# 3. Exploring the Past and Future Dimensions of the Absent Victim in International Human Rights Adjudication

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***Abstract:*** *This chapter studies the contours of some of the decisions, procedural frameworks, and argumentative strategies used by regional human rights courts to provide some sort of redress in cases involving violations that can have intertemporal dimensions, either because the victims are not present or because the interests of future victims might also be at stake. To do so, it first analyses who can be considered a victim in regional human rights courts, then proceeds to construct the idea of the 'absent victim' as a subject of the decision using insights from green criminology and victimology, and lastly, maps out certain ways in which courts might deal with these issues. It argues that the robust case law of the Inter-American Court of Human Rights regarding guarantees of non-repetition as a form of reparation and the introduction of pilot judgements that deal with structural issues with a forward-looking scope by the European Court of Human Rights, might have the potential for dealing with the interests of absent victims.*

## *Introduction*

Regional human rights courts must adjudicate complex causes involving the violation of fundamental rights recognised in their constitutive documents and rules of procedure. The determination of who can claim to be a victim before these adjudicative bodies is regulated by their rules on standing, admissibility, and jurisdiction. However, certain cases speak to constituencies beyond the confines of the courtroom. Cases involving grave violations of human rights (eg enforced disappearances), environmental and collective property issues, climate change litigation and its human rights impacts, and situations of systematic injustice which are attached to intergenerational harm and trauma, have several implications for victims beyond those that are formally and exclusively recognised as such due to procedural constraints and limitations.

Some victims of injustices and human rights violations are simply not present in cases that are formally adjudicated by these courts. This could be, for instance, because the case deals with enforced disappearances, which as a crime entails in its substance 'the projection of human suffering

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in time',[1] or simply because the scope of victimisation in cases dealing with environmental damage necessarily affects future generations. In the former set of cases, the victims are not present in the courtroom but through forms of legal and formal representation; in the latter set of cases, the scope of the future repercussions of harmful actions will continue affecting people through generations, sometimes in unforeseen ways. Nonetheless, the experiences, trauma, and implications of these 'absent victims' – past and future – are, and should be, relevant contextual elements of the decisions taken by human rights courts.

This chapter explores these past and present dimensions of absent victimhood in regional human rights courts. It studies the contours of some of the decisions, procedural frameworks, and argumentative strategies used by these courts to provide some sort of redress in cases involving violations that can have intertemporal dimensions, either because the victims are not present or because the interests of future victims might also be at stake. To do so, the first section analyses who can be considered a victim in regional human rights courts, then proceeds to construct the idea of the 'absent victim' as a subject of the decision, and lastly, maps out certain ways in which courts might deal with these issues. In particular, the section argues that the robust case law of the Inter-American Court of Human Rights (IACtHR) regarding guarantees of non-repetition as a form of reparation and the introduction of pilot judgements that deal with structural issues with a forward-looking scope by the European Court of Human Rights (ECtHR), might have the potential for dealing with the interests of absent victims, particularly in the cases of intergenerational justice. The determination *per se* of what those interests of the absent victim may constitute and how current judges would ascertain them is not considered in this contribution. Nonetheless, it is worth highlighting that in the realm of law and emotions, judicial empathy[2] plays an important role in the determination of those interests. As noted by Hoffamn: [t]he challenge to the empathic imagination is to be moved by thinking or reading about the consequences of the litigation for absent – often completely unknown or even unborn – others

1 Antônio Augusto Cançado Trindade, 'Enforced Disappearances of Persons as a Violation of Jus Cogens: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights' (2012) Nordic Journal of International Law 507, 521.

2 See: Richard Posner, 'Emotion vs Emotionalism in Law' in Susan Bandes (ed), *The Passions of Law* (New York University Press 1999).

who will be affected by your decision.'[3] Thus, any available procedural pathway for the representation of the absent in the legal process will require not only being informed by insights of green victimology and its particular concern for intergenerational justice, but also a degree of empathy from judges and decision makers in determining the protection of their interests.

As outlined above, the aim of this chapter is narrow and limited to the exploration of certain procedural avenues by which the interests of absent victims can be represented in international proceedings. There might certainly be other procedural devices worth exploring, but here special reference is made to guarantees of non-repetition and pilot judgements. Moreover, against the backdrop of the interdisciplinary endeavour undertaken in this volume, diverging understandings of what constitutes a generation, the 'absent', and even intergenerational justice can indeed present a challenge for construing a common and interchangeable vernacular amongst contributions, more so if they are informed by heterogeneous disciplinary epistemologies. What is expressed in this chapter is a much humbler endeavour; it recognizes the formal limits of the law in ascribing international responsibility in the adjudication of human rights claims. Within these formal limits, in certain cases and through certain procedural devices, direct and indirect redress can be found for absent victims. These can be past and present, belonging to the same or different generations, and in their quest for redress, there might be an impact on how we can understand the adjudication of intergenerational claims, indistinctive of what that might precisely mean for different disciplines and people.

## *1. Victims in International Human Rights Law*

The concept of victim is impregnated with ambiguity, vagueness, semantic polyvalence and cultural polysemy.[4] The definition of victim is related, amongst other things, to theoretical conceptions developed by victimology, criminal law, criminology, and international human rights law; and involves discussions about who are the victimisers or perpetrators, the causes of victimisation, the legal and social definition of victims, and the

3 Martin L Hoffman, 'Empathy, Justice and Law' in Amy Coplan and Peter Goldie (eds), *Empathy: Philosophical and Psychological Perspectives* (OUP 2011) 252.

4 Alán Arias Marín, 'Teoría Crítica y Derechos Humanos: Hacia un Concepto Crítico de Víctima' (2012) Nómadas. Revista Crítica de Ciencias Sociales y Jurídicas 18.

characteristics that surround them. In this regard, Ezzat Fattah argues that in each society, there is constant construction and deconstruction of the concept of victim depending on various social attitudes.[5] For the purposes of our analysis in the present chapter, the same conceptual variables apply, in addition to the jurisdictional and standing requirements of each international court or tribunal.

