channeling its resources to deploy a suitable remedial tool for each case. Negotiation and monitoring techniques may reduce the tribunal's costs and provide remedies in an increased number of cases. Direct remedial orders may use more resources and provide stronger remedies for victims, but their strength gives salience to the tribunal's risk of error.

IV. Conclusion

When international tribunals consider how to exercise the remedial powers they possess, or when drafters consider the remedial powers they wish to confer on a new international tribunal, both the advantages and the disadvantages of possible remedial approaches should be taken into account. The bi-level context of international human rights tribunals—which operate as distant adjudicators seeking to induce remedial action at the national level—affects the likely consequences of particular remedial approaches, not

only for the victim appearing before the tribunal but also for the past and potential victims of other human rights violations.

One possible avenue for improving remedial practice is to increase the range of actions that the tribunal orders directly. As this Article argues, the direct remedy approach has costs as well as benefits, and there are other methods by which a tribunal—especially one conscious of the limits of its knowledge—may seek to induce remedial action. The tribunal can define the remedial goal while affording the state discretion to choose among effective remedial alternatives; or it can facilitate negotiation toward that goal among an appropriate range of interested parties. These strategies are not mutually exclusive: a tribunal with sufficient authorization can combine them sequentially or allocate them among appropriate categories of cases.

The three approaches each have their own advantages and disadvantages. The direct remedy approach does tend to offer stronger and clearer remedial orders for victims and other similarly situated individuals. These potential benefits, however, are accompanied by higher procedural costs and risks of tribunal error, including possible harm to absent third parties. The monitoring approach gives the state greater choice among effective remedies, subject to the tribunal's evaluation. This method can reduce procedural costs and increase compliance, especially when the tribunal's evaluation is binding. The victim, however, might receive only the minimum effective remedy. Finally, the negotiation approach can be employed in a manner that provides greater opportunity for all interested persons to influence the remedy, and successful negotiation may lead to a better remedy and greater compliance. Hybrid approaches combining a negotiation stage with the option of a direct remedy or monitoring can increase the likelihood of such success.

A tribunal considering changes in its remedial practice should examine these general benefits and costs in relation to its own particular context. For example, the resources and staffing of the tribunal and the size of its caseload affect a variety of cost considerations, and the formal binding force of the tribunal's decisions and the political environment in which it operates affect compliance considerations.

The analysis presented in this article seeks to inform such specific inquiries, encouraging attention to a range of remedial alternatives and identifying a range of human-rights-relevant consequences of those alternatives. Those consequences involve the degree to which the remedy actually achieves reparation for the victim and the prevention of similar violations in the future. They also involve respect for the human rights of other individuals with conflicting interests, and the tribunal's capacity to provide remedies to victims in other, unrelated cases.