In the field of international human rights law, the concept of victim is based on the existence of an injured party. Specifically, an individual or groups of individuals who have suffered a detriment to their rights. This concept is based on a damage to the physical, psychological and/or moral integrity, which may or may not have a patrimonial content, going from the direct victim to his or her family, relatives, and society. Under this premise, the victim is part of a social and family network which is affected because of the violations committed against the direct victim. For example, the family members and relatives of those who have been victims of disappearance, torture, homicide, or extrajudicial executions; although they are not the ones who personally suffer such events, they are affected not only by the pain, anguish and anxiety generated by these situations but also suffer economic losses.

At the universal level, a definition of victim can be found in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The Declaration, adopted by the UN General Assembly in 1985, states that:

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim.[6]

5 Ezzat Fattah, 'The Evolution of a Young, Promising Discipline. Sixty Years of Victimology, a Retrospective and Prospective Look' in Shlomo Giora Shoham, Paul Kneppet and Martin Kett (eds), *International Handbook of Victimology* (Routledge 2010) 49.

6 UNGA Res 40/34 (29 November 1985).

Arguably, the Declaration marks a starting point in international human rights law insofar as, for the first time, the UN organ of the hierarchy of the General Assembly dealt with victims as an independent category through a soft law instrument, defining the concept and establishing rights such as access to justice and fair treatment, and assistance. Subsequently, the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law further expanded the concept of victim to institute an accountability framework that included access to justice, truth, reparation, and guarantees of non-repetition as an obligation for states and a right for victims.[7]

Moreover, beyond the need for a general definition of victim, a more functional approach is the recognition that there are different descriptive categories derived from a plurality of international instruments referring to different groups of persons protected by international human rights law.[8] In this context, Fernández de Casadevante, recognizing that there is no single definition of victim in international law, states that:

> (…) the international norms actually related to victims fall into several categories: victims of crime, victims of abuse of power, victims of gross violations of international human rights law, victims of serious violations of international humanitarian law, victims of enforced disappearance, victims of violations of international criminal law, victims of trafficking and victims of terrorism.[9]

Thus, although a general concept of victim cannot be derived from international human rights law, it must be analyzed within the piecemeal approach provided by an array of international instruments that establish specific recognition for different groups of persons as victims and from which specific rights and duties derive, depending on a case-by-case basis. This general or specific recognition will have repercussions on procedural issues, particularly those related to *jus standi* and the possibility of seeking redress and remedies for human rights violations.

7 UNGA Res 60/147 (16 December 2005).

8 That is, women, children and adolescents, migrants, persons deprived of liberty, elderly persons, forcibly disappeared persons, persons with disabilities.

9 Carlos Fernández de Casadevante Romani, *International Law of Victims* (Springer 2012) 39.

### 1.1. Victims in the Inter-American System of Human Rights

Neither the American Convention of Human Rights nor the Rules of Procedure of the Inter-American Commission of Human Rights provide a definition of victim. Regarding *jus standi,* the Convention only specifies under Article 44 that 'any person or group of persons, or any nongovernmental entity legally recognized in one or more member States of the Organization, may lodge petitions with the Commission'. Article 46.1(d) further States that an admissibility requirement is that 'the petition contains the name, nationality, profession, domicile and signature of the persons or legal representatives that are lodging the petition.'

It is in Article 2 of the Rules of Procedure of the IACtHR that we find a characterisation of the term victim within the Inter-American System of Human Rights. Said provision states that 'the term victim refers to a person whose rights have been violated, according to a judgement emitted by the Court.'[10]

Moreover, according to Article 35.2. of the Court's Rules of Procedure: 'When it has not been possible to identify one or more of the alleged victims who figure in the facts of the case because it concerns massive or collective violations, the Tribunal shall decide whether to consider those individuals as victims.'[11] This provision has opened the possibility for the subsequent inclusion of other victims in the proceedings when the lack of identification can be justified. In a sense, these identifiable potential victims can be referred to as future victims, given the fact that they are only going to be individualized at a future stage of the proceedings, but the impact the case is going to have on their rights can be reasonably foreseen. Furthermore, these provisions have also helped the Court go beyond the limitation of the notion of 'injured party' that is originally found in Article 63.1 of the American Convention on Human Rights for the purpose of awarding reparations.[12]

10 Rules of Procedure of the Inter-American Court of Human Rights, approved by the Court during its LXXXV Regular Period of Sessions from November 16 to 28, 2009, available at <https://perma.cc/5Q93-62CQ>.

11 ibid.

12 For a recount on the evolution of how the IACtHR has dealt with interpreting the term 'injured party' *vis-à-vis* the concept of 'victims', see: Clara Sandoval Villalba, 'The Concepts of "Injured Party and "Victims" of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights' in Carla Ferstman,

Based on this, the Inter-American Court has extended the scope for the determination of victims to those that are unknown but potentially identifiable. In *Plan de Sanchez Massacre v Guatemala,* the Court recognised as victims those initially mentioned by the Commission 'and those that may subsequently be identified since the complexities and difficulties faced in identifying them lead to the presumption that there may be victims yet to be identified.'[13] Later, this possibility was further interpreted to include members of entire communities in the case of reparations orders that included collective measures. Particularly, in the *Case of the Saramaka People v Suriname*, the Court categorically stated that:

> (…) given the size and geographic diversity of the Saramaka people, and particularly the collective nature of reparations to be ordered in the present case, the Court does not find it necessary in the instant case to individually name the members of the Saramaka people in order to recognize them as the injured party. Nevertheless, the Court observes that the members of the Saramaka people are identifiable in accordance with Saramaka customary law (…)[14]

In the words of Sandoval-Villalba, the use of the term 'injured party', as shown in the above-cited quote from the Saramaka case, can be considered 'an umbrella term that covers: victims (direct and indirect); potential victims; the next of kin of the victims as successors/heirs; dependents; and members of communities.'[15] This open-ended characterisation of the term victim for the purposes of reparations has led to general descriptions of the Court as victim-centered or victim-oriented in specialised scholarship.[16]

### 1.2. Victims in the European System of Human Rights

In comparison with other regional human rights systems which can be considered as having more lax rules regarding the standing of the petitioners,

Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Martinus Nijhoff 2009).

13 *Case of Plan de Sanchez Massacre v. Guatemala*, Judgement on Merits, 29 April 2004, para. 47.

14 *Case of the Saramaka People v Suriname*, (2007) IACHR Series C No 172, para. 188.

15 Sandoval Villalba (n 12) 280.

16 See: Thomas Antkowiak, 'An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice' (2011) 47 Stanford Journal of International Law 279.

the determination of who can claim to be a victim is of paramount importance in the European system of Human Rights. Article 34 of the European Convention on Human Rights (ECHR) states that: '[t]he Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation (…) of the rights set forth in the Convention' or its Protocols by one of the State parties. This presupposes that a requirement for admissibility is directly linked to the applicant claiming to be affected or harmed by the circumstances of the case. The so-called 'victim requirement' is, thus, one of the pre-conditions for admissibility in the ECHR system in the case of individual applications.

In this context, it is important to point out that the victim requirement should be interpreted in accordance with the circumstances of the case. The Court has warned that an 'excessively formalistic, interpretation of that concept [the term 'victim'] would make protection of the rights guaranteed by the Convention ineffectual and illusory,'[17] and that the term victim in Article 34 must be 'interpreted in an evolutive manner in the light of conditions in contemporary society.'[18]

The ECtHR has recognised different categories of victims, mainly direct, indirect, and potential victims.[19] Direct victims are those where the applicant can show that he or she was 'directly affected' by the measure or order issued by the State party and which constitutes the alleged violation.[20] Usually, one of the benchmarks used by the Court to assess whether the applicant is a direct victim is his or her participation in the domestic proceedings. Nonetheless, this criterion is not of rigid application, and there are cases where the Court, due to specific circumstances, has recognised victims that have not participated in domestic proceedings as direct victims for the purpose of Article 34.[21]

17 *Gorraiz Lizarraga and Others v Spain* App no. 62543/00 (ECtHR, 27 April 2004) para. 38.

18 ibid.

19 See: ECHR, Practical Guide on Admissibility Criteria, updated 1 August 2021 <https://www.echr.coe.int/documents/admissibility_guide_eng.pdf> accessed 20 October 2021; Vassilisa Tzevelekos, 'Standing: European Court of Human Rights (ECtHR)' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2019).

20 See: *Tanase v Moldova* App no. 7/08 (ECtHR, 27 April 2010) para. 104*; Burden v United Kingdom* App no. 13378/07 (ECtHR, 29 April 2008) para. 33*; Lambert and Others v France* App no. 46043/14 (ECtHR, 5 June 2015) para. 89.

21 See*: Beizaras and Levickas v Lithuania* App no. 41288/15 (ECtHR, 14 January 2020) paras 78–81.

In terms of indirect victims, the Strasbourg Court has allowed the next-of-kin to present applications, predominantly in cases involving death or disappearance under Article 2 of the European Convention. These next-of-kin have included close family members, such as parents[22] of a dead or disappeared person, children,[23] siblings,[24] married and unmarried partners,[25] and even nephews.[26]

The ECtHR has also stated that Article 34 of the Convention does not allow for an *actio popularis* or *in abstracto* complaints.[27] Nonetheless, the Court has recognised that an applicant may be considered a potential victim in light of certain circumstances. For instance, in a case where specific legislation would criminalise homosexual acts, the mere existence of the law was considered as putting the applicant in a situation of potential affectation;[28] or in the case of an applicant who could not assert whether potentially violating legislation had been applied to him due to the secret character of the measures,[29] and even in cases where legislation permitting secret surveillance measures can affect an applicant who has no accessible remedy to challenge it.[30] In these kinds of cases, the prospective victim must present 'reasonable and convincing evidence of the potential violation; mere suspicion or conjecture is insufficient.'[31]

In contrast with the Inter-American System, the fact that the qualification of a victim is decided within the context of issues of admissibility leaves

22 See: *Ramsahai and Others v the Netherlands* App no. 52391/99 (ECtHR, 15 May 2007).

23 See: *McKerr v United Kingdom* App no. 28883/95 (ECtHR, 4 May 2001).

24 See: *Andronicu and Constantinou v Cyprus* App no. 25052/94 (ECtHR, 9 October 1997).

25 For married partners see: *McCann v United Kingdom* App no. 18984/91 (ECtHR, 27 September 1995). For unmarried partners see: *Velikova v Bulgaria* App no. 41488/98 (ECtHR, 18 May 2000).

26 See: *Abdullah Yasa and Others v Turkey* App no. 44827/08 (ECtHR, 16 July 2013).

27 See: *Centre for Legal Resources on behalf of Valentin Campeanu v Romania* App no. 47848/08 (ECtHR, 14 July 2014) para. 101.

28 *Dudgeon v United Kingdom* App no. 7525/76 (ECtHR, 22 October 1981) para. 41.

29 *Klass and Others v Germany* App no. 5029/71 (ECtHR, 6 September 1978) paras 33–34.

30 See: *Roman Zakharov v Russia* App no. 47143/06 (ECtHR 4 December 2015) paras 173–79; *Centrum för rättvisa v Sweden* App no. 35252/08 (ECtHR, 25 May 2021) paras 166–77.

31 *Centre for Legal Resources on behalf of Valentin Campeanu v Romania*, para. 101; *Tauira and 18 Others v France*, Commission decision of 4 December 1995, DR 83-B, 130*; Senator Lines GmbH v Ausria, Belgium, Denmark and others*, Grand Chamber, Decision of Admissibility, 10 March 2004.

little to discuss regarding the scope of who can be considered a victim at the stage of reparations.

### 1.3. Victims in the African System of Human Rights

Neither the African Charter of Human and Peoples' Rights, nor the Protocol for the Establishment of the Court, or even the Rules of Procedure, make any specific reference to victims. However, regarding the conditions for admissibility of a case, it is important to point out that by virtue of Article 6.2 of the Protocol for the Establishment of the African Court of Human and Peoples' Rights (ACtHPR), both the African Commission and the Court share the same criteria, found in Article 56 of the Charter. The latter Article simply stipulates that the petition should indicate the name of the authors, even if they request to maintain anonymity further in the proceedings. Applicant and victim should not be understood as necessarily the same person or persons, as it has been recognised that the African System has an open system of *actio popularis* that presupposes that anyone could action before the system and set it in motion.

On this last point, the African Commission has stated in the *Case of Article 19 v Eritrea* that:

> In the consideration of communications, the African Commission has adopted an actio popularis approach where the author of a communication need not know or have any relationship with the victim. This is to enable poor victims of human rights violations on the continent to receive assistance from NGOs and individuals far removed from their locality. All the author needs to do is to comply with the requirements of Article 56.[32]

Regarding access to the African Court, individuals can have indirect access through the Commission, or, if the case concerns a State Party to the Protocol that has made a declaration under its Article 34.6, individuals or NGOs with Observer Status before the Commission, irrespective of whether they are the injured parties or victims, can petition the Court directly.

In an African Court document entitled 'Fact Sheet on Filing Reparations Claims', the Court has implied recognition for direct and indirect victims by stating that the term victim can encompass:

32 *Article 19 v State of Eritrea*, Communication No 275/2003, 30 May 2007, para. 65.

> Person(s) who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or impairment of their fundamental rights, through acts or omissions that constitute violations of international human rights law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[33]

Furthermore, victims can also be entire communities, peoples' or groups with a common identity,[34] a staple of the African System for the protection of human rights, which places a strong emphasis on the collective scope of action.

### 1.4. The 'Absent Victim' and Human Rights Adjudication

When adjudicating complex cases, international human rights courts deal with scopes of victimhood that are not necessarily present at the moment that a particular claim is litigated. These claims can be either backward-looking in the sense that they focus on past victims or can be forward-looking in the sense that the actions caused in the scope of the claim might affect potential victims in the future. At these crossroads, issues involving claims of intergenerational justice (i.e. what is owed to past and future generations) overlap with the representation of the interests of the absent victims in judicial proceedings (past and potential). This, in turn, intersects with procedural institutions such as standing, jurisdiction, and the right to a remedy in the form of reparations, as we have seen from the brief analysis above regarding how human rights courts tackle these issues in the scope of their particular legal frameworks. Combined, all these aspects have an important effect on the narrative construction of who – or in whose name- can claim to be a victim of human rights violations and be recognised as such. For instance, groups of victims might coalesce in the identity of shared trauma and might remain united through their claims of redress or the scope of the decisions and judgements.

33 Fact Sheet on Filing Reparation Claims, Adopted during the Fifty-Third Ordinary Session of the African Court on Human and Peoples' Rights, 10 June – 5 July 2019, Arusha, Tanzania available at <https://perma.cc/JZ3S-UHQ8>.

34 ibid.

Decisions by international human rights courts more often than not construct narratives that, in some cases, impact the way we see victims. These narratives emerge from the judicial discourse that seeks to generate identity ties that in turn forge a chain of personal, social and cultural meanings. Thus, these narratives influence the judicial decision-making process and vice versa. Mirta Antonelli has described the process of this narrative construction as:

> (...) the specifically temporal dimension through which social actors assign meaning to life, individual and collective, linking-suturing time as narrative: memories (symbolic approximations of the past), future (imaginary projections of the future), both from the present as a point of articulation of a particular historical consciousness.[35]

Furthermore, and adding an intertemporal layer to the narrative legal process, as pointed out by Ezzat Fattah: 'the most important right of crime victims is the right to be protected against future victimization, yet this is a social, not a legal right, and it rarely, if ever, figures on the victims' rights agenda'[36]. Thus, international human rights law and victims' movements might be well served by different disciplines and understandings in analysing and assessing forms of victimhood. For instance, the field of environmental victimology includes future generations as victims of environmental degradation. Christopher Williams, one of the first scholars to explain environmental victimisation, defines environmental victims as:

> Those of past, present or future generations who are injured as a consequence of change to the chemical, physical, microbiological, or

35 Mirta Alejandra Antonelli, 'Mineria transnacional y dispositivos de intervención en la cultura: La gestión del paradigma hegemónico de la "minería responsable y desarrollo sostenible"' in Maristella Svampa and Mirta Alejandra Antonelli (eds), *Minería transnacional, narrativas del desarrollo y resistencias sociales* (Editoral Biblos 2009) 72. [Translation by the author from the original Spanish: '(…) la dimensión específicamente temporal mediante la cual los actores sociales le asignan sentido a la vida, individual y colectiva, eslabonando-suturando el tiempo como narración: memorias (aproximaciones simbólicas del pasado), porvenir (proyecciones imaginarias de futuro), ambas desde el presente como punto de articulación de una particular conciencia histórica.']

36 Fattah (n 5) 69.

> psychosocial environment, brought about by deliberate or reckless individual or collective human act or act of omission.[37]

As outlined above, certain forms of victimization are, in turn, related to an intergenerational component. For example, environmental degradation caused by toxic substances has serious intertemporal consequences. It not only jeopardizes the current health of the environment but has devastating consequences for future generations.[38] As Williams cautions in this context, any community comprises more than one generation; therefore, rights and responsibilities must be the same for all generations.[39] Thus clearly linking intergenerational justice with the protracted forms of harm found in environmental damage.

Although in these cases, it is not easy to identify future generations as current victims, it is clear that given the profound impact on the current environment, the same environmental conditions that exist today will not be available in the coming years.[40] In the words of Richard Hiskes:

> The interconnection of modern life is never more apparent nor better understood than in the context of environmental degradation and the need for preservation. Our natural environment is the singular physical manifestation of our connectedness both with our contemporaries and also with those who in their own future will inherit our space, our land, our air, water, and soil.[41]

This indicates that the damage related to toxic industries goes beyond the orbit of the collective, actual and present, to the collective, potential, and future. Consequently, those who are currently losing control over the

37 Christopher Williams, 'Environmental Victimization and Violence' (1996) 1(3) Aggression and Violent Behavior 191, 194.

38 UN Human Rights Council, Thirty-ninth session,10–28 September 2018, Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes (3 August 2018) UN Doc A/HRC/39/48, para. 8.

39 Williams (n 37) 194.

40 See: Eileen Skinnider, *Victims of Environmental Crime – Mapping the Issues* (The International Centre for Criminal Law Reform and Criminal Justice Policy 2011) 2 <https://perma.cc/W79N-RB9Y>; Antony Pemberton, 'Environmental Victims and Criminal Justice: Proceed with Caution' in Toine Spapens, Rob White and Marieke Kluin (eds), *Environmental Crime and its Victims: Perspectives within Green Criminology* (Routledge 2014) 69.

41 Richard P Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (CUP 2008) 66.

natural resources that have belonged to them for centuries affect the legitimate inheritance of future generations.[42] Ultimately, future generations suffer damage inasmuch as they will not be able to benefit from natural resources in the way that present generations have.[43] Of course this does not necessarily entail a right to access resources in the same capacity for future generations, the resources might not be available on the first place or what can be understood to be a valuable resource might change depending on new technologies and notions of productivity. As espoused by the International Law Association's 'New Delhi Declaration': 'benefit' in this context is to be understood in its broadest meaning as including, inter alia, economic, environmental, social and intrinsic benefit.'[44]

Moreover, the environmental damage can be direct or indirect, individual or collective, and occur in the short, medium or long term.[45] For instance, when the damage takes years to happen,[46] and the vast majority of people affected are not always aware of their own victimisation,[47] it could take years to identify the health and environmental effects.[48] The damage can be diffuse and difficult to detect.[49] Thus, as Skinnider outlines, '[f]uture generations are thus an important category of potential victims of environmental crimes'[50], in general and one could add, a potential subset of victims of human rights violations requiring domestic or international redress.

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42 Rob White, *Transnational Environmental Crime: Toward and Eco-Global Criminology* (Routledge 2011) 113.

43 Skinnider (n 40) 35–39.

44 Article 2.2, *New Delhi Declaration on Principles of International Law Relating to Sustainable Development*, International Law Association, 70th Conference 2–6 April 2002.

45 ibid., 34; White (n 42) 116.

46 Lorenzo Natali, 'A Critical Gaze on Environmental Victimization' in Ragnhild A Sollund (ed), *Green Harms and Crimes: Criminological Perspectives* (Palgrave Macmillan 2015) 68.

47 Matthew Hall, *Victims of Environmental Harm: Rights, Recognition and Redress under National and International Law* (Routledge 2013) 26; Matthew Hall and Gema Varona, 'La Victimología Verde como Especia de Encuentro para. Repensar la Otredad más allá de la Posesión' (2018) 7 Revista de Victimología/Journal of Victimology 108, 112; Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, 7 October 2019, UN Doc A/74/480, para. 44; Skinnider (n 40) 25.

48 Pemberton (n 40) 68.

49 Skinnider (n 40) 2; Matthew Hall, 'Exploring the Cultural Dimensions of Environmental Victimization' (2017) 3 Palgrave Communications 1, 2; Rob White, *Crimes Against Nature: Environmental Criminology and Ecological Justice* (Willan Publishing 2008) 197.

50 Skinnider (n 40) 39.

At the same time, public interest environmental litigation has been used to establish future generations as victims of environmental crime[51] with the aim to ensure that they would be able to enjoy a high quality of the environment and natural resources.[52]

In the same way, as the legal narrative might contribute to the construction of the victimised collective and the self-appraisal of the individual as part of it, those who are left out of the group because of procedural or substantive constraints might constitute in and of themselves another group of direct, indirect, or potential victims. This is how the absent victim is construed beyond the confines of the courtroom. Fields such as victimology, green criminology, or socio-legal studies are way ahead of international human rights law in the identification of these issues and in recognition of how legal interventions affect these victims in an intertemporal dimension. In this sense, the interdisciplinary lens is warranted to adapt and reframe international human rights law to the challenges that the representation of absent generations (past and future) might pose in situations of environmental justice, climate change litigation, or gross and systematic human rights violations. Whilst the next sections focus on future absent victims, the same is applicable to past victims. As we have seen from the above discussion on victimhood in different systems of protection, the absent victim, no longer present because of death or other circumstances, can be vicariously represented by the next-of-kin. Nonetheless, in cases involving mass violations, redress mechanisms that affect society as a whole can have an impact beyond the parties recognised as such in decisions of human rights courts.

## *2. Redress for Absent Victims in Human Rights Courts*

For lack of a better term, this section is called 'redress for absent victims.' At face value, this would seem to imply some sort of logical flow that presupposes a first step of determination of what an absent victim is and then a next logical step that would entail a tribunal or judge that actively interprets the law in an effort to provide some sort of remedy. The construction of the notion of absent victim and the possible impacts that a judgement can

51 Rob White, 'Green Victimology and Non-Human Victims' (2018) 24(2) International Review of Victimology 239, 242.

52 Hiskes (n 41) 92.

have then, requires a more dialectical relationship, nonetheless. The present section explores two instances where, in seeking redress for a particular case at hand, the decisions of courts have an impact on absent victims, even if not initially foreseen. Guarantees of non-repetition and pilot judgements are two procedural avenues that have structural connotations. They aim at changing situations that are, *per se,* states of systematic and structural injustice. In doing so, they provide redress not only to present victims recognized in the proceedings but also to future and potential victims.

### 2.1. Guarantees of Non-Repetition and Absent Victims

The basis for establishing reparations in the sphere of the IACtHR is Article 63.1 of the American Convention on Human Rights (ACHR). According to this Article, the Inter-American System has gone beyond a simple concept of reparation. It has referred to all its history of integral reparations as provisions that tend to return the victims to the situation they were in before the human rights violation occurred or, if not, to reduce the effects of such violation as far as possible.[53] In this regard, the Inter-American System implements restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as reparation measures.

In the context of protecting the absent victims, guarantees of non-repetition take an important role. Guarantees of non-repetition intend to have a wider impact on society and prevent a repetition of similar human rights violations. Thus, they focus on the future, not the past. The Inter-American Court has established through its decisions:

> (…), according to the general obligation established in Article 1(1) of the Convention, the State has the obligation to take all necessary steps to ensure that these grave violations are not repeated, an obligation whose fulfillment benefits society as a whole.[54]

According to Schönsteiner, in many cases these guarantees can take the form of legislative measures that aim to remedy structural and systematic

53 Juana Inés Acosta López and Diana Bravo Rubio, 'El cumplimiento de los fines de reparación integral de las medidas ordenadas por la Corte Interamericana de Derechos Humanos: énfasis en la experiencia colombiana' (2008) International Law: Revista Colombiana de Derecho Internacional 323, 332.

54 *Case of Trujillo-Oroza v Bolivia*, Judgement (Reparations and Costs), 27 February 2002, para. 110.

human rights violations.[55] For instance, the Inter-American Court ordered Guatemala to reform its Criminal Code in relation to the treatment of prisoners who allegedly represent a danger to society at large,[56] its definition of the crime of abduction and the forms of criminal penalties.[57] In other cases, the Court has even ordered a State to implement a constitutional amendment[58] or sweeping legal reforms in relation to extrajudicial executions.[59]

However, guarantees of non-repetition go beyond legislative or constitutional reform. For instance, in the case of *González and others ('Cotton Field') v Mexico*, the IACtHR ordered that the State shall standardize all its protocols to investigate cases related to disappearances, sexual violence and homicides of women (femicides) according to the Istanbul Protocol and other international standards based on a gender perspective.[60] In addition, the Court prescribed that Mexico had to continue implementing programs and courses of education and training in human rights and gender.[61] In other decisions, such as the case of *Guerrero, Molina and others v. Venezuela*, *Massacre of Mozote and Nearby Places v. El Salvador*, and *Yarce and others v. Colombia,* the Court also ordered the respondent States to conduct training, programs and projects on human rights to build capacity and knowledge among different public officials and society at large.[62] In the case of *Ramírez Escobar and others v Guatemala*, the Inter-American Court prescribed that the State had to adopt the necessary measures to create

55 Judith Schönsteiner, 'Dissuasive Measures and the "Society as a Whole": A Working Theory of Reparations in the Inter-American Court of Human Rights' (2007) 23(1) American University International Law Review 127, 147.

56 *Case of Fermin Ramirez v Guatemala*, Judgement (Merits, Reparations and Costs), 20 June 2005, para. 138.8.

57 *Case of Raxcaco-Reyes v Guatemala*, Judgement (Merits, Reparations and Costs), 15 September 2005, para. 145.5.

58 *Case of the 'Last Temptation of Christ' (Olmedo-Bustos et al) v Chile*, Judgement (Merits, Reparations and Costs), 5 February 2001, para. 103.4.

59 *Case of Barrios Altos v Peru*, Judgement (Reparations and Costs), 30 November 2001, para. 50.5.

60 *Case of Gonzalez et al. ('Cotton Field') v Mexico*, Judgement (Preliminary Objection, Merits, Reparations, and Costs), 16 November 2009, para. 502.

61 ibid., paras 541–543.

62 See: *Caso Guerrero, Molina y Otros v Venezuela*, Sentencia (Fondo, Reparaciones y Costas), 3 de Junio de 2021, para. 181; *Case of the Massacres of El Mozote and Nearby Places v El Salvador*, Judgement (Merits, Reparations and Costs), 25 October 2012, para. 369; *Caso Yarce y Otras v Colombia*, Sentencia (Excepcion Preliminar, Fondo, Reparaciones y Costas), 22 de Noviembre de 2016, para. 350.

and implement an effective program to guarantee adequate supervision, inspection, and control of the institutionalization of minors.[63]

In certain cases, the line between guarantees of non-repetition and other measures of reparation can become blurred. Especially when the intent of the Court ordering a particular measure is tied to a general aim of providing a deterrent effect for society as a whole in the case of future violations. One good example of situations where this might happen is in cases linked with a procedural violation of the duty to investigate human rights violations and the positive obligations derived thereof for States. In the *Case of the Afro-descendant's Communities Displaced from the Cacarica River Basin v Colombia*, the IACtHR established this link between the duty to investigate and guarantees of non-repetition.[64] Even more poignantly, in the matter of *Beneficiaries of Late Norbert Zongo and others v Burkina Faso* before the African Court of Human and Peoples' Rights, the petitioners asked for the reopening of investigations on the assassination of Mr Zongo and his companions as a matter of guarantees of non-repetition in their submissions on reparations. The Court said that the measure could be characterized more as a matter of cessation but that, nonetheless, ordering the measure was in line with the jurisprudence of the African Commission of Human Rights and the UN Human Rights Committee as it would ensure that similar violations do not occur in the future.[65]

Returning to the Inter-American System, in many cases, the IACtHR, although not directly recognising an extended group of victims through measures of non-repetition, has gone beyond in protecting future generations or victims that were not represented during the proceedings. Thus, the Court has not expanded the scope of the 'victim' *per se* but has rather used reparations by chiefly referring to society's role in pursuing the aim of non-recurrence of human rights violations.[66]

An interesting example of how this phenomenon applies in the case of absent victims is the protracted action of the IACtHR in monitoring compliance with its decisions. On a very characteristic note, the Court remains

63 *Caso Ramirez Escobar y Otros v Guatemala*, Sentencia (Fondo, Reparaciones y Costas), 9 de Marzo de 2018, para. 408.

64 *Case of the Afro-Descendant Communities Displaced for the Cacarica River Basin (Operation Genesis) v Colombia,* Judgement (Preliminary objections, merits, reparations and costs), 20 November 2013, para. 370.

65 *Beneficiaries of Late Norbert Zongo and others v Burkina Faso*, Judgement on Reparations, 5 June 2015, App no. 013/2011, paras 101–106.

66 Schonsteiner (n 55) 138.

seized of the cases after it has taken decisions, periodically evaluating how the State complies with its orders. This is a form of judicial enforcement, lacking other political avenues for compliance, as with the ECtHR with the Council of Ministers. A case in point is that of *Velez Loor v Panama*. In that particular case, Panama recognized its international responsibility for a series of human rights violations against Mr Velez Loor, including a violation of his personal integrity and a lack of effective investigation on allegations of torture. Mr Velez Loor, an immigrant, was detained because of his migratory status in an ordinary detention facility for common criminals, something that the Court also found as a violation of several rights contained in the American Convention.[67]

The Court ordered as guarantees of non-repetition, amongst other things, that the State had to adopt administrative measures to ensure that in the future, those detained for their migratory status should be separated from those detained for ordinary crimes. It also ordered the State to improve its detention centres and penitentiary facilities (even those for ordinary crimes) to international standards.[68] By themselves, and taken in 2010, these orders for guarantees of non-repetition already have a strong projection in time that affect absent victims who are potentially protected from violations in the future. Nonetheless, the Court has remained seized of the matter in virtue of its powers to monitor compliance with its decisions and it has continued to issue provisional measures based on the original decision in June 2021, more than ten years after the original ruling on merits and reparations. These measures have gone as far as ordering the State of Panama to ensure the improvement of Panamanian detention centres to sanitary standards that help combat the Covid-19 pandemic.[69] The 2021 provisional measures even serve as a reminder to the Panamanian authorities that the migrant population has to be taken into consideration for Covid 19 vaccination schemes in light of the principle of equality and non-discrimination, without distinction of nationality and migratory status.[70]

It seems quite an exercise in judicial activism and expansive interpretation for a Court to take guarantees of non-repetition ordered in 2010 as the

67 *Case of Velez Loor v Panama*, Judgement (Preliminary Objections, Merits, Reparations and Costs), 23 November 2010, para. 210.
68 ibid., paras 271–276.
69 *Case of Velez Loor v Panama*, Medidas Provisionales, Resolución de la Corte Interamericana de Derechos Humanos, 24 de Junio de 2021, paras 26, 29 and 63.
70 ibid., para. 47.

basis for construing in 2021 an obligation for the State to (in attention to its capacities) provide for vaccination schemes to third-country nationals and improve its detention centres to sanitary standards that can help combat the Covid-19 pandemic. On the other side of the coin, this can also be seen as a perfect example of how guarantees of non-repetition can have a protracted effect in time on the protection of a group of potential victims that was not part of the original proceedings. Thus, it constitutes an avenue for safeguarding the interests of absent victims in general and specifically with the potential of addressing claims of intergenerational justice, such as those proceedings dealing with past generational redress (for instance, dealing with enforced disappearances) and those that have clear future-looking effects such as climate change and environmental protection litigations. In other words, as the *Case of Velez Loor* exemplifies, the IACtHR, through a broad understating and application of guarantees of non-repetition and the protracted effect of its procedure for monitoring compliance with its judgements, has opened the door for procedural pathways through which one can address intergenerational claims.

### 2.2. Pilot Judgements: Structural Decisions for Future Victims

Another mechanism that might prove promising in a reinterpretation of the victim that could provide redress for the absent is that of the pilot judgements adopted by the European Court of Human Rights. Depending on doctrinal leanings and institutional conceptions, pilot judgements can be described as answering to the constitutionalisation[71] of the ECHR system due to its structural character. They have even been labelled as a sort of 'human rights class action'.[72]

According to the ECtHR's case law, pilot judgments serve a dual function; they help to identify structural problems whilst at the same time inducing the State to take remedial action at the domestic level to resolve

71 Pilot judgements have been described as 'an emphatic expression of the constitutional turn' of the ECtHR. See: Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgements' (2009) Human Rights Law Review 397, 450.

72 See: Tatiana Sainati, 'Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights' (2015) 56 Harvard International Law Journal 147.

the large number of cases that arise from these structural and systemic issues.[73] On the other hand, they also respond to the Court's need to manage its ever-increasing workload due to the repetitive nature of the cases that these structural problems create.[74] The increasing number of cases after the entry into force of Protocol 11 and their repetitive nature led to the issuance of the first pilot judgement in 2004 in the case of *Broniowski v Poland* concerning some 80 000 affected victims due to the lack of compensation faced by Polish citizens who had to abandon property beyond the Bug River (now in Ukrainian territory) after the Second World War.[75] Previously, the Committee of Ministers of the Council of Europe had identified repetitive cases and structural violations as a pressing issue for the Strasbourg system and had invited the Court 'to assist states in finding the appropriate solution.'[76]

It was not until 2011 that the Rules of Procedure of the Court were amended to provide a proper normative framework after the jurisprudential development. Rule 61 was introduced, stating that:

1. The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.[77]

Furthermore, Rule 61 proceeds to acknowledge that the parties shall be consulted as to the existence and extent of the systemic and structural problems that may trigger the Court to activate a pilot judgement procedure and that these might be initiated on the Court's own motion, but also at the request of one of the parties. Since its initial creation, the Court has adjudicated pilot judgements in an array of issues deemed structural such as the violation of property rights due to inadequate provisions on rent-control,[78] problems with the restitution of nationalised or confiscated property

73 *Greens and M.T. v the United Kingdom* Apps no. 60041/08 and 60054/08 (ECtHR, 23 November 2010) paras 107–108.
74 Factsheet – Pilot Judgements, (ECtHR July 2021)<https://www.echr.coe.int/documents/fs_pilot_judgments_eng.pdf> accessed 26 October 2021.
75 See: *Broniowski v Poland* App no. 31443/96 (ECtHR, 22 June 2004).
76 Council of Europe, Resolution of the Committee of Ministers on judgments revealing an underlying systemic problem, Res (2004) 3.
77 ECtHR, Rule 61, Rules of Court, 18 October 2021 <https://perma.cc/TJZ4-W8LS>.
78 See: *Hutten-Czapska v Poland* App no. 35014/97 (ECtHR, 19 June 2006).

under communist regimes,[79] excessive length of domestic proceedings,[80] a blanket ban on voting for convicted prisoners,[81] and detention conditions that could be characterised as inhuman or degrading.[82]

Regarding a remedy and the rights of the victim, it can be interpreted that pilot judgements may have relevant implications for the right to individual application enshrined in Article 34 of the European Convention. This follows from the fact that under Rule 61(6), it is understood that the Court adjourns similar cases that pertain to the same issue after the delivery of the pilot judgement in order to give the respondent State the opportunity to implement remedial measures of a general character, thus limiting the rights of potential individual applicants. Nonetheless, Rule 61(3) and (4) require the Court to identify the structural and systemic problems and provide general measures in the operative provisions of the judgement. It states:

3. The Court shall in its pilot judgment identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment.
4. The Court may direct in the operative provisions of the pilot judgment that the remedial measures referred to in paragraph 3 above be adopted within a specified time, bearing in mind the nature of the measures required and the speed with which the problem which it has identified can be remedied at the domestic level.

By being part of the operative provisions of the Judgement and on the basis of Article 46 of the European Convention, these general measures cannot be labeled directly as forms of reparation under Article 41 of the

79 See: *Maria Atanasiu and Others v Romania* Apps no. 30767/05 and 33800/06 (ECtHR, 12 October 2010); *Manushaqe Puto and Others v Albania* Apps no. 604/07, 43628/07, 46684/07, 34770/09 (ECtHR, 31 July 2012).

80 See: *Rumpf v Germany* App no. 46344/06 (ECtHR, 2 September 2010); *Athanasiou and Others v Greece* App no. 50973/08 (ECtHR, 21 December 2010); *Ümmühan Kaplan v Turkey* App no. 24240/07 (ECtHR, 20 March 2012).

81 See: *Greens and M.T. v the United Kingdom* Apps no. 60041/08 and 60054/08 (ECtHR, 23 November 2010).

82 See: *Ananyev and Others v Russia* Apps no. 42525/07 and 60800/08 (ECtHR, 10 January 2012); *W.D. v Belgium* App no. 73548/13 (ECtHR, 6 September 2016); *Rezmives and Others v Romania* Apps no. 61467/12, 39516/13, 48213/13, and 68191/13 (ECtHR, 25 April 2017).

Convention. However, the resemblance in matters of impact with guarantees of non-repetition cannot be understated. Especially since the general measures ordered by pilot judgements tend to entail the adoption of legislative reform that would effectively promote non-recurrence in practice. As stated by Ichim:

> In essence, it is laudable that the Strasbourg mechanism has not tolerated mere assurances, but has endeavoured to provide effective guarantees of non-repetition, even if not labelled as such and even if not clearly demanded. In the context of the pilot-judgment procedure, the Court gives an express order to the respondent state to adopt and implement general measures. It is not simply an implied element of the execution phase, confined to political supervision.[83]

To be fair, the author further explains that while pilot judgement procedures are designed to act as a mechanism of redress for victims who are already affected by violations, guarantees of non-repetition are preventive in character and thus not directly analogous.[84] However, for the purposes of our analysis in the context of absent victims, it is clear that while their legal nature is not the same, both mechanisms can produce similar protracted effects for future absent victims. Both help construe a category of victim that is not necessarily present in the courtroom by addressing potential violations. Legal and administrative reform that tend to expedite access to justice or ameliorate conditions of detention and imprisonment – to mention just two examples of measures ordered by both the IACtHR and the ECtHR – might serve the purpose of potentially addressing intergenerational claims of justice by protecting the interests, albeit indirectly, of the absent.

### *Conclusions*

Given the lack of mechanisms that could constitute a thorough and complete representation of the interests of those absent because either they are not with us anymore or they are not with us yet, a reinterpretation and reframing of certain procedural avenues in the context of human rights litigation can serve to provide a degree of protection that whilst not optimal,

83 Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (CUP 2015) 253.

84 ibid., 254.

may constitute a starting point while political and international consensus is made elsewhere.

International human rights law and the mechanisms it provides can become a space for contestation and emancipation for the protection of the interests of the absent and even future and past generations. For that, a necessary reinterpretation and reimagination of the rules of procedure currently set up in international courts and tribunals against the background of certain disciplines such as victimology or green criminology, which already have strong considerations for intertemporal and intergenerational issues, is needed.

Current and future challenges such as climate change litigation, environmental protection, and the need to ensure a sustainable world for future generations require that legal action finds progressive ways to reinterpret existing normative structures in imaginative and performative ways that can ensure visibility and redress for victims. This chapter has sought to provide, in a succinct and limited way, how distinct legal institutions such as guarantees of non-repetition and pilot judgements can be reimagined in order to ensure those goals. Both, if analyzed from a socio-legal perspective, can help build redress for absent and potential victims.